No. 09-1164

In The Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION OF NORFOLK DREDGING COMPANY'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In maritime contract disputes where there is no agreement to shift the risk of attorney's fees, are federal courts required to apply state fee-shifting statutes as an exception to the American Rule?

LIST OF PARTIES

The following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit:

1. Petitioner (Appellant below):
   Norfolk Dredging Company.
2. Respondent (Appellee below):
   Misener Marine Construction, Inc.

CORPORATE DISCLOSURE STATEMENT

Respondent, Misener Marine Construction, Inc., is a Florida corporation. Orion Marine Group is Misener Marine Construction, Inc.'s parent company.

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In *Misener Marine Constr. Co. v. Norfolk Dredging Co.*, 594 F.3d 832 (11th Cir. 2010), the Eleventh Circuit affirmed the decision below that Norfolk Dredging was not entitled to recover its attorneys' fees under a state fee-shifting statute that conflicts with federal maritime law.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals was entered on January 21, 2010.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1923 is set forth in the Appendix at App. 1.

Georgia Prompt Pay Act, Ga. Code Ann. § 13-11-8 is set forth in the Appendix at App. 2.

STATEMENT OF THE CASE

The Norfolk Dredging Agreement

The Port of Savannah ("Port") is the fourth largest container port in the United States and the largest single-terminal operation in North America. App.

at 3a.[1] It is a gateway to and from the Atlantic Ocean and serves as a major distribution hub, including a twenty-six state region. *Id.*

The Georgia Ports Authority hired Misener Marine Construction, Inc. ("Misener" or "Respondent"), a Florida-based maritime construction contractor, to demolish a dock and to build a new dock at the Port. *Id.* Separately, Misener contracted with Norfolk Dredging Company ("Norfolk" or "Petitioner"), a Virginia-based maritime dredging company with operations throughout the Atlantic Coast and beyond,[2] to dredge parts of the Savannah River in the Port. Norfolk wrote the dredging contract which omitted any fee-shifting provision. *Id.* The parties implicitly agreed to adhere to the American Rule.

After Norfolk completed its dredging work, two temporary mooring dolphins pulled from the riverbed causing a vessel to release from its secured position. Misener was forced to make repairs and to reconstruct the damaged mooring dolphins. Misener believed Norfolk's dredging work caused the incident. *Id.* at 4a.

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[1] The Appendix to the Petition for Writ of Certiorari includes the January 21, 2010 Eleventh Circuit Opinion and the November 24, 2008 District Court Order. Citations herein to "App. at ___a" are references to Petitioner's Appendix.

[2] *See* http://www.norfolkdredging.com/services

The Underlying Lawsuit

Misener sued Norfolk for negligence and breach of the dredging contract in federal court pursuant to 28 U.S.C. § 1333 and Federal Rule of Civil Procedure 9(h). *Id.* Norfolk answered the complaint without challenging the district court's admiralty jurisdiction. Norfolk also counterclaimed for breach of the dredging contract and for interest and attorneys' fees under a state fee-shifting statute – the Georgia Prompt Pay Act ("GPPA"). *Id.* The GPPA provides, *inter alia*: "In any action to enforce a claim under this chapter, the prevailing party is entitled to recover a reasonable fee for the services of its attorney including but not limited to trial and appeal and arbitration, in an amount to be determined by the court or the arbitrators, as the case may be." O.C.G.A. § 13-11-8. Norfolk did not assert diversity jurisdiction. *See* App. at 4a.

Misener determined Norfolk's work may not have been the cause after all. Accordingly, Misener voluntarily dismissed its claims against Norfolk and attempted to pay Norfolk for its dredging work. *Id.* at 4a-5a. Norfolk rejected Misener's offer, and, instead, incurred additional litigation expenses by filing a motion for summary judgment on its counterclaim. *Id.*

The First Order

Although no exception to the American Rule applied, and notwithstanding the fact that Misener and Norfolk never agreed the prevailing party would

be entitled to its attorneys' fees, the district court determined that awarding Norfolk its fees under the GPPA would not be inconsistent with federal law. App. at 5a-6a. More than two years later, however, the district court requested additional briefing on the issue of attorneys' fees. Before fully resolving the issue, the district court judge passed away. *Id.* at 6a.

The Final Order

A new district court judge determined that maritime law provides the answer – attorneys' fees are not permitted unless an exception to the American Rule applied. Specifically, the district court ruled:

> The law regarding attorneys' fees under maritime law is clear. "The prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course. Attorneys' fees generally are not recoverable in admiralty unless (1) they are provided by the statute governing the claim, (2) the non prevailing party acted in bad faith in the course of the litigation, or (3) there is a contract providing for the indemnification of attorneys' fees."

Id. at 26a (citations omitted). The district court ruled that Misener did not act in bad faith; the parties did not agree in a contract to shift the risk of attorneys' fees; and there was no federal statute at issue that permitted Norfolk to recover its fees. Because Norfolk failed to establish that any of the exceptions applied, the district court denied Norfolk's claim for fees.

The Appeal

The Eleventh Circuit held that the dredging contract is governed by maritime law and that "[t]he prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course." App. at 10a. The court also held that none of the exceptions to the American Rule applied because Norfolk did not assert a claim under a federal statute authorizing fees; Misener did not act in bad faith; and, importantly, Norfolk did not seek Misener's agreement in the dredging contract that the prevailing party would recover its attorneys' fees. App. at 12a. Although Norfolk did not mention *Jensen*[3] in any of its appellate briefs, the court also cited the case to illustrate that the GPPA contravenes a characteristic feature of the general maritime law and interferes with its proper harmony and uniformity. *Id.* at 13a.

