In The
Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

MISENER MARINE CONSTRUCTION, INC. and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court overrule the doctrine, first enunciated in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917), that state statutes which "work material prejudice to the characteristic features of the general maritime law [or] interfere with the proper harmony and uniformity of that law in international and interstate relations," are impliedly preempted?

2. Even if *Jensen* remains and applies to matters properly within admiralty jurisdiction, should a state statute granting attorneys' fees to a prevailing party be preempted in light of this Court's concern, in *American Dredging Co. v. Miller*, 510 U.S. 443, 452-54 (1994), with "substantive" state law "rule[s] upon which maritime actors rely in making decisions about primary conduct"?

LIST OF PARTIES BELOW

The parties to this case below are as reflected in its caption. In proceedings before the district court, other parties involved were General Gas Carrier Corporation, the owners of the LPG/C "STEVEN N", PCS Phosphate Company, PCS Nitrogen Fertilizer, L.P., and the Georgia Ports Authority. See App. 1a, 20a. None of these parties appeared in the court of appeals, having been dismissed by the district court. See App. 21a.

RULE 29.6 NOTICE

Petitioner, Norfolk Dredging Company, has no significant shareholders or parent corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Norfolk Dredging Company ("Norfolk"), respectfully prays that a writ of certiorari issue to review the January 21, 2010, judgment and opinion of the U.S. Court of Appeals for the Eleventh Circuit in this proceeding.

OPINIONS BELOW

The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of January 21, 2010, *Misener Marine Constr. Co. v. Norfolk Dredging Co.*, is reported at 594 F.3d 832 (11th Cir. 2009), and reprinted at App. 1a.

The Eleventh Circuit opinion was issued in response to a an unpublished order from the U.S. District Court for the Southern District of Georgia of November 24, 2008, *Misener Marine Constr. Co. v. Norfolk Dredging Co.,* 2008 WL 5046174 (S.D. Ga. 2008), the relevant portions of which are reprinted at App. 20a.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of January 21, 2010. App. 1a.

The U.S. Supreme Court has jurisdiction to review cases from federal courts of appeals by virtue of 28 U.S.C.§ 1254(1) (2000).

STATUTORY PROVISION INVOLVED

This Petition raises the question of whether the judge-made federal maritime law impliedly preempts a state statutory enactment. The state statute at issue here is the attorneys' fees award provision of the Georgia Prompt Pay Act ("GPPA"), codified at Ga. Code Ann. § 13-11-8, the pertinent provisions of which are reprinted at App. 34a.

STATEMENT

1. Misener Marine Construction ("Misener") was contracted by the Georgia Ports Authority ("GPA") to demolish a dock and build a new dock at the Garden City Terminal near Savannah, Georgia. Misener subcontracted with petitioner, Norfolk Dredging Company ("Norfolk"), to remove material from the construction area outside the navigation channel of the Savannah River. While Misener's general contract with GPA expressly provided that Georgia law would control, Norfolk's subcontract with Misener contained neither a choice-of-law clause nor a provision for attorneys' fees in the event of a dispute between the parties. See App. 3a; 25a.

Norfolk began its work on the construction project in March 2004, and completed its work within the time specified by the subcontract. In July 2004, two mooring "dolphins" (or structures) adjacent to Norfolk's work area were pulled from the riverbed, causing a vessel to release from its secured position. Misener blamed Norfolk's work for the failure, and refused to pay any amounts owing to Norfolk on the

subcontract. See App. 4a.

2. a. Misener brought suit against Norfolk in the Southern District of Georgia for negligence, breach of the subcontract, and breach of warranty. These claims were filed pursuant to the district court's maritime jurisdiction. Norfolk answered Misener's complaint and counter-claimed for payment for the work, interest, and attorneys' fees. See App. 4a.

Norfolk's counterclaims invoked the Georgia Prompt Pay Act (GPPA), Ga. Code Ann.§ 13-11-1 *et seq*; App. 34a. The GPPA governs payments to contractors and subcontractors who "perform construction services," Ga. Code Ann.§ 13-11-2(1); App. 34a, and provides that "[i]n any action to enforce a claim under th[e Act], the prevailing party is entitled to recover a reasonable fee for the services of its attorney . . . ." Id. § 13-11-8; App. 34a. Even though it relied on the GPPA for its causes of action, Norfolk's counterclaim neither expressly invoked diversity jurisdiction (although it indicated that the parties were diverse based on their principal places of business), nor did it disclaim admiralty jurisdiction. See App. 4a &n.6; 24a.[1]

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[1] Nevertheless, the parties stated in the proposed Pre-Trial Order before the district court that jurisdiction was based on "[a]dmiralty jurisdiction under 28 U.S.C.§ 1333 and diversity jurisdiction for the counterclaim and third-party claim under 28 U.S.C.§ 1332." Dist Ct. Dckt.175, at 17.

After more than a year of discovery and defense by Norfolk, Misener concluded that Norfolk was not at fault. In October 2005, Misener filed a voluntary dismissal of its claim against Norfolk. Norfolk then moved for summary judgment on its counterclaim against Misener for amounts owing on the subcontract, interest and attorneys' fees. See App. 5a; 21-22a.

b. In January 2006, the district court, Judge John Nangle presiding, entered summary judgment for Norfolk and granted Norfolk attorneys' fees under the GPPA, while reserving the precise calculation of fees to be awarded. See App. 5a; 22a. Judge Nangle ruled that there was no established federal rule regarding attorneys' fees in maritime cases, and the award of fees is not the type of issue that requires a uniform national rule. He thus held that recovery of attorneys' fees under the GPPA was not inconsistent with maritime law. See App. 5-6a; 22a.

