No.

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

PETITION FOR A WRIT OF CERTIORARI

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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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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 695 F.3d 1. The judgment of the court of appeals dismissing petitioners' cross-appeal (App., *infra*, 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 (App., *infra*, 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 jurisdiction of this Court is invoked under 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 de-

cree 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 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.

Every relevant consideration weighs in favor of a grant of certiorari. As both the First Circuit and others have recognized, the courts of appeals are "divided" and "in disarray" on this issue, App., *infra*, 2a, 6a, with four circuits (including the court below) holding that contractual fee awards are *sometimes* collateral, one circuit holding that they are *never* collateral, and four circuits holding that they are *always* collateral. The First Circuit's decision conflicts, not only with decisions of other circuits, but also with *Budinich* itself, since it depends on a case-by-case and hard-to-apply distinction—between "merits" and "nonmerits" fee awards—that *Budinich* expressly rejected. The decision below is therefore wrong, as are the decisions of the courts the First Circuit followed. Beyond this, the question presented is a recurring and important one, and this case is an unusually good vehicle for deciding it.

A. This Court's Decision In *Budinich*

Federal courts of appeals have jurisdiction of appeals from all "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* v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988), 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. *Id.* 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 treat-

ment 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

Petitioner Ray Haluch, Inc. originally operated a sand and gravel business that performed construction work. App., *infra*, 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., a related entity, entered into a collective bargaining agreement with respondent union. *Id.* at 2a-3a, 24a, 49a-55a. The agreement obligated the company to make certain contributions to respondent union-benefit funds. *Id.* at 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, 52a.

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. App., *infra*, 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, Dist. Ct. Dkt. 1, seeking to recover benefit-plan contributions under the Employee Retirement Income Security Act of 1974, 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. App., *infra*, 46a. In February 2011 the district court conducted a three-day bench trial and took the matter under advisement. *Id.* at 3a, 20a. Five weeks later respondents filed a motion for attorney's fees and costs. The motion sought a total of $143,600.44, the overwhelming majority of which consisted of attorney's fees for litigating the case. Dist. Ct. Dkt. 69. The district court issued two decisions that are relevant here.

On June 17, 2011, the district court issued a memorandum and order setting forth its findings of fact and conclusions of law. App., *infra*, 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. App., *infra*, 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, together with $16,688.15 in costs. *Id.* at 47a.

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). Dist. Ct. Dkt. 75. 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. Dist. Ct. Dkt. 77.

C. The Court Of Appeals' Decision

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

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

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. 10/3/11 C.A. Order at 2. 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." 1/24/12 C.A. Order.

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. App., *infra*, 1a-18a.

a. The court of appeals observed that the jurisdictional question in this case was an "issue[] of first impression in this circuit" but one that has "divided our sister circuits." App., *infra*, 2a. That question, according to the First Circuit, 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." *Id.* at 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* (as opposed to statutory) fee provision, "the courts of appeals * * * are in disarray." App., *infra*, 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." App., *infra*, 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, App., *infra*, 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 ac-

cordingly "fall beyond the line drawn by the *Budinich* Court." *Id.* at 9a. In reaching this conclusion, the First Circuit found 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 rather 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." App., *infra*, 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. App., *infra*, 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.

REASONS FOR GRANTING THE PETITION

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 decision further deepens an entrenched, longstanding, and acknowledged post-*Budinich* circuit conflict. The decision below is irreconcilable with *Budinich*, which squarely rejected the "merits"/"nonmerits" distinction, and is therefore wrong. The question whether a contractual fee award is always, sometimes, or never collateral to the merits is a recurring and important one. And this case is an ideal vehicle for deciding it, because respondents' appeal will fail in its entirety if our position on finality is adopted. Certiorari should be granted.