SUMMARY OF THE ARGUMENT

Petitioner asks this court to overturn *Jensen* and require federal district courts applying federal maritime law to recognize state fee-shifting statutes as an exception to the American Rule, which generally requires each party to pay its own attorneys' fees in maritime disputes. *Jensen* and its progeny, including *American Dredging,*[4] certainly support circuit courts'

[3] *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

[4] *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

unanimous refusal to apply state fee-shifting statutes in non marine insurance federal maritime cases. However, the uniform rule is grounded in the principles articulated in *Alyeska Pipeline,*[5] in which this Court recognized the historic origin of the American Rule, the need to apply the general rule uniformly in all cases under federal law, and that Congress, not the judiciary, must establish any further exceptions to it. Petitioner presents no justification, let alone a compelling one, to abandon or simply ignore *Alyeska Pipeline's* unwavering precedent, and its assurance that it does not intend to "subvert" the holding is hardly an adequate substitute.

The American Rule's general prohibition against a prevailing party's recovery of its attorneys' fees is deeply rooted in the nation's federal common law. It developed from legislation that limited the practice of permitting the recovery of fees under state statutes, which has historically produced unjust results that could not be reconciled with Congress' call for equity and predictability in the federal court system. Thus, by statute, Congress limited the recovery of fees in cases brought in federal courts, including, *expressly,* cases under maritime law.

Federal courts have long adhered to Congress' statutory limitation on fee awards, subject only to certain clearly-defined narrow exceptions. Importantly,

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[5] *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

the American Rule will not prevent a remedy where there is a contract providing for the indemnification of attorneys' fees. And admiralty law's strong tradition of enforcing parties' contractual agreements assures that contractual fee-shifting clauses will be enforced. Federal courts have consistently declared that these substantive principles are firmly established in federal maritime law, where the call for substantive uniformity is, perhaps, heard the loudest.

The district court and the court of appeals followed this Court's precedent that any further exceptions to the American Rule's prohibition on fee-shifting would have to be established by Congress, not by the judiciary, and certainly not by a state's legislators. The court remained loyal to uniform federal maritime precedent that, absent a contractual agreement, the risk and burden of attorneys' fees cannot be shifted to another party that was not compensated for shouldering the risk. And it followed the rule from courts in six other federal circuits which have earnestly rejected the very proposition Petitioner (implicitly) urges this Court to adopt – that when confronted with the clear conflict between a state fee-shifting statute and the clear and uniform rule pronounced in *Alyeska Pipeline*, courts should simply shrug at the federal precedent.

Petitioner makes much of the criticism over *Jensen*, calling for the Court to reverse that "ill-starred" decision. However, for whatever criticism *Jensen's* uniformity analysis brings, any further treatment of the preemption analysis would neither alter that

which this Court so boldly declared in *Alyeska Pipeline* – that further exceptions to the American Rule will not be judicially established – nor change the fact that recognition of substantive state fee-shifting statutes in federal maritime contract disputes would drastically undermine the predictable uniform results the American Rule has provided. As this Court held in *American Dredging*, a state court may not "attempt to make changes in the *substantive* maritime law." Nor may it rewrite parties' clearly defined maritime commercial agreements.

And the remedy Petitioner seeks by overturning ninety-three years worth of judicial precedent was in its command all along. If Petitioner wanted the right to be indemnified for its attorneys' fees, it could have included a fee-shifting clause in its maritime contract. Existing clearly-defined principles of federal maritime law would then have honored Petitioner's claim. But Petitioner chose not to agree that the prevailing party would recover its fees, perhaps because it knew the obligation would be reciprocal, presenting a risk Petitioner chose not to bear. So, instead, Petitioner seeks a monumental change in federal maritime law to permit its recovery of fees under a state statute, all with the hind-sight knowledge that it prevailed in the lawsuit. The court of appeals said it best: "The [state statute] will not serve as an escape clause for Norfolk when the legal framework for the shifting of attorneys' fees was clear prior to Norfolk's drafting of the contract."

Because current federal maritime law and existing Supreme Court precedent answers the precise question presented here, *i.e.*, whether there is an exception to the American Rule for state fee-shifting statutes, the debate over the appropriate framework of *Jensen* is better left for a dispute that arises in a more salient context – one in which the state law presents a rule that is not in direct conflict with unchallenged Supreme Court authority; and one in which the sought-after relief was beyond the parties' ability to obtain *via* contract.

This Court should deny Petitioner's Writ of Certiorari.

ARGUMENT

A. Petitioner seeks a judicially-crafted exception to the American rule – something this Court has repeatedly declined to do.

> *"[I]t is not for us to invade the legislature's province by redistributing litigation costs . . . "*

–Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 271 (1975).

Petitioner asks this Court to create an exception to the American Rule that would recognize state fee-shifting legislation in federal maritime contract disputes. In Petitioner's words, "[o]bviously, the question raised here is whether a state statutory grant of attorneys' fees would qualify as an exception to the American Rule." Petition at 28, n. 8. This Court has already answered Petitioner's question.