Judge Nangle, however, passed away before issuing a final award of attorneys' fees to Norfolk. The case was reassigned to another district judge. See App. 6a; 20a n.1. Misener moved for reconsideration of the grant of attorneys' fees to Norfolk, as being inconsistent with the general maritime law which impliedly preempted the GPPA. The district court agreed in an order issued in November 2008. See App. 23-33a.[2]

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[2] Also in this order were rulings concerning Norfolk's bill of costs, and whether the earlier judgment in Norfolk's favor had been fully satisfied. See App. 21, 33a. These matters were not appealed, and are not material to this petition.

Judge Edenfield ruled that, whether or not Norfolk's counterclaims were brought under diversity, they were still within admiralty jurisdiction. See App. 24a (citing *Pope & Talbot v. Hawn*, 346 U.S. 406, 410-11 (1953)). As a consequence, the decisive issue was whether the GPPA's award of attorneys' fees was "inconsistent with the substance of federal maritime law" or "frustrate[d] national interests in having uniformity in maritime law." App. 26a (quoting Eleventh Circuit precedents).

The district court recognized that attorneys' fees were generally not recoverable in admiralty. And while it acknowledged that there was an exception when such "are provided by the statute governing the claim," App. 26a (quoting *Natco Ltd. P'ship v. Moran Towing of Florida, Inc.*, 267 F.3d 1190, 1993 (11th Cir. 2001)), the district court held that only the provision of a federal, not a state, statute would qualify under this exception. So even though the GPPA was "the statute governing the claim," it was irrelevant. See App. 27a.

The district court also declined to "supplement" the judge-made general maritime law by allowing the award of attorneys' fees pursuant to a state statute, finding the "reasoning persuasive" that such would "undermine the uniformity of maritime law." See App. 28, 30-32a (discussing *Texas A&M Research Found. v. Magna Transp. Inc.*, 338 F.3d 394 (5th Cir. 2003); and *Garan Inc. v. M/V AIVIK*, 907 F. Supp. 397 (S.D. Fla. 1995)).

c. Norfolk appealed the district court's denial of its attorneys' fees request, and the Eleventh Circuit affirmed on largely congruent grounds. App. 18a.

The court of appeals held that "the rule that each party generally bears its own attorneys' fees is a characteristic feature of maritime law [and that the] GPPA would directly contravene this established rule of maritime law." App. 7a. In reaching this conclusion, the Eleventh Circuit ruled that Norfolk's claims sounded in admiralty jurisdiction as involving "dredging a navigable waterway in a port that services international and national commerce" and as having "a direct effect on maritime services and commerce." App. 8a. Moreover, the court of appeals noted that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law." App. 9a (quoting *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)). Whether Norfolk's counterclaims also sounded in diversity was irrelevant. See App. 9a n.11 (citing *Pope & Talbot v. Hawn*, 346 U.S. 406, 411 (1953)).

The Eleventh Circuit also ruled that the GPPA did not qualify as a "statute[] governing the claim," within the meaning of established exceptions to the American Rule against award of attorneys' fees, because "[l]ogic and a proper reading of case law limiting 'statutes governing the claim' to federal statutes. Since the GPPA is not a federal statute it does not fall within this exception." App. 12a (footnote omitted).

Following this Court's teaching in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Eleventh Circuit turned to the nub of the appeal: whether the GPPA should be impliedly preempted because it "contravene[s] a characteristic feature of the general

maritime law [or] interfere[s] with the proper harmony and uniformity of maritime law." App. 13a. In "conclud[ing] that the principle that each party bear its own attorneys' fees is a characteristic feature of maritime law," the court of appeals did "not reach the question of proper harmony and uniformity." App. 14-15a.

The Eleventh Circuit acknowledged that there is a split in authority on the question of whether the American Rule on attorneys' fees is a "characteristic feature of maritime law," within the meaning of *Jensen*'s implied preemption doctrine. See App. 15-16a ("Norfolk argues, as some courts have ruled, that the rule that each party bear its own attorneys' fees is not a characteristic feature of maritime law, but is rather only a general federal procedural rule." (citations omitted)).

The court of appeals, in construing this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), agreed with Norfolk that the American Rule "did not originate in maritime law, it does not have exclusive application in maritime law, and it is a doctrine of general application in federal law." App. 16-17a. Nevertheless, the Eleventh Circuit distinguished this Court's holding in *American Dredging* – that a state statute concerning *forum non conveniens* dismissals was not impliedly preempted because it was a procedural rule. The court of appeals instead held that the American Rule was a "principle of substantive maritime law," App. 17a, and that "[a]lthough we recognize the position of those who argue that the American Rule is not a characteristic feature of

maritime law, the long developed precedent of this Circuit and others cannot be so easily set aside." Id. "Therefore," the Eleventh Circuit concluded, "the GPPA's entitlement to attorneys' fees is in direct conflict with this principle of substantive maritime law. Thus, the GPPA cannot be incorporated into substantive maritime law." Id.