A. There Is A Circuit Conflict

Nine of the thirteen circuits have addressed the question whether a claim for contractual attorney's

fees is collateral, such that a district court's decision on the merits that leaves the fee claim unresolved is final. Four circuits, including the First Circuit here, have held that such a claim is *sometimes* collateral. One circuit has held that it is *never* collateral. And four circuits have held that it is *always* collateral. This conflict has been acknowledged by multiple circuits, on different sides of the split, including the First Circuit below.

1. Four circuits have held that a contractual fee award is *sometimes* collateral

In this case the First Circuit held that a contractual attorney's fee award may or may not be collateral, depending on the nature of the fees. The Third, Fourth, and Eighth Circuits have reached the same conclusion post-*Budinich*.

First Circuit. In the decision below, the First Circuit recognized that the question whether *Budinich* applies to contractual attorney's fees has "divided" the circuits, which are in "disarray" on the issue. App., *infra*, 2a, 6a. As the First Circuit explained, the Second, Fifth, Seventh, and Ninth Circuits "have held that *Budinich* applies to *all* claims for attorneys' fees," whereas 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 (emphasis added). Joining the latter group, the First Circuit held that *Budinich* does not apply when contractual fees are "an element of damages" and therefore "part of the merits of the[] contract claim." *Id.* at 8a-9a. The First Circuit undertook an analysis of the contract at issue here, as well as respondents' claim under it, *ibid.*, and determined that, in this case, the at-

torney's fees are damages and thus "beyond the line drawn by the *Budinich* Court," *id.* at 9a.

Third Circuit. While the First Circuit believed that the Third Circuit "has put a foot in each camp," App., *infra*, 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 the holding of *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. 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).

Fourth Circuit. In *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F.3d 354 (4th Cir. 2005), a decision that the First Circuit followed here, App., *infra*, 8a, the Fourth Circuit found that an order that did not resolve a request for contractual attorney's fees was not an appealable final decision, but the three members of the panel each employed a different rationale in reaching that result.

The lead opinion, by Judge Niemeyer, held that "application of *Budinich*" leads to the conclusion 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." *Carolina Power & Light*, 415 F.3d at 360. Judge Niemeyer engaged in a detailed analysis of "the contract between 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. Citing decisions of the Fifth and Ninth Circuits, Judge Niemeyer acknowledged that "the desirability of maintaining a brighter-line jurisdictional rule * * * has led more than one of our sister circuits to treat contractual awards of attorneys fees as collateral" without regard to "whether the contract at issue provided such awards as an element of damages or as costs to the prevailing party." *Id.* at 362. Judge Niemeyer noted, however, that the Eighth and Eleventh Circuits have rejected that view. *Ibid.*

In a concurring opinion, Judge Wilkinson articulated a narrower rule. He 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. Based on his own analysis of the contractual language, Judge Wilkinson 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. Judge

Wilkinson recognized, however, that the Fifth, Seventh, and Ninth Circuits have held that awards based on "contractual attorneys' fees provisions are *always* collateral." *Id.* at 363-364 (emphasis added).

In the third opinion, concurring in the result, Judge Widener endorsed a rule that was *broader* than the one adopted by Judge Niemeyer. He would have applied the Eleventh Circuit's rule: that an order leaving unresolved "a request for attorneys' fees pursuant to a contractual clause" is *never* final. *Carolina Power & Light*, 415 F.3d at 364 (internal quotation marks omitted).

Eighth Circuit. In *Justine Realty Co.* v. *American National Can Co.*, 945 F.2d 1044 (8th Cir. 1991), the Eighth Circuit, like the First Circuit below, 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." *Id.* at 1047-1048. The panel was divided, however, on whether the fees at issue in that case were of that 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. One circuit has held that a contractual fee award is *never* collateral

Like the First, Third, Fourth, and Eighth Circuits, the Eleventh Circuit has held that *Budinich*'s rule—that attorney's fees awards are collateral—

does not apply to fees that are based on a 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, and 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 award under 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 *Budinich*, but felt bound by its prior decision in *MedPartners*, which postdated *Budinich* and remains "the law of this circuit." 249 F. App'x at 154. "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.