In *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974), this Court addressed whether a successful Miller Act plaintiff was entitled to collect its attorneys fees in a commercial contract dispute "where the 'public policy' of the State in which suit was brought allows for the award of fees in similar contexts." *Id.* at 126. This Court explained that federal courts have long adhered to a uniform rule that "avoids many of the pitfalls which have already manifested themselves in using state law referents." *Id.* at 127. The American Rule provides a uniform result, while not completely barring recovery in all situations, such as where a federal statute permits recovery, a party agrees to shift fees in a contract, or where a clearly defined exception applies. *See id.* at 129-30. Ultimately, this Court held that it would not recognize a new exception to the American Rule to permit fee-shifting in a common commercial dispute:

> In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do. The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut the application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merit of arguments for a further departure from the American Rule in Miller Act commercial

> litigation, those arguments are properly addressed to Congress.

Id. at 130-31. *See also Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-18 (1967) (recognizing that "[t]he rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor").

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), this Court again declined to recognize a further exception to the American Rule and held that the issue was for Congress to decide, not the judiciary. At issue was Wilderness Society's request for attorneys' fees in a lawsuit aimed at preventing the Secretary of the Interior from issuing permits for the trans-Alaska oil pipeline. The court of appeals awarded attorneys' fees as a purported exception to the American Rule for performing the services of a private attorney general. This Court reversed, offering a compelling analysis of the history of the country's fee-shifting rules.

Because common law did not permit the recovery of attorneys' fees, "[d]uring the first years of the federal-court system, Congress provided through legislation that the federal courts were to follow the practice with respect to awarding attorneys' fees of the courts of the States in which the federal courts were located, with the exception of district courts under admiralty and maritime jurisdiction, which were to follow a specific fee schedule." *Id.* at 248-49.

However, where there was no statutory authority for the award, federal courts would not judicially create one. *See id.* at 249. Federal legislation authorizing fees under the states' practice expired by 1800; however, "[t]he practice after 1799 and until 1853 continued as before, that is, with the federal courts referring to the state rules governing awards of counsel fees, although the express legislative authorization for that practice had expired." *Id.* at 250.

As this trend continued, Congress became concerned "that there was great diversity in practice among the courts and that losing litigants were being unfairly saddled with exorbitant fees for the victor's attorneys." *Id.* at 251. Congress thus enacted a "far-reaching [a]ct" intended to limit the recovery of attorney's fees charged to a losing party. *See id.* at 251-52. Senator Bradbury explained the purpose of the 1853 Act:

> The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed. . . .
>
> It is to correct the evils and remedy the defects of the present system, that the bill has been prepared and passed by the House

> of Representatives. It attempts to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed. . . .

Id. at 251, n. 24 (citations omitted). Thus, through the 1853 Act, "Congress undertook to standardize the costs allowable in federal litigation." *Id.* at 251. The Act included specific provisions for cases in admiralty and maritime jurisdiction. *See id.* at 253, n. 25.

This Court has enforced the federal legislation limiting attorneys' fees. It struck down unreasonable awards of attorney's fees that were inconsistent with the express statutory provisions. *See id.* at 253-54 (citations omitted). *See also id.* at 257 ("this Court understandably declared in 1967 that with the exception of the small amounts allowed by §1923, the rule 'has long been that attorney's fees are not ordinarily recoverable . . . '") (citing *Fleischmann Distilling Corp.*, 386 U.S. at 717; *F.D. Rich Co.,* 417 U.S. at 128; *Hall v. Cole,* 412 U.S. 1 (1973)).

Although the judiciary had recognized certain limited and clearly-defined exceptions to the general prohibition of fee-shifting, Congress never "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.* at 260. Instead, " . . . the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. §1923." *Id.* at 269.

Against this background, this Court declined Wilderness Society's invitation to recognize a new exception to the American Rule. Instead, this Court admonished that "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.* This rule "is deeply rooted in our history and in Congressional policy." *Id.* at 271. To hold otherwise "would make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 269.

This Court has consistently adhered to *Alyeska Pipeline's* prohibition of judicially-created exceptions to the American Rule. In *Summit Valley Industries, Inc. v. Local 112,* 456 U.S. 717 (1982), for example, this Court unanimously held that "[i]n the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years." *Id.* at 721 (citing *Alyeska Pipeline,* 421 U.S. at 249-50; *Arcambel v. Wiseman*, 3 Dall. 306, 1 L.Ed. 613 (1796)). *See also Chambers v. Nasco Inc.,* 501 U.S. 32, 59 (1991) (where Justice Scalia noted in his dissenting opinion that the American Rule, " . . . 'deeply rooted in our history and in congressional policy' . . . , prevents a court (without statutory authorization) from engaging in what might be termed substantive fee

shifting, that is, fee shifting as part of the merits award.").

Petitioner fails to explain how the judicial recognition of state fee-shifting statutes in federal maritime cases as an exception to the American Rule can co-exist with federal legislation that limits fees in maritime cases. *See Wilburn Boat Co. v. Firemen's Ins. Co.*, 348 U.S. 310, 314 (1955) ("And States can no more override such judicial rules validly fashioned than they can override Acts of Congress . . . "). Moreover, although Petitioner admits the issue here is whether the GPPA "would qualify as an exception to the American Rule," Petitioner devotes surprisingly little attention to this Court's fee-shifting precedent. Petitioner does not even introduce *Alyeska Pipeline* in its Petition until page 28, where Petitioner assures that it "does not intend to subvert this Court's teachings in *Alyeska Pipeline* . . . and *Fleischmann Distilling* . . . " Petition at 28, n. 8. Petitioner suggests that *Alyeska Pipeline* does not preclude the recognition of state fee-shifting statutes because the opinion states that fees may be awarded where they are authorized by "statute." Petitioner apparently believes this Court's reference to "statute" is broad enough to contemplate a *state* statute. It is not.