Judge Black of the Eleventh Circuit specially concurred with the panel decision. See App. 18a. Under the *Jensen* and *American Dredging* calculus, she, unlike the panel majority, would have held that "application of the GPPA would disrupt the proper harmony and uniformity of admiralty law, and thus . . . would not reach the issue of whether the American Rule is a characteristic feature of admiralty law." App. 18a. In further distinguishing this Court's holding in *American Dredging* and considering whether a state statutory rule affects "parties' conduct both inside and outside the courtroom," App. 18a, Judge Black observed that

> the American Rule is a substantive law that yields consistent and predictable results. Moreover, attorneys' fees can be a substantial portion of a party's recovery and thus could influence secondary behavior, such as a decision of where to sue. Other courts that have considered the application of state statutes providing for attorneys fees in maritime cases have also concluded uniformity is an important interest.

App. 19a (citing *Sosebee v. Rath*, 893 F.2d 54, 56-57 (3d

Cir. 1990); *Texas A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 406 (5th Cir. 2003)). Judge Black would thus have affirmed the district court's denial of attorneys' fees as being impliedly preempted by the general maritime law, but under slightly different premises than those offered by the panel majority's analysis of *Jensen* and *American Dredging*.

d. This timely petition follows.

REASONS FOR GRANTING THE PETITION

JENSEN SHOULD BE EITHER OVERRULED OR FURTHER CABINED

This petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred. . . ."). At issue here is the ongoing viability of a central – and controversial – tenet of our admiralty jurisprudence: that state statutes at variance with either "characteristic features" of the federal judge-made "general maritime law," or which "interfere[] with the proper harmony and uniformity of that law in international and interstate relations," are impliedly preempted. *Southern Pacific*

Co. v. Jensen, 244 U.S. 205, 215-16 (1917).

After nearly a century of discordant experience with implied preemption in admiralty, flowing from *Jensen* and its fractious progeny, it is finally time to either repudiate the doctrine altogether or to change jurisprudential course. This petition takes the exceptional step of asking the Court to re-examine *Jensen*, especially in light of this Court's ruling in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), with the object of overruling the implied preemption doctrine or substantially curtailing its effect.

A. The Time Has Come To Overrule *Jensen*.

Jensen's implied preemption doctrine[3] in admiralty was critiqued at its inception by members of this Court as being flawed in its premises and

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[3] All members of the Court in *American Dredging* framed the doctrine in terms of preemption. See 510 U.S. at 445, 447 n.1 ("Petitioner's pre-emption argument was primarily based upon the principles established in *Jensen*, as repeated in the later cases. . . .") (citations omitted). See also id. at 458 (Souter J., concurring); 459-61 (Stevens, J., concurring); 466 (Kennedy, J., dissenting). What makes preemption "implied" under this doctrine, is, of course, the absence of any express act of Congress. That is why some scholars have referred to *Jensen*'s rule as a judicial expression of a Dormant Admiralty Clause. See, e.g., Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 922 n.61 (2007); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COMM. 469, 518-19 (2004).

reasoning. *Jensen* has produced nearly five generations of discordant progeny, in which the only consistent theme has been this Court's recognition of the implied preemption rule's inherent potential for incoherence and judicial "mischief." See *Kossick v. United Fruit Co.*, 365 U.S. 731, 742-43 (1961) (Frankfurter, J., dissenting). As recently as this Court's 1994 decision in *American Dredging*, the contours of the doctrine have been constrained, but with little success in giving guidance to lower courts as to precisely under what circumstances a state statute should be impliedly preempted as being in conflict with the judge-made federal general maritime law.

1. *Jensen* was born under peculiar circumstances. At issue was applying New York's workers' compensation statute to pay the widow of a longshoremen (Christen Jensen) who was killed on a gangplank a few feet offshore of Pier 49 in Manhattan. See 244 U.S. at 207-14. In striking down the statute, the *Jensen* Court, Justice McReynolds writing, intoned:

> Considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions, Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. And further, that, in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction.

. . . .

> In view of these constitutional provisions . . . it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. . . . [S]tate statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Id. at 215-16 (citations omitted). Because Jensen's injury occurred within admiralty jurisdiction, the Court applied the general maritime law, as a *constitutional* matter, so as to preempt a contrary state statutory scheme. *Jensen*'s conceptual similarity to the Court's now-discredited due process holding in *Lochner v. New York*, 198 U.S. 45 (1905), has not gone unnoticed. See *American Dredging*, 510 U.S. at 458 (Stevens, J., concurring).

The majority's holding in *Jensen* was vigorously

critiqued by the dissenters to that decision. Justice Pitney emphasized the lack of historic evidence for the proposition that the Framers intended Article III's Admiralty Clause as a free-standing grant of law-making power to the courts – judicial law-making that would automatically preempt state statutory and common law. See id. at 226, 228 (Pitney, J., dissenting). Additionally, Justice Pitney doubted whether there was any authority for *Jensen*'s broad holding. The *Jensen* majority's reliance, see id. at 215-16, on one earlier case, *The LOTTAWANNA*, 88 U.S. (21 Wall.) 558 (1874), and its notion that the general maritime law was "a uniform law founded on natural reason and justice," id. at 572-73, was especially unsettling. It was in response to the majority's claim of jurisprudential superiority for a judge-made general maritime law that Justice Holmes's dissent in *Jensen* – which would presage this Court's later ruling in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) – made the observations that "judges do and must legislate, but they can only do so interstitially" and that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." Id. at 221, 222 (Holmes, J., dissenting).