3. Four circuits have held that a contractual fee award is *always* collateral

In disagreement with the First, Third, Fourth, and Eighth Circuits, as well as with the Eleventh, the Second, Fifth, Seventh, and Ninth Circuits have held that a contractual fee award, like a statutory fee award, is *always* collateral under *Budinich*. This case would therefore have been decided differently in those circuits.

Second Circuit. In *O & G Industries, Inc.* v. *National Railroad Passenger Corp.*, 537 F.3d 153 (2d Cir. 2008), the district court entered judgment and decided that an award of contractual attorney's fees was warranted, but did not determine the amount of fees prior to the appeal of the judgment. *Id.* at 158-159. Like the First Circuit in the decision below, App., *infra*, 8a-9a, the Second Circuit characterized the fees at issue as "a contractually stipulated element of damages." 537 F.3d at 167 (internal quotation marks omitted). Unlike the First Circuit, however, the Second Circuit held that, under "the 'bright-line rule' enunciated by the Supreme Court in *Budinich*," the district court's failure to determine the fee amount "does not impair the finality" of its judgment. *Id.* at 168. The Second Circuit observed that "[s]ome of our pre-*Budinich* precedent might be read to support 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." *Id.* at 168 n.11. But the Second Circuit rejected that precedent, "heed[ing] the * * * admonition in *Budinich*" that no "different treatment" should be accorded to "attorney's fees deemed part of the merits recovery" and "abid[ing] by" *Budinich*'s "uniform

rule." *Ibid.* (quoting *Budinich*, 486 U.S. at 202); see also *McGuire* v. *Russell Miller, Inc.*, 1 F.3d 1306, 1315 (2d Cir. 1993) ("a judgment is 'final' even though the court has yet to determine attorneys' fees, and even if those fees are sought pursuant to a contract" (citing *Budinich*)). The Second Circuit's categorical rule means that respondents' appeal in this case would have been dismissed as untimely insofar as it challenged the district court's order on remittances if the case had been filed, not in Massachusetts, as it was, but across the border in New York, Connecticut, or Vermont.

Fifth Circuit. In *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197 (5th Cir. 1990), as in this case, App., *infra*, 3a, 8a-9a, the plaintiff filed suit "to recover [a] deficiency [under a contract] and attorneys' fees." 902 F.2d at 1198. The district court entered judgment on the deficiency but did not rule on the fee request. *Id.* at 1199. The defendants argued that the judgment was not final, and thus that the notice of appeal filed more than 30 days after the judgment was not untimely, because "attorney's fees arising out of a contract are a part of the merits of the case." *Ibid.* The Fifth Circuit held that this claim was foreclosed by *Budinich*. While *Budinich* arose "in a situation where attorneys' fees were provided by *statute*," the Fifth Circuit explained, "it is clear from its sweeping language that *Budinich* establishes a 'bright line' rule that applies with equal force where attorneys' fees are sought under a *contract*." *Ibid.*; see also *Resolution Trust Corp.* v. *Marshall*, 939 F.2d 274, 280 n.2 (5th Cir. 1991) (per curiam) ("We extended *Budinich* to awards of attorneys fees authorized by contract in *First Nationwide Bank* * * *.").

Seventh Circuit. In *Continental Bank, N.A.* v. *Everett*, 964 F.2d 701 (7th Cir. 1992) (Easterbrook, J.), as in this case, App., *infra*, 8a-9a, the contracts on which suit was brought entitled the plaintiff "to recover the attorneys' fees incurred in the course of collection." 964 F.2d at 702. The district court entered judgment for the plaintiff on the contracts (in that case, guarantees), "but put off determining the precise amount payable as fees." *Ibid.* The Seventh Circuit held that it had jurisdiction to review the judgment despite the lack of a ruling on fees. Citing *Budinich*, the court explained that "[a]n open issue about legal fees, *contractual or otherwise*, does not affect our jurisdiction to resolve the appeal on the guarantees." *Ibid.* (emphasis added). The Seventh Circuit acknowledged, but declined to follow, the Eighth Circuit's contrary holding in *Justine Realty*. *Id.* at 703; see also *In re Stoecker*, 5 F.3d 1022, 1026 (7th Cir. 1993) (Posner, J.) ("The determination of attorney's fees is a collateral matter which, even when as in this case they are claimed by virtue of contract rather than statute, does not affect the appealability of the underlying claim." (citing *Budinich*)).