Alyeska Pipeline held that fees may be awarded pursuant to federal legislation; that is why the Court deferred the issue of whether there should be further exceptions to the American Rule to Congress, not to

state legislators. *See Alyeska Pipeline,* 421 U.S. at 260-61 ("What *Congress* has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.") (emphasis added). Nothing in *Alyeska Pipeline* or any other Supreme Court case suggests state legislation is an exception to the American Rule. *See Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air,* 478 U.S. 546, 561-62 (1986) ("There are exceptions to [the American Rule], the major one being *congressional authorization* for the courts to require one party to award attorney's fees to the other.") (emphasis added); *see also Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the *legislature*, not the courts") (emphasis added); and *Chambers*, 501 U.S. at 63 (wherein Justices Kennedy, Rehnquist and Souter observed in a dissenting opinion that "[t]he American Rule recognizes that the *Legislature*, not the Judiciary, possesses constitutional responsibility for defining sanctions and fees . . . ") (emphasis added). That *Alyeska Pipeline* contemplated federal legislation, not state legislation, cannot be seriously questioned.

Thus, Petitioner's quest for recognition of a state fee-shifting statute as a new exception to the American Rule (or as an extension of an existing exception) never really takes flight. *Alyeska Pipeline* and the

other cases discussed above, of which Petitioner does not seek review, defeat Petitioner's argument.

B. *Jensen* has caused no "indiscernible" federal court results in this area.

Petitioner's call to overturn *Jensen* is based on an oddly misplaced rationale. Petitioner focuses almost entirely on Supreme Court dissenting opinions that have noted potentially inconsistent applications of the preemption analysis in certain contexts – though never in the context of state attorneys' fee statutes. According to Petitioner, the Eleventh Circuit's analysis exemplifies that *Jensen* is nothing more than a "patchwork doctrine which embraces abstract standards and indiscernible distinctions, apparently impervious to precise delineation."[6] Petition at p. 22 (quotations omitted). Petitioner's argument is belied by the fact that every circuit court that has addressed whether the American Rule must bend to state

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[6] Petitioner assures there are "other, less constitutionally-invasive, means available to ensure the coherence of maritime law . . . " Petition at 27. However, Petitioner explains neither what those less invasive means are, nor the manner in which any new standard would render the Eleventh Circuit's opinion susceptible to attack. Petitioner gave special emphasis to Justice Stevens' concurring opinion in *American Dredging* that "we should focus on whether the state provision in question conflicts with some particular substantive rule of federal statutory or common law . . . " *Id.* at 21. If this is the standard Petitioner suggests, the American Rule easily qualifies.

fee-shifting statutes in non marine insurance federal maritime cases has rejected the proposition. Petitioner's claims that "lower courts are split on whether such [fee-shifting] statutes are impliedly preempted under *Jensen*," *id.* at 29, and that "there is a division in precedents on whether state attorneys' fee statutes are impliedly preempted under *Jensen*," *id.* at 35, are not accurate.

The U.S. Constitution, Article III provides that federal judicial power "shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const., Art. III, § 2, cl. 1. *See also* 28 U.S.C. § 1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."). As this Court recognized in *American Dredging*, "[i]n exercising *in personam* jurisdiction, however, a state court may adopt such remedies, and . . . attach to them such incidents, as it sees fit so long as it does not attempt to make changes in the *substantive* maritime law." *American Dredging v. Miller*, 510 U.S. 443, 447 (1994) (emphasis added). Substantive maritime law, as the cases below illustrate, rejects state fee-shifting statutes and requires parties to pay their own fees unless an exception to the American Rule applies.

Over forty-eight years ago, the First Court of Appeals recognized that state fee-shifting statutes do not apply in federal maritime litigation. In *American Union Transport Co. v. Aguadilla Terminal, Inc.,* 302

F.2d 394 (1st Cir. 1962), the court reversed a fee award under a state fee-shifting statute because "the present suit is in admiralty, and in admiralty there is no specific authority in the statutes, Title 28 U.S.C. §§ 1923, 1925, or the Admiralty Rules for awarding counsel fees. Lacking such authority, counsel fees are neither allowable nor taxable as costs . . . The award of counsel fees must be stricken from the District Court's decree." *Id.* at 396 (citing *The Baltimore*, 8 Wall 377, 388, 19 L.Ed. 463 *et seq.* (1869); *Daniel F. Young, Inc. v. United States*, 55 F.Supp. 24, 25 (D.C. N.Y. 1944)). *See also Stephenson v. Star-Kist Caribe, Inc.*, 598 F.2d 676, 681-82 (1st Cir. 1979). Thus, in *Templeman v. Chris Craft Corp.*, 770 F.2d 245 (1st Cir. 1985), *cert. denied*, 474 U.S. 1021, 106 S.Ct. 571, 88 L.Ed.2d 556 (1985), the court held that "[p]laintiffs have no legal basis for invoking Rule 14.4(d) of the Puerto Rico Rules of Civil Procedure." *Id.* Rather, "[u]nder admiralty law, a court has inherent power 'to assess attorneys' fees when a party has "acted in bad faith, vexatious, wantonly, or for oppressive reasons"'." *Id.* (citations omitted). More recently, in *Southworth Mach. Co. v. F/V Corey Pride*, 994 F.2d 37 (1st Cir. 1993), the court held that the maritime contract at issue was "a standard contractual breach to which maritime law has always applied." *Id.* at 42. Thus, "[t]he conduct found to violate [the local statute] falls squarely within the focus of existing maritime law, and [the local statute's] attorney's fee provisions, being inconsistent with maritime law, cannot be applied in this case." *Id.*