Jensen's career in patrolling the boundaries of federalism in the maritime sphere immediately produced "conclusion[s]" that were later characterized, in substantial judicial understatement, as "remarkable." *American Dredging*, 510 U.S. at 458 (Stevens, J., concurring). When Congress attempted – not once, but twice – to statutorily overrule *Jensen* by

delegating to the states the authority to enact their own workers' compensation statutes with applicability to maritime workers, the Supreme Court struck down those federal statutes as violative of *Jensen*'s uniformity command. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924). The dissenters in *Knickerbocker Ice* and *Dawson*, Justices Holmes and Brandeis, called for *Jensen*'s overruling. See 253 U.S. at 167 (Holmes, J., dissenting); 264 U.S. at 236-37 ("These far[-]reaching and unfortunate results of the rule declared in [*Jensen*] cannot have been foreseen when the decision was rendered.") (Brandeis, J., dissenting). See also John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 6-9 (1983) (considering relevance of *stare decisis* principles to calls for *Jensen*'s overruling).

It was only with the adoption of a uniform, federal compensation scheme for longshoremen that the *Jensen* rule was ostensibly satisfied. But even that did not quell confusion as to *Jensen*'s doctrinal reach in that realm of state regulation. In 1942, this Court held that the State of Washington could make an award under its compensation law to the widow of a worker drowned in a navigable river, and thus within admiralty jurisdiction, essentially creating a "twilight zone," in which workers could receive compensation under either state or federal schemes. See *Davis v. Dep't of Labor & Indus.*, 317 U.S. 249, 256 (1942). Chief Justice Stone dissented and indicated that the majority should have overruled *Jensen*. See id. at 263 (Stone, C.J., dissenting). In concurring, Justice Frankfurter

called *Jensen* an "ill-starred decision," although candidly acknowledging that after twenty-five years, "[f]ederal and state enactments had accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings. . . ." Id. at 259 (Frankfurter, J., concurring).

2. If *Jensen*'s implied preemption doctrine in admiralty was "ill-starred" at birth and in its youth, its middle age was no less troubled. For starters, the doctrine appeared to be riddled with contradictions. Compare *Just v. Chambers*, 312 U.S. 383, 388 (1941) (allowing enforcement of a state wrongful death action), with *Pope & Talbot v. Hawn*, 346 U.S. 406, 409-10 (1953) (ruling against application of state law on injuries to stevedores). This Court's 1955 decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), cautioned that "it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty law." Id. at 313. This Court thus upheld the application of state law insurance provisions on breaches of warranties, and expressly declined the invitation to prescribe such rules itself. See id. at 314-17.

Likewise, Justice Frankfurter, writing for the Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), observed that

> [i]t is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope.

> State-created liens are enforced in admiralty. State remedies for wrongful death and state statutes providing for the survival of actions . . . have been upheld when applied to maritime causes of action. . . . State rules for the partition and sale of ships, state laws governing the specific performance of arbitration agreements, state laws regulating the effect of a breach of warranty under contracts of maritime insurance – all these laws and others have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity.

Id. at 373-74.

And in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), this Court held that a provision of state law may not require that a maritime contract be in writing where admiralty law regards oral contracts as valid. Even so, the Court acknowledged these defects in the *Jensen* doctrine:

> Although the doctrines of the uniformity and supremacy of the maritime law have been vigorously criticized – see *Southern Pacific Co. v. Jensen*, 244 U.S. at 218 (dissenting opinion); *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 309 [1943] – the qualifications and exceptions which this Court has built up to that imperative doctrine have not been considered notably

> more adequate. . . .[T]he process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

Id. at 739 (citing, *inter alia*, David P. Currie, *Federalism and the Admiralty: 'The Devil's Own Mess,'* 1960 SUP. CT. REV. 158, 220 ("It cannot be gainsaid that the area of federalism and admiralty is plagued with inconsistencies.")). And, if that was not enough, Justice Frankfurter penned this dissent in *Kossick*:

> Certainly no decision in the Court's history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than [*Jensen*]. The mischief it has caused was due to the uncritical application of the loose doctrine of observing "the very uniformity in respect to maritime matters which the Constitution was designed to establish." [*Jensen*, 244 U.S. at 217]. The looser a legal doctrine, like that of the

> duty to observe "the uniformity of maritime law," the more incumbent it is upon the judiciary to apply it with well-defined concreteness. It can fairly be said that the *Jensen* decision has not been treated as a favored doctrine. Quite the contrary. It has been steadily narrowed in application. . . .

Id. at 742-43.

3. The "stead[y] narrow[ing]" of the *Jensen* doctrine has proceeded apace in its golden years, bringing us to the current juncture.[4] Material to the Eleventh Circuit's decision, and consideration of this petition, was the Court's 1994 ruling in *American Dredging*. At issue there was a Louisiana statute rendering unavailable the doctrine of *forum non conveniens* as a basis for dismissing suits brought in that state's courts. See 510 U.S. at 445-46. This Court concluded that such a state statute was not impliedly

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[4] For whatever its value, academic criticism of *Jensen* has been legion. In addition to such classic works as Currie, *Federalism and the Admiralty* (cited above), more recent scholarship includes Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1451-63 (2001); David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995); Ernest A. Young, *Preemption at Sea*, 67 G.W.U. L. REV. 273 (1999); id., *The Last Brooding Omnipresence:* Erie Railroad Co. v. Tompkins *and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS L. REV. 1349 (1999).

preempted under *Jensen*.