Ninth Circuit. In *United States ex rel. Familian Northwest, Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952 (9th Cir. 1994), the district court entered judgment in the plaintiff's favor and then awarded it contractual attorney's fees in a separate order. *Id.* at 954. The defendant filed a motion to alter or amend the judgment within 10 days of the latter order but not of the former (10 days being the applicable deadline for such a motion at the time). *Ibid.* The Ninth Circuit held that the motion was untimely under *Budinich*, because the judgment was final when the first order was entered. *Id.* at 954-955. It rejected the defendant's proffered "distinction between fees

authorized by [statute] and those authorized by contract." *Id.* at 954. It also "decline[d] to follow" the Eighth Circuit's decision in *Justine Realty*, which, in the Ninth Circuit's view, "ignores *Budinich*'s emphasis on the need for a bright-line rule in order to determine appealability." *Id.* at 955. The Ninth Circuit noted that "[t]he Eighth Circuit's holding in *Justine Realty* was considered and rejected by the Seventh Circuit in *Continental Bank*," and the Ninth Circuit "reject[ed] it as well." *Ibid.*[2]

B. The Decision Below Is Incorrect

1. The rule adopted by the First Circuit below, and the identical or similar rules adopted by the Third, Fourth, and Eighth Circuits, are fundamentally inconsistent, not only with decisions of four other circuits, but also with *Budinich* itself. Indeed, they conflict with *Budinich* in several related ways. The rules are accordingly wrong.

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[2] One other circuit—the Tenth—has held that, under *Budinich*, an award of contractual "attorney fees *for the litigation at hand* is a collateral issue," *McKissick* v. *Yuen*, 618 F.3d 1177, 1197 (10th Cir. 2010), a position with which, in that court's view, all circuits to consider the question but the Eleventh would agree, *id.* at 1197-1198. While it rejected the position of the Eleventh Circuit, *id.* at 1197-1198 & n.11, the Tenth Circuit had no occasion to decide whether other types of contractual fee awards are collateral. It therefore did not choose sides in the conflict between the Third, Fourth, and Eighth Circuits, on the one hand, and the Second, Fifth, Seventh, and Ninth, on the other. The D.C. and Sixth Circuits have not addressed the question presented here either, but district courts in those circuits have followed the Fourth Circuit's decision in *Carolina Power & Light*. See *Qatar Nat'l Bank* v. *Winmar, Inc.*, 831 F. Supp. 2d 159, 162-163 (D.D.C. 2011); *Lynch* v. *Sease*, 2006 WL 1206472, at *4 (E.D. Ky. May 2, 2006).

First, the "critical question" in deciding whether *Budinich*'s holding applies to contractual attorney's fees in a particular case, according to the First Circuit, is whether the claim for fees "is part of the merits." App., *infra*, 8a; see also *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 137 (3d Cir. 2001) (claim for fees is not collateral when it is "part of the contractual damages at issue on the merits"); *Carolina Power & Light Co.* v. *Dynegy Mktg. & Trade*, 415 F.3d 354, 362 (4th Cir. 2005) (claim for fees is not collateral when it "goes directly to the merits of the case"); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1048 (8th Cir. 1991) (claim for fees is not collateral when it is "inherent in the merits of [the] claim"). 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 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.*

Second, in the Fourth Circuit decision that the First Circuit followed, the requested attorney's fees were deemed "merits" rather than "nonmerits" fees at least in part because of how the contract at issue characterized them (in that case, as "damages"). *Carolina Power & Light*, 415 F.3d at 359; see also *id.* at 363 (Wilkinson, J., concurring). But *Budinich* held that the finality of a judgment "should not turn

upon the characterization of those fees" by the law that authorizes them. 486 U.S. at 201.