The Second Circuit applies the same uniform rule. In *American Nat'l Fire Ins. Co. v. J. Kenealy,* 72 F.3d 264 (2d Cir. 1995), the court followed its earlier holding that "'. . . the award of fees and expenses in admiralty actions is discretionary with the district judge upon a finding of bad faith.'" *Id.* at 270 (quoting *Ingersoll Milling Mach. v. M/V Bodena,* 829 F.2d 293, 309 (2nd Cir. 1987)). The court explained that *Ingersoll* "stated the federal prohibition against attorneys' fees and admiralty suits in the broadest of terms. It did not temper its holding by suggesting that a different rule would apply if the insurance company brought the action. We believe that our holding in *Ingersoll* suffices to 'establish' a federal admiralty rule, which now must be followed instead of state law." *Id.* at 270. In *Norwalk Cove Marina, Inc. v. S/V Odysseus*, 64 Fed. Appx. 319 (2nd Cir. 2003), the Second Circuit affirmed the district court's holding that "[t]here is a strong interest in maintaining uniformity in maritime law." *Norwalk Cove Marina, Inc. v. S/V Odysseus*, 90 F.Supp.2d 190, 192 (D. Conn. 2000). The district court reasoned:

> Where a conflict arises between a state statute and judicially established admiralty law, the state law must yield to admiralty as if the admiralty law had been codified by an Act of Congress . . . Admiralty law applies the "American Rule" as to attorneys' fees. Therefore, the Court has discretion to award attorneys' fees upon a showing that opposing counsel has commenced or conducted an action in bad faith, vexatiously, wantonly, or

> for oppressive reasons . . . Accordingly, [the state statute] allows for the award of attorneys fees . . . without meeting the standards established for such awards in admiralty law. Since [the state statute] conflicts with admiralty law, the [state] claim will be dismissed.

Id. at 192-93.

The Third Circuit reached the same conclusion in *Sosebee v. Rath*, 893 F.2d 54 (3rd Cir. 1990), where the court held that federal maritime law preempted a local state fee-shifting statute because the statute was in direct conflict with the American Rule. *See id.* at 56 ("a general award of attorneys' fees pursuant to a state statute which does not require a finding of bad faith directly conflicts with federal admiralty law") (citing *F. Ocean Barge Transp. v. Hess Oil Virgin Islands Corp.*, 598 F.Supp. 45, 47 (D.V.I. 1984) (Virgin Islands' statute allowing attorney's fees should not be applied in admiralty action), *aff'd without opinion,* 760 F.2d 259 (3rd Cir. 1985), and *Templeman*, 770 F.2d at 250). The court explained that its holding was grounded in the "strong interest in maintaining uniformity in maritime law." *Id.* at 56-57.

The Fifth Circuit also adheres to the principle that uniform maritime law prohibits state fee-shifting statutes. In *Texas A&M Research Found. v. Magna Transp. Inc.*, 338 F.3d 394 (5th Cir. 2003), the court held that "[m]aritime disputes generally are governed

by the 'American Rule,' pursuant to which each party bears its own costs."[7] *Id.* at 405 (citing *Galveston County Nav. Dist. v. Hopson Towing Co.*, 92 F.3d 353, 356 (5th Cir. 1996)). Therefore, "absent statute or enforceable contract, litigants must pay their own attorneys' fees." *Id.* More recently, in *OneBeacon Am. Ins. Co. v. Turner*, No. 06-20302, 204 Fed. Appx. 383 (5th Cir. 2006), the court held that "this general rule, coupled with the need for uniformity in federal maritime law, precludes the application even of mandatory state attorney's fee statutes. Absent a federal statute or an enforceable contract, litigants must pay their own attorney's fees."[8] *Id.* at 385 (quotations omitted).