In reaching that conclusion, though, the Court majority substantially altered the contours of the *Jensen* doctrine. Proceeding from the traditional bifurcation of *Jensen* preemption issues, the *American Dredging* Court, Justice Scalia writing, turned its attention to those state statutes that might arguably "work[a] material prejudice to [a] characteristic feature[] of the general maritime law." *Jensen*, 244 U.S. at 216. The *American Dredging* Court held that, in order for a state statute to be impliedly preempted as infringing a "characteristic feature" of maritime law, the rule being affected must have either "originated in admiralty [or have] exclusive application there." 510 U.S. at 450. Since *forum non conveniens* neither originated in admiralty (its origins were traceable to Scots estate law, see id. at 449) nor had exclusive application there (as a general rule of venue, see id. at 450, 453), it was not a "characteristic feature of the general maritime law," within the meaning of *Jensen*'s implied preemption rule.

Jensen's second prong – whether a state statute disrupted the "proper harmony and uniformity" of the general maritime law, *Jensen*, 244 U.S. at 216 – presented a thornier issue for the *American Dredging* Court. Justice Scalia acknowledged that "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence." 510 U.S. at 452. Notwithstanding, the Court concluded that Louisiana's *forum non conveniens*

statute did not offend the maritime law's harmony and uniformity because it embodied a "procedural rule" and not a "substantive right," id. at 453-54, and was "not a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." Id. at 454. Indeed, the Court questioned whether *forum non conveniens* even amounted to much of a rule "about secondary conduct – in deciding, for example, where to sue or where one is subject to being sued." Id. at 455. The Court acknowledged that the process/substance distinction was elusive, and that certain doctrines (such as burdens of proof) have changed character over the years. See id. at 453-54; see also id. at 457-58 (Souter, J., concurring) ("in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive pre-emption analysis.").

The *American Dredging* Court was hardly effusive in its praise for *Jensen*. In response to Justice Stevens' call for *Jensen*'s overruling, see id. at 458 (Stevens, J., concurring), the majority merely noted that "[s]ince we ultimately find that the Louisiana law meets the standards of *Jensen* anyway, we think it inappropriate to overrule *Jensen* in dictum, and without argument or even invitation." Id. at 447 n.1. Nor did the Court majority much dispute Justice Stevens' critique that "*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation. . . without any firm grounding in constitutional text or principle." Id. at 459 (Stevens, J., concurring), 461

(questioning whether *Jensen* has any originalist basis).

Indeed, the majority appeared to agree with Justice Stevens' characterization of the *Jensen* maritime preemption doctrine as a "patchwork." Id. at 460 (Stevens, J., concurring); see also id. at 452 ("It would be idle to pretend. . . ."). Nothing in the *American Dredging* majority suggests that *Jensen*'s "strong preemption doctrine" is necessitated by the demands of protecting contemporary maritime commerce from the ravages of state protectionism, id. at 461 (Stevens, J., concurring), or could be as effectively accommodated by other constitutional means, such as Commerce Clause and Due Process Clause jurisprudence. See id. at 461-62 (Stevens, J., concurring). Justice Stevens offered this re-conceptualization of the *Jensen* doctrine:

> we should focus on whether the state provision in question conflicts with some particular substantive rule of federal statutory or common law, or, perhaps, whether federal maritime rules, while not directly inconsistent, so pervade the subject as to preclude application of state law. We should jettison *Jensen*'s special maritime pre-emption doctrine and its abstract standards of "proper harmony" and "characteristic features."

Id. at 461 (Stevens, J., concurring).

In contrast, the *American Dredging* dissenters (Justice Kennedy, joined by Justice Thomas) offered a robust justification for *Jensen*, and would have ruled

that Louisiana's *forum non conveniens* statute was impliedly preempted. See id. at 462-70. Even so, the Court's decisions after *American Dredging* have acknowledged that guidance is still lacking in this realm. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995) ("exercise of federal admiralty jurisdiction does not result in automatic displacement of state law."). In its 1996 decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, the Court regretfully noted that

> The federal cast of admiralty law, we have observed, means that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959). Our precedent does not precisely delineate that scope. . . . We attempt no grand synthesis or reconciliation of our precedent today.

516 U.S. 199, 210 n.8 (1996) (citing and quoting *American Dredging*, 510 U.S. at 452).

4. The decision for which review is sought here amply illustrates the cost of this Court perpetuating a "patchwork" doctrine which embraces "abstract standards" and "[in]discernible" distinctions, apparently impervious to "precise[] delineat[]ion." The Eleventh Circuit's opinion pronounces a formidably expansive vision of federal admiralty jurisdiction and a concomitant assertion of the supremacy of the federal

judge-made general maritime law, even at the expense of legitimate state statutory enactments.

Even before launching into its *Jensen* analysis, the court of appeals pronounced a crucial premise to its holding: "with admiralty jurisdiction comes the application of substantive maritime law." App. 9a (quoting *E. River S.S. Co. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986)). The court of appeals was apparently heedless of this Court's caution in *Grubart*, 513 U.S. at 545 ("exercise of federal admiralty jurisdiction does not result in automatic displacement of state law"), and this Court's modulated treatment of admiralty jurisdiction over maritime contracts. See *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 23-25 (2004) (whether a contract falls into admiralty jurisdiction depends "upon the nature and character of the contract [and] whether it has reference to maritime service or maritime transactions") (citations omitted). The Eleventh Circuit held that Norfolk's subcontract was within admiralty jurisdiction, notwithstanding that the general contract for the construction was governed by Georgia law and that Norfolk removed material outside the Savannah River's navigable channel. See App.7-10a.