Third, application of the First Circuit's rule demands a fact-intensive analysis of both the specific contract at issue and the underlying claim, to determine whether attorney's fees are part of the "merits" or not in each individual case. See App., *infra*, 8a-9a; see also *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, expressly rejecting 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. 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.

Fourth, the First Circuit's rule is 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). (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 Fifth, Seventh, and Ninth, but rather to propose an even more complicated one, according to which contractual fees must also be treated as collateral in "ambiguous or hybrid cases." *Ibid.*)

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, App., *infra*, 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. In any case, it is hardly unusual for a plaintiff to allege an entitlement to *statutory* attorney's fees in a complaint, and such fees are indisputably collateral under *Budinich*.

The First Circuit also distinguished between fees for "collecting payments due" (which it deemed "merits" fees) and those for a "prevailing party" (which it did not). App., *infra*, 9a (quoting collective bargaining agreement). But the court did not say whether that is a definition or merely an example. In any event, the distinction provides scant justification for departing from the "practical approach" of *Budinich*, 486 U.S. at 202, particularly when one considers that respondents 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, and that, in almost all cases, including this one, see Dist. Ct. Dkt. 69, the attorney's fees sought were "incurred mostly in connection with th[e] litigation," *Carolina Power & Light*, 415 F.3d at 360.

The impracticability of the First Circuit's rule is confirmed by the fact that the Third Circuit has reached conflicting results in applying its even murkier "integral part of the contractual relief sought" rule in different cases, and also by the fact that judges of the Eighth Circuit reached conflicting results *in the same case*. See *supra* Point A.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 the holding of *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.

Finally, the First Circuit's decision ultimately depends upon a particular understanding of *Budinich*: that, although "attorney's fees *generally* should be considered a collateral matter, they may *sometimes* be considered as part of the merits." App., *infra*, 7a-8a (emphasis added); see also *Justine Realty*, 945 F.2d at 1048. In fact that is the very opposite of what *Budinich* means. 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 idea that "the general status of attorney's fees for § 1291 purposes must be altered" when the "law authorizing them" requires that they be treated as "part of the merits" in a particular case. *Id.* at 201. Yet that is the very premise on which the First Circuit's decision rests.

2. The Eleventh Circuit would have reached the same result as the First Circuit in this case, but on a different ground: that a contractual fee award is *never* collateral (even though, under *Budinich*, a statutory fee award *always* is). That rule is at least as misguided as the First Circuit's.

For one thing, the Eleventh Circuit's rule is also inconsistent with *Budinich*, because it too rests on a distinction between "merits" and "nonmerits" fees—with the difference that *all* contractual fees are "merits" fees and all statutory fees (per *Budinich*) are not. For another, as each of the other circuits to consider the question has recognized, it is simply not the case that all contractual fees go to the "merits" of a claim, even assuming that some do—the most obvious counterexample being fees that are based on a "prevailing party" provision. Finally, the Eleventh Circuit cannot account for another category of "hybrid" cases—those in which fees are sought under both a contract *and* a statute. The Eleventh Circuit's rule is accordingly untenable, as that court itself all but acknowledged in *Adeduntan*.

C. The Question Presented Is Important

More than 30,000 contract actions are filed in federal court each year. *Judicial Business of the United States Courts, 2011 Annual Report of the Director* 16 (statistics for 2007-2011). And that number does not include the statutory cases, like this one, that ultimately rest on a claim of breach of contract. See, *e.g.*, 29 U.S.C. § 185(a) ("[s]uits for violation of contracts between an employer and a labor organization representing employees"). A substantial proportion of the contracts in these common-law and statutory cases include attorney's fees provisions, which are "commonplace in commercial and business

transactions." 1 Robert L. Rossi, *Attorney's Fees* § 9:1 (3d ed. 2012).

