No. 20-382

In the Supreme Court of the United States

GOVERNMENT OF GUAM,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

LEEVIN T. CAMACHO
Attorney General
JAMES L. CANTO II
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
590 S. Marine Corps Drive
Suite 901
Tamuning, Guam 96913

JOHN D.S. GILMOUR
WILLIAM J. JACKSON
FABIO C. DWORSCHAK
KELLEY DRYE & WARREN LLP
515 Post Oak Boulevard
Suite 900
Houston, TX 77027

GREGORY G. GARRE
Counsel of Record
ROMAN MARTINEZ
BLAKE E. STAFFORD
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

BEZALEL STERN
KELLEY DRYE & WARREN LLP
3050 K Street, NW
Suite 400
Washington, DC 20007

Counsel for Petitioner

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INTRODUCTION

The United States' response confirms that certiorari is warranted. The United States does not deny that the CERCLA provisions at issue here are critical to the operation of the Superfund program. It does not deny that this Court routinely intervenes when the circuits have split on the meaning of key CERCLA provisions. It admits that the circuits *are* split on the first question presented. BIO 10. And it acknowledges that the result reached by the D.C. Circuit below is "'harsh'" (*id.* at 22) for Guam, which is now left on the hook for a cleanup bill that would amount to a *trillion dollar* outlay for the Federal Government, even though the United States itself built the dumpsite at issue and used it for decades to dump toxic waste generated by the Navy. Pet. 24. That is reason enough to grant certiorari.

But there is more. As the United States itself repeatedly stressed in pursuing an interlocutory appeal in this case, the circuits are also split on the second question presented. Pet. 12, 17-18; *see, e.g.*, Add. 8a-9a (identifying the "circuit split" produced by "conflicting statutory interpretations" on the second question); *id.* at 16a (emphasizing "sharp split of legal authority" on second question); *id.* at 26a-31a (detailing "circuit split" on second question).[1] Remarkably, the United States now attempts to deny that circuit conflict. BIO 10, 18-21. But the same cases the United States relied on below to *advance* the conflict now refute its effort to deny it.

Certiorari is warranted to resolve these circuit conflicts. The United States does not deny that the

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[1] Excerpts from the relevant briefs are appended hereto.

issues are cleanly presented. The parties have clearly joined battle on the merits. And the importance of this case—both for the administration of CERCLA and for Guam—underscore the need for review.

ARGUMENT

A. The Circuits Are Split On Both Questions

1. The United States concedes (at 10) that "the first question presented is the subject of a circuit conflict." The D.C. Circuit—after expressly acknowledging the "'split,'" Pet. App. 16a—joined the Third, Seventh, and Ninth Circuits in holding that a non-CERCLA settlement can trigger CERCLA Section 113(f)(3)(B), while the Second Circuit has repeatedly held to the contrary. Pet. 14-17.

The United States calls the conflict "lopsided." BIO 14. But the interest in maintaining uniformity of federal laws does not depend on the *extent* of the conflict, and this Court thus routinely grants certiorari to resolve "lopsided" splits.[2] The United States itself asked this Court to resolve a 3-1 split implicating the same CERCLA provisions at issue here in *United States v. Atlantic Research Corp.*, 551 U.S. 128, 133-34 (2007). Particularly given "CERCLA's 'policy favoring national uniformity,'" resolving "inter-circuit conflicts" over the meaning of its core provisions "is of paramount importance." *United States v. Burlington N. & Santa Fe Ry. Co.*,

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[2] *See, e.g.*, *Barton v. Barr*, 140 S. Ct. 1442, 1447-48 (2020) (4-1 split); *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 775 & n.3 (2020) (6-1 split); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 & n.4 (2018) (6-1 split); *Lagos v. United States*, 138 S. Ct. 1684, 1687 (2018) (5-1 split); *Honeycutt v. United States*, 137 S. Ct. 1626, 1631 & n.1 (2017) (5-1 split).