Perhaps just as significantly, the court of appeals held as a preliminary matter that it was irrelevant that Norfolk's counterclaims sounded in state law (under the Georgia Prompt Pay Act (GPPA)) and were brought under diversity jurisdiction. See App. 9a n.11. That they were also encompassed within admiralty jurisdiction sufficed for the all-encompassing application of the federal general maritime law, as per

this Court's ruling in *Pope & Talbot*, 346 U.S. at 411. But it is questionable whether this holding of *Pope & Talbot* survived the Court's ruling in *Romero*, see 358 U.S. at 363, 371, and (more importantly) the 1966 adoption of Fed. R. Civ. P. 9(h), which requires the designation of maritime claims in order to distinguish them from those brought under diversity or other jurisdictional bases. See Fed. R. Civ. P. 9 advisory committee's note (1966 amendment).

In deciding that the American Rule against the award of attorneys' fees was a "characteristic feature" of the general maritime law, the court of appeals had to first acknowledge, in accordance with *American Dredging*, that "the American Rule did not originate in maritime law, it does not have exclusive application in maritime law, and it is a doctrine of general application in federal law." App. 16-17a. This should have ended the "characteristic feature" analysis. Instead, the Eleventh Circuit went on to hold that the "GPPA is distinguishable from the Supreme Court's holding in *American Dredging*" because the GPPA is a "substantive law." App. 17a. But the process/substance distinction goes to *Jensen*'s second prong, "harmony and uniformity," and not to a "characteristic feature" of the maritime law.

The Eleventh Circuit's analytic confusion as to *American Dredging*'s distinct treatment of "characteristic features" and "harmony and uniformity" is no mere semantic mis-step.[5] The Eleventh Circuit

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[5] Most courts of appeal, post-*American Dredging*, have explicitly sought to avoid analytically "collapsing" *Jensen*'s

elided this Court's requirement that a state statute "materially prejudice[]" a "characteristic feature," by simply concluding that there was a "direct conflict" between the American Rule and the GPPA. App. 17a. By effectively merging *Jensen*'s two prongs, the panel majority belied its assertion that it did "not reach the question of proper harmony and uniformity." App. 15a. It most certainly did.

Nor did Judge Black's special concurrence cure this analytic defect. She would have held that the American Rule "is a substantive law that yields consistent and predictable results. . . . and thus could influence secondary behavior, such as a decision of where to sue." App. 19a. But this Court's ruling in *American Dredging* required that for a state statute to be impliedly preempted it must interfere with the proper harmony and uniformity of the maritime law inasmuch as "primary conduct" was concerned – "how [maritime actors] manage their business and what precautions to take." 510 U.S. at 454. The *American Dredging* Court's discussion of "secondary conduct," id. at 455, was meant to be cautionary: even if *forum non conveniens* rules influenced "secondary conduct" (which the Court doubted), they would not necessarily qualify

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two prongs. See, e.g., *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 279 n.12 (2d Cir. 2002), rev'd on other grounds, *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, (2nd Cir. 2009); *In re Exxon Valdez*, 270 F.3d 1215, 1250-51 (9th Cir. 2001); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 627 (1st Cir. 1994) (referring to *Jensen*'s "prong[s]").

as preemptive under *Jensen*.[6] If the Eleventh Circuit's combined treatment of "primary" and "secondary" conduct is countenanced, it would mean that virtually any rule of conduct would satisfy *Jensen*'s "harmony and uniformity" prong.

5. *Jensen* has reached the end of its life as a judge-made rule. See Stevens, *supra*, 58 N.Y.U. L. Rev. at 6-9. Petitioner is mindful of the understandable reluctance this Court would exercise in considering whether to overrule a precedent so apparently central to admiralty and federalism jurisprudence. Nevertheless, petitioner is prepared to argue that *Jensen* was birthed under false historical and constitutional assumptions, which have been since fundamentally undermined by this Court's *Erie* ruling rejecting the application of a federal general common law in diversity actions. See *Erie R.R.*, 304 U.S. at 78.

Jensen's implied preemption calculus, even as re-fashioned in *American Dredging*, is also unsustainable in practice, leaving lower courts "without a reliable compass for navigating maritime pre-emption problems." *American Dredging*, 510 U.S. at 459 (Stevens J., concurring). Implied maritime preemption

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[6] Two of the three courts of appeals to consider the issue have concluded that *American Dredging*'s emphasis is on "primary conduct." See, e.g., *Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co.*, 85 F.3d 44, 49 (2d Cir. 1996); *Ballard Shipping*, 32 F.3d at 629; but see *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 669 (9th Cir. 1997) (considering both primary and secondary conduct under implied preemption analysis).

– as a reflection of some sort of constitutionalized "admiralty exceptionalism" – is no longer necessary. There are other, less constitutionally-invasive, means available to ensure the coherence of maritime law than *Jensen*'s overweening rule of implied preemption.

American Dredging predicted that a time would come where the Court would be asked to reconsider *Jensen*. See 510 U.S. at 447 n.1. That day has arrived.

B. Even If This Court Is Disinclined To Overrule *Jensen*, Review Should Be Granted As To Whether A State Statutory Award of Attorneys' Fees Is Impliedly Preempted.

Quite apart from its handling of *Jensen*'s implied preemption analysis, the Eleventh Circuit's specific ruling – that the American Rule was a "characteristic feature" of the general maritime law and was, therefore, preemptive of Georgia's Prompt Pay Act – extends the doctrine well-beyond its current contours and (as the court of appeals itself acknowledged, see App. 15-16a & n.19, 17a) conflicts with the decisions of other courts.[7]

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[7] Georgia is not alone in enacting an award of attorneys' fees to the prevailing party in construction disputes. See, e.g., Ala. Code § 8-29-6; Del. Code Ann. tit. 6, § 3506(e); Mo. Rev. Stat.§ 431.180(2); Mont. Code Ann.§ 28-2-2105; 62 Pa. Cons. Stat.§ 3939; Tex. Gov't Code Ann.§ 2251.043.