Indeed, both the prevalence and the variety of such provisions are amply demonstrated by the court of appeals cases discussed in this petition alone. The contracts at issue just in those cases include collective bargaining agreements and other union-related contracts, *e.g.*, App., *infra*, 2a-3a; *Ragan* v. *Tri-County Excavating, Inc.*, 62 F.3d 501, 505 (3d Cir. 1995); merger agreements and stock purchase agreements, *e.g.*, *McGuire* v. *Russell Miller, Inc.*, 1 F.3d 1306, 1309 (2d Cir. 1993); *Gleason v. Norwest Mortg., Inc.*, 243 F.3d 130, 137-138 (3d Cir. 2001); indemnity agreements and settlement agreements, *e.g.*, *O & G Indus., Inc.* v. *Nat'l R.R. Passenger Corp.*, 537 F.3d 153, 167 (2d Cir. 2008); *Justine Realty Co.* v. *Am. Nat'l Can Co.*, 945 F.2d 1044, 1045 (8th Cir. 1991); credit agreements and similar contracts, *e.g.*, *First Nationwide Bank* v. *Summer House Joint Venture*, 902 F.2d 1197, 1199 (5th Cir. 1990); *Cont'l Bank, N.A.* v. *Everett*, 964 F.2d 701, 702 (7th Cir. 1992); and employment agreements and separation agreements, *e.g.*, *McKissick* v. *Yuen*, 618 F.3d 1177, 1198 (10th Cir. 2010); *Adeduntan* v. *Hosp. Auth. of Clarke Cnty.*, 249 F. App'x 151, 153 (11th Cir. 2007) (per curiam). And that is just a representative sample. Attorney's fees provisions are also common in contracts for sale of real estate, leases, license agreements, construction contracts, and franchise agreements. 1 Rossi, *supra*, §§ 9:2, 9:17.

Because there are so many contract cases in federal court, because so many contracts include an attorney's fees provision, and because district courts often award attorney's fees "in a separate memorandum," App., *infra*, 38a, after entering judgment and

considering "briefing and documentation" on the fee issue, *Budinich*, 486 U.S. at 197, the question whether a district court's decision is "final" when it does not resolve a request for contractual attorney's fees is a recurring and important one. That conclusion is confirmed by the fact that almost all of the circuits have had occasion to address the question—some of them multiple times.

It also bears emphasis that this finality question can arise in a number of procedural settings. One of the most common is a case, like this, in which the district court issues a decision on the merits and then issues a separate decision on attorney's fees, and the question is whether the appeal came too late as to the merits decision. See also *Vargas* v. *Hudson Cnty. Bd. of Elections*, 949 F.2d 665, 667-668 (3d Cir. 1991). That was what happened in *Budinich* too. Another is when the district court issues a decision on the merits but does *not* issue a decision on attorney's fees, and the question is whether the appeal came too *early*. *E.g.*, *Carolina Power & Light Co.* v. *Dynegy Marketing & Trade*, 415 F.3d 354, 358 (4th Cir. 2005); *Brandon, Jones, Sandall, Zeide, Koh, Chalal & Musso, P.A.* v. *MedPartners, Inc.*, 312 F.3d 1349, 1354-1355 (11th Cir. 2002) (per curiam). And there are still other contexts in which the finality question can affect the timeliness of an appeal post-*Budinich*. See *Justine Realty*, 945 F.2d at 1045-1047 (merits decision, then Fed. R. Civ. P. 59(e) motion seeking attorney's fees; issue was whether motion was proper Rule 59(e) motion that tolled time to appeal merits decision). The question can also affect proceedings in district court. See, *e.g.*, *United States ex rel. Familian Nw., Inc.* v. *RG & B Contractors, Inc.*, 21 F.3d 952, 954 (9th Cir. 1994) (merits decision, then fee decision, then Fed. R. Civ. P. 59(e) mo-

tion addressed to merits; issue was whether motion was timely); *McKissick*, 618 F.3d at 1183-1184 (merits decision, then appeal, then fee decision; issue was whether district court had jurisdiction to award fees); *Qatar Nat'l Bank* v. *Winmar, Inc.*, 831 F. Supp. 2d 159, 161-164 (D.D.C. 2011) (merits decision without fee decision; issue was whether district court had authority to issue writs of attachment, execution, and garnishment).