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[7] Petitioner argues that *United States ex rel. Garrett v. Midwest Constr. Co.*, 619 F.2d 349 (5th Cir. 1980) "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." Petition at 32. However, as the court of appeals observed, the issue of whether maritime law preempted the state statute was never addressed. Moreover, even if it could be construed as a case supporting Petitioner's argument, the Fifth Circuit has overruled it in its subsequent cases, such as *Texas A&M Research Found.*

[8] District courts in the Fifth Circuit consistently apply the American Rule over state fee-shifting statutes. Most recently, in *Jambon & Assoc. LLC v. Seamar Divers Inc.*, No. 09-2670, 2009 WL 2175980 (E.D. La. 2009), the district court rejected the application of a state fee-shifting statute, and held that "it is undisputed that the general rule in maritime contract claims precludes recovery of attorney's fees unless there is a controlling statute or contractual provision that allows for such recovery." *Id.* at *8 (citing *Texas A&M Research Found.*, 338 F.3d at 405). The statute cannot apply, the court reasoned, because it "would present an obvious collision between the general maritime rule

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Convincingly, courts in the Fourth, Ninth and Eleventh Circuits apply the same uniform rule. In *Geftman v. Boat Owners Association of the United States*, Cause No. C/A 2:02-1461-18 2003 WL 23333312 (D. S.C. 2003), the district court relied on *Norwalk Cove Marina*, cited *supra*, and held: "Attorney's fees are awarded under admiralty law solely under a rare exception to the 'American Rule.' Fees are not allowed unless there has been a showing that opposing counsel has commended or conducted an action in bad faith . . . [the state statute] is inconsistent with that provided under the federal admiralty law and, as such, plaintiff's [claim for fees] is preempted." *Id.* at *4-5. Similarly, in *Shinichi Jonathan Sakanaka Louis v. Atlantis Submarines, Inc.,* 1999 A.M.C. 1204 (D. Hawaii 1999), the court held that a Hawaii fee-shifting statute was not applicable in a maritime dispute. "Atlantis' claim for attorneys' fees arises out of a state statutory provision that awards fees to the prevailing party in breach of contract actions. The breach of contract claim asserted in this case is for maintenance payments. Thus, the subject of the claim is one integrally and historically relegated to maritime law and jurisdiction." *Id.* In *Tampa Port Authority v. M/V Duchess, et al.*, 2000 A.M.C. 114 (M.D. Fla. 1997), the district court held that "[t]he general rule is that the prevailing party's attorney fees are

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precluding recovery of attorney's fees on a maritime contract claim and the Louisiana state law allowing for recovery of fees under an open account claim." *Id.*

not recoverable in admiralty cases." *Id.* (citing *Noritake Co., Inc. v. M/V Hellenic Champion,* 627 F.2d 724, 730 (5th Cir. 1980)). Thus, "regardless of whether there is an issue of local concern state law cannot displace conflicting federal law." *Id. See also Garan Inc. v. M/V Aivik,* 1995 A.M.C. 2657, 2661 (S.D. Fla. 1995) (rejecting a state fee-shifting statute in a federal maritime case in favor of "a strong interest . . . in maintaining uniformity in maritime law.").

If *Jensen's* task was to further the uniformity of substantive federal maritime law, it must be credited as succeeding when it comes to the question of fee-shifting in ordinary maritime cases. Notably, Petitioner does not address the majority of these federal decisions. Instead, Petitioner focuses on cases arising in the marine insurance context and a state court opinion, *Hughes v. Foster Wheeler Co.*, 932 P.2d 784 (Alaska 1997), as exemplifying the supposed *Jensen*-driven "split" in authority. With respect to the former, the three cases Petitioner cites are based on the recognition that marine insurance matters have historically been addressed under state law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 321, 75 S.Ct. 368, 321 (1955). Petitioner does not argue dredging contracts affecting the nation's largest ports are matters of pure state concern. Petitioner's marine insurance cases are plainly distinguishable and have little value here.

With respect to the latter, *Hughes* has no far reaching implication and does not advance Petitioner's argument. In that case, the court affirmed an

award of attorneys' fees to the defendants who prevailed on a *forum non conveniens* motion. The court held that federal law is "inapplicable to a case resolved by a dismissal pursuant to the doctrine of *forum non conveniens*." *Id.* at 787. The court also held that, based on Alaskan precedent, once an action is brought in state court, federal law does not apply. *See id.* at 787. According to the Alaska state court, "admiralty law does not prohibit the award of attorney's fees and costs in admiralty cases decided in state courts under the savings to suitors jurisdiction". *Id.* The court held that it would not consider federal case law that prohibited the award of attorneys' fees based on the American Rule as applied in maritime cases because "the cited cases involve situations where federal admiralty law is litigated in federal court." *Id.* at 788. Notably, the court even acknowledged that its approach to the issue was unusual. The court observed that "[i]n general, *all federal courts (and all state courts with the exception of Alaska) follow the 'American rule,'* pursuant to which neither party is entitled to an award of attorney's fees." *Id.* (emphasis added). Petitioner labels *Hughes* as the most "cogent" authority on the issue. However, the court's rationale is inapplicable and in some instances simply dubious.

In sum, the federal maritime law in the area of state fee-shifting statutes in ordinary maritime disputes is uniform, no doubt attributed in part to the principles this Court articulated in *Alyeska Pipeline* and similar cases. Federal courts consistently reject

state fee-shifting legislation because it conflicts with federal substantive maritime law, which adheres to the American Rule. There is no "split" in authority in ordinary federal maritime contract disputes, as Petitioner argues. Thus, Petitioner's primary argument for overturning *Jensen* – that it has been criticized for producing inconsistent results – is simply misplaced in this context.