The court of appeals' analysis would, of course, extend to preempt *any* state statutory grant of attorneys' fees in an action denominated as maritime in character. For

1. As already discussed, see *supra* at 24-26, the court of appeals muddled the *Jensen/American Dredging* analysis by essentially collapsing *Jensen*'s two prongs. Whatever the true character of the "American Rule" on the award of attorneys' fees, it – as the Eleventh Circuit declared – "did not originate in maritime law, it does not have exclusive application in maritime law, and it is a doctrine of general application in federal law." App. 16-17a.[8] Nevertheless, both the

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a dated, yet exhaustive, tally of state fee-shifting statutes, see Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 328-45 (1984) (documenting 2000 state fee-shifting provisions). See also 1 Mary Francis Derfner & Arthur D. Wolf, COURT AWARDED ATTORNEY FEES, ch. 5, *Statutory Exceptions to the American Rule* (1998).

[8] Petitioner does not intend to subvert this Court's teachings in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); and *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), both relied upon by the court of appeals in its ruling below. See App. 15a n.18. But both decisions acknowledged that the American "Rule" is really a presumption, and that attorneys' fees can certainly be awarded where there is a "statute . . . providing therefor." 386 U.S. at 717. Obviously, the question raised here is whether a *state* statutory grant of attorneys' fees would qualify as an exception to the American Rule. The Eleventh Circuit conclusively answered "no." See App. 12a.

In the specific context of maritime cases, this Court has already acknowledged at least one exception to the American Rule: where there is misbehavior by a litigant. See *Vaughan v. N.J. Atkinson*, 369 U.S. 527, 530-31 (1962). The Eleventh Circuit held that Norfolk had not asserted

panel majority and special concurrence declared the American Rule as "substantive," App. 17a, 19a, and thus preemptive under *Jensen*, whether under the "characteristic feature" or "harmony and uniformity" prongs.

The Eleventh Circuit's conclusion that the American Rule is "substantive" found support only in the special concurrence's assumption (see App. 19a) that, in *American Dredging*, rules going to "secondary conduct" were impliedly preempted under *Jensen*. But that was not this Court's holding in *American Dredging*, and the *Jensen* analysis should not be so extended as to cover rules of "secondary conduct."

2. Given the number of state statutes that allow for the grant of attorneys' fees to prevailing parties (irrespective of bad faith conduct), see *supra* at 27 n.7, lower courts are split on whether such statutes are impliedly preempted under *Jensen*. The Eleventh Circuit acknowledged this division. See App. 15-16a & n.19, 17a.

Three courts of appeals decisions support the Eleventh Circuit's conclusion. See *Sosebee v. Rath*, 893 F.2d 54 (3d Cir. 1990); *Southworth Machinery Co. v. F/V COREY PRIDE*, 994 F.2d 37 (1st Cir. 1993); *and Texas A&M Research Foundation v. Magna Transp, Inc.*, 338 F.3d 394 (5th Cir. 1993). But the *Jensen* analysis in these decisions is conclusory. In *Sosebee*, a

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that Misener's conduct amounted to bad faith. See App. 12a. That still leaves Norfolk's claim as of right under the GPPA as the "prevailing party" in the proceeding. Ga. Code Ann.§ 13-11-8; App. 34a.

pre-*American Dredging* case, the First Circuit merely held that "[t[here is a strong interest in maintaining uniformity in maritime law. This interest would be undermined if the availability of attorneys' fees depended upon where the plaintiff filed suit." 893 F.2d at 56-57.

In *Southworth*, an opinion filed after *American Dredging* but where this Court's decision in that case is not considered, the First Circuit offered this approach:

> State statutes providing for attorney's fees may sometimes be given effect in admiralty cases, notably, where the attorney's fees are awarded incident to a dispute that is not normally a subject of maritime law. For example, in *Pace v. Insurance Company of North America*, 838 F.2d 572, 578-79 (1st Cir. 1988), we held that maritime law did not preempt a Rhode Island cause of action allowing recovery of damages and attorney's fees for an insurer's bad faith refusal to pay or settle claims; the refusal to settle claims is normally left untouched by maritime law. . . .
>
> Turning to the case at hand, Southworth's liability under [state law] was not predicated on any ground novel to or unaddressed by maritime law. Rather, Southworth was found liable as a result of its breach of its express warranty for parts and workmanship incident to the repair of a ship, a standard contractual

> breach to which maritime law has always applied. The conduct found to violate [state law] falls squarely within the focus of existing maritime law, and [state law's] attorney's fee provision, being inconsistent with maritime law, cannot be applied in this case.

Id. at 41-42 (citations omitted). *Southworth*'s citation to *Pace* is significant inasmuch as *Pace* reflects a line of cases where state fee-shifting statutes in the insurance context were applied to marine insurance disputes, and held consistent with the *Jensen* doctrine. See also *INA of Texas v. Richard*, 800 F.2d 1379, 1381 (5th Cir. 1986); and *All Underwriters v. Weisberg*, 222 F.3d 1309, 1315 (11th Cir. 2000) (holding to the same effect as *Pace*), which the court below distinguished as being a marine insurance case and thus not relevant to wider maritime disputes. See App. 11a n.13.