520 F.3d 918, 952 (9th Cir. 2008) (Bea, J., dissenting) (citation omitted), *rev'd*, 556 U.S. 599 (2009).

The United States also suggests that the Second Circuit has "signaled its willingness to reconsider" its position. BIO 14-15 (citing *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 126 n.15 (2d Cir. 2010)). Hardly. The footnote in *Niagara Mohawk* merely acknowledges—in dicta, as the footnote itself recognizes—an argument in a footnote in an amicus brief addressed to a different question. 596 F.3d at 126 n.15 (quoting Gov't Amicus Br. 15 n.4, *Niagara Mohawk*, 596 F.3d 112 (No. 08-3843), 2008 WL 10610074). Moreover, the court said nothing about its "willingness" to do anything. For a circuit notoriously reluctant to convene en banc, *see United States v. Taylor*, 752 F.3d 254, 255-57 & n.1 (2d Cir. 2014) (Cabranes, J., dissenting), the dicta of a single three-judge panel—one of whom was a district court judge sitting by designation—hardly shows *the circuit's* "willingness" to revisit a longstanding position it has repeatedly affirmed in precedential decisions. BIO 15; *see* Pet. 15-16.

The important point is that the United States concedes (at 10, 14) that the actual *law* of the Second Circuit "conflict[s]" with the law in other circuits. That admitted conflict warrants review.

2. The circuits are also split on the second question presented: Whether a settlement "resolve[s] . . . liability" under Section 113(f)(3)(B) if it explicitly disclaims any liability determination and leaves the settling party exposed to future liability. Pet. 17-20. The United States' remarkable attempt (at 18-22) to deny that conflict before this Court fails.

a. In pursuing an interlocutory appeal in this case, the United States explicitly and repeatedly recognized the "circuit split" produced by "the conflicting statutory interpretations and different outcomes in both circuit and district courts" on the second question presented. Add. 8a-9a; *see id.* at 15a-16a (recognizing "clear differences of opinion in the courts of appeal" and "sharp split of legal authority"); *id.* at 22a, 26a-31a (recognizing "[t]he existence of a circuit split" on the "controlling" question of "what it means to 'resolve . . . liability' for 'some or all of a response action' under Section 113(f)(3)(B)"). The United States made these representations even after "coordinat[ing] its legal position" with the Solicitor General's Office, *id.* at 17a-18a, including in a D.C. Circuit brief filed by three of the attorneys who signed the BIO here. *Id.* at 34a; *see id.* at 22a, 26a-31a.

The closest the United States comes to acknowledging its stunning about-face is its passing claim (at 21-22) that it merely noted circuit "tension" in seeking an interlocutory appeal, but then changed course in its D.C. Circuit "merits briefing." That in itself would be a classic bait-and-switch. Yet, even that is false. As quoted above, the United States consistently represented that there was a direct "circuit split," not simply "tension." And the very first page of its merits brief acknowledged that circuit conflict, urging the D.C. Circuit to follow "the Ninth Circuit's construction of Section 113(f)(3)(B)," rather than the contrary constructions adopted by "the Sixth and Seventh Circuits." Gov't C.A. Br. 1.

The Court should reject the United States' disingenuous attempt to disavow the very circuit conflict it advanced below.

b. In any event, the circuit conflict is real. The Sixth and Seventh Circuits have both "draw[n] a bright line" for settlements with liability disclaimers and conditional liability releases: They foreclose the application of Section 113(f)(3)(B). *Florida Power Corp. v. FirstEnergy Corp.*, 810 F.3d 996, 1008 (6th Cir. 2015); *see Refined Metals Corp. v. NL Indus. Inc.*, 937 F.3d 928, 931 (7th Cir. 2019) (these "two factors" together are "dispositive" under *Bernstein v. Bankert*, 733 F.3d 190, 212-13 (7th Cir. 2012)). The Ninth Circuit specifically "disagree[d] with the Sixth and Seventh Circuits' holdings in *Florida Power* and *Bernstein*" regarding the "meaning of the phrase 'resolved its liability.'" *Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1123-25 (9th Cir. 2017). And the D.C. Circuit below likewise rejected the Sixth and Seventh Circuits' position and chose, instead, to align with the Ninth Circuit. Pet. App. 23a-24a (citing *Asarco*, 866 F.3d at 1123-24). The district court below explained this "clear" "split" in detail. Pet. App. 38a-39a; *see id.* at 73a-85a.

The United States' late-breaking attempt (at 19-20) to reconcile these decisions now is unavailing. Relying on the *dissent* in *Florida Power*, the United States says that "[t]he Sixth Circuit has sometimes held that a settlor had 'resolved [its] liability' within the meaning of Section 113(f)(3)(B) even though the settlement contained provisions similar to those" in the 2004 CWA consent decree. BIO 20 (alteration in original) (quoting *Florida Power*, 810 F.3d at 1017-18 (Suhrheinrich, J., dissenting)). But the majority in *Florida Power* vigorously disagreed, reiterating that court's "bright line" regarding such provisions. 810 F.3d at 1006-09. That is the law in the Sixth Circuit.