Budinich emphasized the importance of certainty and predictability in this area of the law. 486 U.S. at 202-203. But the acknowledged "disarray" in the lower courts, App., *infra*, 6a, has led to *un*certainty and *un*predictability, not only within circuits but across them. As we have explained, moreover, the issue on which there is disarray can arise in a large number of cases, in a variety of factual and procedural contexts. This Court should restore order. It should provide the clarity and consistency demanded by the "very real interests," not only of parties to litigation, but also of "our judicial system." *Budinich*, 486 U.S. at 201 (internal quotation marks omitted).

D. This Case Is An Ideal Vehicle

This Court sometimes denies certiorari when the resolution of the question presented would be "irrelevant to the ultimate outcome of the case." Eugene Gressman *et al.*, *Supreme Court Practice* 248 (9th ed. 2007). This is not such a case. On the contrary, a grant of certiorari and reversal not only might but *would* be outcome-determinative on *all* the issues in respondents' appeal to the First Circuit. This case is therefore an unusually good vehicle for resolving the circuit conflict on whether an outstanding claim for contractual attorney's fees can render an otherwise-final decision non-final.

Respondents raised three issues in their appeal, and the First Circuit decided each of them in respondents' favor. It held that respondents' appeal was timely, not only as to attorney's fees, but also as to remittances. App, *infra*, 5a-9a. It held that respondents are entitled to additional remittances for unidentified employees. *Id.* at 9a-17a. And it held that, because respondents are entitled to additional remittances, their attorney's fees should be recalculated. *Id.* at 17a-18a.

If this Court grants review and adopts the jurisdictional rule we advocate, all three of these issues will necessarily be decided *against* respondents. There will be no jurisdiction to review the district court's order on remittances, because the appeal will be untimely as to that issue. The district court's order on remittances, which found that respondents are not entitled to additional ones for unidentified employees, will therefore stand. And respondents' challenge to the attorney's fees, which depended upon an entitlement to additional remittances, see Resp. C.A. Br. 47-48; Resp. C.A. Reply Br. 13, will necessarily fail.

It is for this reason, among others, that this case is a far better vehicle than *Adeduntan* v. *Hospital Authority of Clarke County*, 554 U.S. 902 (2008) (No. 07-1079), in which certiorari was sought on a similar issue and denied. In that case the issue was *not* outcome-determinative, because the appeal had been "dismissed as premature" and the petitioners were able to "file another one after the district court entere[d] an order determining the amount of fees." *Adeduntan* v. *Hosp. Auth. of Clarke Cnty.*, 249 F. App'x 151, 155 (11th Cir. 2007) (per curiam). Unlike in this case, therefore, a decision by this Court in

Adeduntan would have affected only *when* the appeal could be taken, not *whether* it could be. See also Br. in Opp. at 7-17, *Adeduntan*, 554 U.S. 902 (No. 07-1079), 2008 WL 2066099 (arguing, in addition, that case had unique facts and that there were alternative grounds for decision).

Similarly, the fact that the First Circuit remanded for further proceedings here is not a reason to deny review. This is not a case in which petitioners might prevail at a later stage or on a different ground, since the First Circuit has determined that respondents are entitled to additional remittances (and perhaps to additional attorney's fees as well). App., *infra*, 9a-18a. This Court has frequently granted certiorari to decide an issue of appealability in cases in which the court of appeals exercised jurisdiction and remanded and the petitioner *could* potentially have prevailed on remand. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009); *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Osborn* v. *Haley*, 549 U.S. 225 (2007); *Holmes Grp., Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002). There is even greater reason to grant review in this case, where there is no such potential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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