C. Petitioner's criticisms of the Eleventh Circuit's analysis fare no better.

Petitioner asks this Court to grant Certiorari because the court of appeals erroneously determined that maritime law governed the contract claim. According to Petitioner, maritime law does not apply because "the general contract for the construction was governed by Georgia law and [] Norfolk removed material outside the Savannah River's navigable channel." Petition at 23 (citing App. at 7a-10a). The Appendix citations do not support the proposition Petitioner advances. Regardless, the primary objective of the contract was dredging a navigable waterway in a port that services international and national commerce. The dredging work thus had a direct effect on maritime services and commerce. *See Norfolk Southern Ry. v. Kirby*, 543 U.S. 14, 23-25 (2004); *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 495-97 (2005); *Ellis v. United States*, 206 U.S. 246, 259 (1907). That other parties executed a separate construction contract for work that was unrelated to Petitioner's dredging work is of no consequence.

Petitioner's contract neither designated Georgia law nor included a fee-shifting statute. It was therefore governed by federal maritime law.

Petitioner also asserts the court of appeals erred because Petitioner's claims were asserted under "diversity jurisdiction." However, as explained above, Petitioner answered the complaint without challenging the district court's jurisdiction to hear the admiralty dispute. Petitioner never asserted diversity jurisdiction as a basis for jurisdiction. App. at 4a. Regardless, the court of appeals properly applied this Court's controlling precedent. *See Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 411, (1953) ("[S]ubstantial rights . . . are not to be determined differently whether [a] case is labeled 'law side' or 'admiralty side' on a district court's docket").[9]

Finally, Petitioner argues that the court of appeals misapplied *American Dredging*. However, *American Dredging* supports the court of appeals' determination that substantive maritime law preempts the GPPA. In that case, this Court addressed whether federal maritime law preempted a Louisiana statute that rendered *forum non conveniens* unavailable in certain maritime lawsuits filed in state court. This Court

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[9] Petitioner cites to Rule 9 of the Federal Rules of Civil Procedure as controlling the substantive law in cases in which there is diversity and in which maritime law applies. However, the comments to the rules discuss the designate in terms of affecting "procedural consequence," not substantive laws. *See* FED. R. CIV. P. 9 advisory committee's note (1966 amendment).

recognized that the case was different than other preemption cases because the state law was procedural. *See id.* at 447 (" . . . a state court may adopt such remedies, and attach to them such incidents, as it sees fit so long as it does not attempt to make changes in substantive maritime law") (quotations omitted). The fact that the Louisiana statute was procedural was important because, as this Court explained, "[u]niformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of admiralty seeks to achieve, since it is supposed to apply in all the courts of the world." *Id.* at 453. This Court held that "*forum non conveniens* does not bear upon the substantive right to recover, and is 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. Nor, given the discretionary nature of the procedural rule, is it correct to say that it can be "relied upon in making decisions about secondary conduct – in deciding, for example, where to sue or where one is subject to being sued." *Id.* at 455. Accordingly, federal maritime law did not preempt the state procedural rule.

In emphasizing that its holding was grounded in the fact that the rule at issue was procedural rather than substantive, the Court rejected the notion that federal courts would be bound by the state law: "It is because *forum non conveniens* is not a substantive right of the parties, but a procedural rule of the forum, that the dissent is wrong to say our decision

will cause federal-court *forum non conveniens* determinations in admiralty cases to be driven, henceforth, by state law." *Id.* at 454 n. 4. *American Dredging* does not support Petitioner's argument that federal courts in maritime disputes must give effect to *substantive* fee-shifting statutes that conflict with the American Rule.

Unlike the Louisiana procedural rule, the GPPA modifies *substantive* federal maritime fee-shifting laws. The 1853 Act, which effectively prohibited federal courts' practice of deferring to state fee-shifting statutes, included specific statutory regulations that governed fee-shifting in federal maritime cases. Additionally, the narrow judicially-recognized exceptions to the American Rule's general prohibition on fee-shifting include the bad faith exception which arose in the context of a maritime dispute involving maintenance and cure. *See Vaughan v. Atkinson*, 369 U.S. 527 (1962). It is no wonder that, in maritime disputes, federal courts consistently recognize that claims for attorneys' fees are governed by the American Rule and must, therefore, be analyzed under the standards set forth in the federal cases discussed in the previous section.[10]

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[10] Unlike procedural *forum non conveniens* rules, federal courts consistently hold that the American Rule is the *substantive* maritime law that applies in federal maritime disputes. *See, e.g., Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982) ("a court has inherent power in an admiralty suit to assess attorneys' fees when a party has

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Further, given that the GPPA seeks to substantially shift the parties' substantive risks, the law affects both primary and secondary conduct as described in *American Dredging*.[11] State fee-shifting

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'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"); *American National Fire Ins. Co. v. Kenealy*, 72 F.3d 264, 270 (2nd Cir. 1995) ("*Ingersoll* . . . stated the federal prohibition against attorneys' fees in admiralty suits in the broadest of terms . . . [w]e believe that our holding in *Ingersoll* suffices to 'establish' a federal admiralty rule, which now must be followed instead of state law."); *Kopacz v. Delaware River and Bay Authority*, 248 Fed. Appx. 319, 322 (3rd Cir. 2007) (in maritime disputes, the "[a]ttorneys' fees and costs 'cannot be recovered unless plaintiff can first establish defendant's bad faith or recalcitrance.'"); *Geftman v. Boat Owners Association of the United States*, Cause No. C/A 2:02-1461-18 2003 WL 23333312 (D. S.C. 2003) ("[a]ttorney's fees are awarded under admiralty law solely under a rare exception to the 'American Rule.'"); *Delta Steamship Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995, 1011 (5th Cir. 1984) ("[t]he general rule in admiralty is that attorneys' fees are not recoverable by the prevailing party"); *Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 74 (8th Cir. 1988) (in a federal maritime dispute, "the traditional American rule provides that the prevailing party in federal litigation is generally not entitled to attorney's fees."); *APL Co. Pte. Ltd. v. UK Aerosols Ltd.*, 582 F.3d 947, 957 (9th Cir. 2009) ("'[a]bsent some statutory authorization, the prevailing party in an admiralty case is generally not entitled to an award for attorneys' fees.'"); *Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1193 (11th Cir. 2001) ("[t]he prevailing party in an admiralty case is not entitled to recover its attorneys' fees as a matter of course").