Likewise, the United States claims that the Seventh Circuit "held" in *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 692 (7th Cir. 2014), that a settlement can trigger Section 113(f)(3)(B) "even if the covenant not to sue is conditioned on satisfactory performance." BIO 20. That is wrong, as the Seventh Circuit itself has stressed: "In *NCR*, the *only* factor that the court explicitly discussed as a reason for distinguishing the settlement from the one in *Bernstein* was the *immediately effective (as opposed to conditional nature)* of the covenant not to sue." *Refined Metals*, 937 F.3d at 931 (second emphasis added) (citing *NCR*, 768 F.3d at 692). There is "no doubt that [in *NCR*] the *immediately effective* covenant not to sue was the dispositive point." *Id.* (emphasis added). So too here—the *conditional* covenant would have been dispositive had this case been in the Seventh Circuit.

Finally, the United States tries (at 18-19) to reframe the issue as one of *contract* interpretation. But as the United States itself explained below, this is a "question of statutory construction, namely how to properly interpret CERCLA § [113](f)(3)(B)." Add. 4a. Indeed, the "sole question" here is "whether the 2004 consent decree 'resolve[d]' Guam's 'liability . . . for some or all of a response action' *within the meaning of Section 113*"—the answer to which turns on "*statutory* text and purpose." Gov't C.A. Br. 18, 23 (alterations in original) (emphasis added).

Accordingly, the cases in the conflict reach different results not because of different settlement provisions, but because of different *statutory* interpretations applied to indistinguishable settlement provisions. And despite vaguely suggesting that the cases in the split involved

"different decrees" with different provisions, BIO 18-19, the United States does not identify any material differences. There are none. As the district court detailed, the provisions at issue here are materially identical to those in the cases from "[t]he Sixth, Seventh, and Ninth Circuits" that form the circuit split. Pet. App. 73a; *see id.* at 94a ("This Court has dutifully compared the clauses in each of th[e] cases" and found no "distinction [that] matters").

The D.C. Circuit's decision turned on whether a settlement containing such provisions "resolve[s] . . . liability" "within the meaning of section 113(f)(3)(B)." *Id.* at 24a. That is a question of statutory interpretation—one on which the circuits are split.

B. The Questions Presented Are Exceptionally Important

The United States does not dispute the importance of the questions presented to the Superfund program. Pet. 21-22. It does not dispute that this Court has repeatedly granted certiorari to resolve confusion over the meaning and scope of Section 113 and related provisions. *Id.* at 22. And it does not contest the grave importance of this case for the people of Guam. *Id.* at 24-25. All this strongly supports review.

The United States does try to minimize its own decades-long role in contaminating the site by suggesting (at 4) that it ended in 1950; but, in fact, the United States continued to dump waste for decades thereafter. Pet. 7. And while the United States argues (at 23) that Guam is at fault too, it misses the point: even assuming Guam shares some responsibility, the decision below saddles Guam—alone—with a staggering $160 million bill for the cleanup of a dump built and exploited by the United

States for decades. That sum exceeds the *combined* yearly budget for Guam's Department of Public Health and Social Services, Police Department, Fire Department, Department of Public Works, Solid Waste Authority, and Environmental Protection Agency. The staggering consequences of this case for Guam strongly support certiorari. Pet. 24-25.

Significantly, the United States also never disputes that this case provides a clean vehicle for resolving the questions presented. *Id.* at 25. Nor could it, given that the United States recognized that these were "controlling legal questions" in pursuing an interlocutory appeal. Add. 26a. Both questions were pressed and passed on below. This is an ideal vehicle to decide these important issues.

C. The Decision Below Is Wrong

The United States' arguments on the merits are premature at this stage, but in any event only underscore the need for this Court's review.

1. On the first question, the United States claims that Section 113(f)(3)(B) encompasses any settlement that "requires a settling party to incur the costs of a CERCLA 'response action,'" which the United States defines as "any action to 'remove' or 'remedy' releases of substances." BIO 10-11 (citation omitted). But this paraphrasing rewrites the statute. Section 113(f)(3)(B) actually says that the settlor must have "*resolved its liability*" for—not merely "incur the costs of"—a CERCLA response action. 42 U.S.C. § 9613(f)(3)(B) (emphasis added). And CERCLA defines "response" to mean an action to "remove" or "remedy" releases of "*hazardous* substances." *Id.* § 9601(23)-(25) (emphasis added). The United States

omits "hazardous," but that is an important limitation on what qualifies as a response action.