The Fifth Circuit in *Texas A&M* merely cited *Southworth* and *Sosebee* in reaching its holding that "the general rule of maritime law that parties bear their own costs, coupled with the need for uniformity in federal maritime law, precludes the application of state attorneys' fees statutes. . . ." 338 F.3d at 406. The Fifth Circuit did not conduct its own review of whether the American Rule was substantive or procedural under the *American Dredging* analysis, or whether it went to primary or secondary conduct. Just as significantly, *Texas A&M* did not distinguish the Fifth Circuit's earlier decision in *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349 (5th Cir. 1980), which held that attorneys' fees were recoverable under

a Texas statute for breach of a dredging contract in a diversity case. See id. at 352-53. Despite the Eleventh Circuit's attempt to discount *Garrett*'s relevance,[9] see App. 10a n.12, *Garrett* should be counted as a court of appeals decision supporting the application of a state attorneys' fee statute in claims brought under concurrent diversity and admiralty jurisdiction.

As recognized by the Eleventh Circuit, see App. 16a n.19, the most cogent decision explaining why the American Rule is a procedural rule having no effect on

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[9] *Garrett* certainly involved a contract for dredging in proximity to navigable waters, see 619 F.2d at 350-51 (sketch illustration of the site). If the Eleventh Circuit was correct in its conclusion that the dredging operation in *Garrett* did not fall within admiralty jurisdiction, see App. 10a n.12, one might legitimately question how Norfolk's work outside the navigable channel in this case does.

In *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14 (2004), this Court held that whether a contract falls into admiralty jurisdiction depends "upon the nature and character of the contract [and] whether it has reference to maritime service or maritime transactions." Id. at 23-25 (citations omitted). The Eleventh Circuit's holding leads to a discordant result – whittling away at *Kirby*, if not ignoring it altogether. Had Misener performed the dredging work itself under the general contract (regardless of choice of law in the contract), federal maritime law would not have barred Misener from collecting attorneys' fees under the GPPA because the "nature and character" of the work was dock construction, which, like vessel construction, is outside admiralty jurisdiction. Under the court of appeals' holding, the opposite result obtains when a subcontractor performs the exact same work.

either primary or secondary conduct is the Alaska Supreme Court's opinion in *Hughes v. Foster Wheeler Co.*, 932 P.2d 784 (Alaska 1997). Rigorously following this Court's calculus in *American Dredging*, see 932 P.2d at 787-91, the Alaska Supreme Court first rejected the notion that the American Rule was a "characteristic feature" of the maritime law because it neither originated in admiralty nor had exclusive application there. See id. at 788-89. As for "proper harmony and uniformity," the Alaska Supreme Court, in an abundance of caution, considered both whether the American Rule affected primary and secondary behavior of maritime actors:

> With respect to primary behavior, it is highly doubtful that parties – either mariners or owners of vessels – will alter their business regimes or take different precautions due to the risk that partial attorney's fees and costs can be awarded in favor of the prevailing party against the losing party. Owners of vessels already have sufficient reason to take precautions to safeguard mariners working on their vessels, since they can and are sued for unseaworthiness, personal injury, wrongful death, and other causes of action when mariners are injured on-board. The fact that [Alaska] Civil Rule 82 would allow a vessel owner, if successful on the merits, to recoup partial attorney's fees and costs is not a sufficient incentive for shipowners to scrimp on safety or change their business

> management techniques. Similarly, the prospect that mariners might recover partial attorney's fees and costs if they successfully prosecute a suit hardly seems to be sufficient incentive for them to carry out their duties in such a way that would cause them to suffer injury.
>
> The analysis of secondary behavior is more involved. First, Civil Rule 82 will not substantially affect where plaintiffs file suit. In all jurisdictions there is a chance that attorney's fees and costs will be awarded. A plaintiff in an admiralty suit who sues in courts of the State of Alaska knows that there is a probability that partial attorney's fees and costs will be awarded to the defendant if the defendant prevails. A plaintiff who files suit in another jurisdiction (federal or state) knows only that, pursuant to *Vaughan* [*v. N.J. Atkinson*, 369 U.S. 527 (1962)], there is a possibility that attorney's fees will be awarded in the exercise of the admiralty court's equity power. While the likelihood of a fee award is higher in Alaska than in other jurisdictions, the difference is not so great that it would influence plaintiffs in their decision concerning where to file suit.

Id. at 790-91. See also *Paul v. All Alaskan Seafoods, Inc.*, 24 P.3d 447, 456-58 (Wash. App. 2001) (reaching the same conclusion as *Hughes*).

3. As the court below acknowledged, see App. 15-16a & n.19, 17a, there is a division in precedents on whether state attorneys' fee statutes are impliedly preempted under *Jensen*. If the marine insurance cases are not distinguished away, the balance of authority may well tip against the Eleventh Circuit's holding. Certainly, the greater weight should be afforded to those opinions, like the Alaska Supreme Court in *Hughes*, that faithfully sought to apply this Court's analysis in *American Dredging*.

Given the plethora of state fee-shifting enactments, see *supra* at 27 n.7, and the variety of contexts in which they might be applied to maritime disputes, the likelihood that this feature of *Jensen* will continue to be litigated in both federal courts and state courts (hearing maritime cases under the "saving to suitors" proviso of 28 U.S.C.§ 1333) is quite high. Even if this Court declines the invitation to pass on the wider question of *Jensen*'s continued viability, it should still grant review to resolve this aspect of the proper federalism balance to be struck in maritime cases.

CONCLUSION

The petition ought to be granted.

Respectfully submitted,

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March 24, 2010