[11] Petitioner's claim that the Court was only concerned with primary conduct is not found anywhere in the opinion, and it is

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statutes like the GPPA certainly affect primary conduct. If, for example, state fee-shifting statutes were given affect, parties who never agreed or intended to shift the risk of attorneys' fees would have to include further expenses to draft contracts to avoid such state statutory provisions or to include law selection clauses that designates a state that has not attempted to statutorily modify the American Rule. The statutes also affect secondary conduct. If parties were unable to contract around state fee-shifting statutes, they would seek out jurisdictions that do not compel a result that is contrary to their intended bargained-for agreement. Thus, under the Court's *American Dredging* analysis, fee-shifting statutes affect primary and secondary conduct and would plainly cause significant discord in an area that has been uniform.

Petitioner's critique of the Eleventh Circuit's opinion fails to identify a misapplication of the federal law or a result that is in conflict with controlling authority. Instead, as is evident from the cases discussed above, the Eleventh Circuit's opinion is consistent with the opinions of other circuits that have addressed the applicability of fee-shifting statutes in ordinary maritime contract disputes. Moreover, the Eleventh Circuit's opinion is consistent with

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doubtful the Court intended its analysis of secondary conduct to be superfluous.

American Dredging, which addressed state procedural rules rather than substantive laws.

D. Federal courts should not permit state legislators to rewrite maritime contracts.

Petitioner seeks to overturn a ninety-three year-old decision in order to accomplish that which federal maritime law enables it to accomplish on its own. The American Rule does not prohibit parties from shifting the risk of attorneys' fees in their contracts. *See F.D. Rich Co., Inc.*, 417 U.S. at 127. Thus, fee-shifting clauses are regularly enforced as a matter of contract in federal maritime cases. *See Natco Ltd. P'ship v. Moran Towing of Fla., Inc.*, 267 F.3d 1190, 1196 (11th Cir. 2001) (attorneys' fees were properly awarded in a maritime case where a specific contractual provision was interpreted to provide the recovery of attorneys' fees); *Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1250 (11th Cir. 2000) ("A party is not entitled to attorney's fees in an admiralty case unless fees are statutorily or contractually authorized.").

Petitioner chose not to include a fee-shifting provision in its dredging contract, and the parties never agreed to bear the risk of indemnifying a prevailing party for its fees. Perhaps Petitioner realized that any fee-shifting clause would have to be reciprocal and did not want to bear the risk of paying for Respondent's fees in the event of adverse

litigation. As the court of appeals held, "Norfolk was a sophisticated party who was, or should have been, well aware of the law of our Circuit concerning attorneys' fees in maritime cases." App. at 12a. The parties, in effect, contractually waived any right to recover fees from the other party.

Although Petitioner never agreed to a fee-shifting clause, and certainly never compensated Respondent for shouldering the additional risk, Petitioner seeks to impose state legislation that would re-write the party's substantive maritime agreement. However, in *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961), this Court held that "were contracts of the kind alleged in this complaint known to be a normal phenomenon in maritime affairs, we think that there would be little room for argument in favor of allowing local law to control their validity." In *Norfolk Southern Ry. v. Kirby*, 543 U.S. 14 (2004), a unanimous Court called for a "uniform meaning of maritime contracts" and reiterated that "[i]t certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *Id.* at 28. Respondent, a Florida company, entered into a maritime dredging contract with Petitioner, a Virginia company, knowing the prevailing uniform maritime law only permits recovery of fees where they are allowed

by federal legislation, a contract, or one of the narrow exceptions to the American Rule. Substantive federal maritime law requires the parties' agreement to be enforced as written by them.

The court of appeals was correct that "[t]he [state statute] will not serve as an escape clause for Norfolk when the legal framework for the shifting of attorneys' fees was clear prior to Norfolk's drafting of the contract." To hold otherwise would not only significantly disrupt maritime parties' rights to have their agreements enforced in a manner that is consistent with the bargained-for consideration, it would also upset the uniform and predictable results the American Rule has provided in ordinary maritime contract disputes.

CONCLUSION

This Court has held that it will not "judicially obviate the American Rule" or recognize any further exceptions to it. The relief Petitioner seeks is irreconcilable with this Court's unchallenged precedent. Further, if *Jensen* is prone to causing inconsistent results, it is in contexts other than fee-shifting legislation, as the circuits that have addressed the issue have adhered to a uniform and predictable rule. Thus, the debate over the appropriate framework of *Jensen* is better left for a dispute that arises in a context that better illustrates the supposed "patchwork" Petitioner asks the Court to correct. And it is

unnecessary to overturn ninety-three years worth of judicial precedent to provide Petitioner with a remedy that it was capable of obtaining all along. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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