Here, whatever costs Guam incurred, EPA repeatedly assured Guam that it was *not* compelling a CERCLA response action. Pet. 8-10. And because the CWA consent decree was not a CERCLA settlement, it says nothing about any *hazardous* substance—the touchstone of a CERCLA response action. Pet. 28 n.8; *cf. Eagle-Picher Indus., Inc. v. U.S. EPA*, 759 F.2d 922, 932 (D.C. Cir. 1985) (CERCLA imposes "liab[ility] for cleanup of a release of a 'hazardous substance,' but not for the cleanup of a release of a 'pollutant or contaminant'").

Permitting non-CERCLA settlements to trigger CERCLA contribution also thwarts what the United States *agrees* (at 12) is a necessary component of contribution—"resolv[ing] a common liability." The United States says that this liability need not be liability "under CERCLA." BIO 12-13 (emphasis omitted). But that assertion flatly contradicts the United States' own arguments—in this case and others—that Section 113(f)(3)(B) contribution is not available unless the settlement resolves the non-settling party's liability *under CERCLA*. Pet. 26-27, 29. The United States makes no effort to reconcile those positions. Nor does it address the bizarre result produced by its contradiction: A consent decree entered under a CWA provision from which the United States is *immune* from liability somehow *resolved* the United States' liability. *Id.* at 27-28.[3]

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[3] Contrary to the United States' suggestion (at 12), whether a settlement triggers Section 113(f)(3)(B) is a different question than whether a cost-recovery action is authorized under Section 107(a). Section 113(f)(3)(B) concerns the *liability* resolved in a

Like the D.C. Circuit, the United States (at 11) ultimately grounds its interpretation in a negative inference drawn from Section 113(f)(1). But as Guam explained, that argument ignores that "response action" *is* a CERCLA-specific term. Pet. 28-29.

2. On the second question, the United States' position strips "resolved . . . liability" of meaning. 42 U.S.C. § 9613(f)(3)(B). According to the United States, an agreement to take an action necessarily resolves liability regardless of whether the agreement (a) *admits* the settling party's liability to take the action, (b) *disclaims* any such liability, or (c) says nothing about liability at all. That can't be right. Here, the United States claims that a consent decree entered "without *any* finding of liability or admission of liability against or by the Government of Guam," Pet. App. 140a (emphasis added), somehow "resolved" Guam's liability. That position "warps" the statutory text "beyond recognition." *Id.* at 90a.

The United States confuses "agree[ing] to perform certain actions . . . to remedy an instance of environmental contamination" with "settl[ing] the issue of *liability* for that contamination." *Bernstein*, 733 F.3d at 212. A party may agree to take an action for any number of reasons, including simply to "avoid protracted litigation." Pet. App. 140a. Moreover, the United States misquotes *Black's* definition of "liability"—"[t]he quality, state, or condition of being

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settlement, while Section 107(a) concerns the *action* actually taken. Moreover, the case comes to the Court on the "premise that 'Guam is permitted to proceed against the United States for full cost recovery under section 107(a).'" Pet. App. 8a (quoting Pet. App. 68a)). The only question here is whether a non-CERCLA settlement like the 2004 CWA decree can trigger Section 113(f)(3)(B). *See* BIO (I).

legally obligated or accountable," *Liability*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added)—by inexplicably omitting "legally." BIO 15. That a party has agreed to take an action does not mean that the parties determined *liability* as to that action—i.e., an *independent* legal obligation to perform the act.

Even if an agreement to undertake an act in a settlement could be viewed as a "liability" (apart from any independent legal obligation), an agreement that disclaims the resolution of *future* liability—including CERCLA liability—through conditional releases of liability and reservations of rights cannot "resolve" liability. Pet. 31-34. Such provisions make clear that any liability "established" for actions "identified in the decree" (BIO 17) will not be "resolved" "until performance [is] complete." *Florida Power*, 810 F.3d at 1002-03 (quoting *Bernstein*, 733 F.3d at 212). The United States' contrary interpretation (at 15-16) flouts the plain meaning of "resolved."

The United States protests that this argument "would 'nullify [S]ection 113(f)(3)(B) in a host of cases'" because of its "three-year limitations period." BIO 16-17 (citation omitted). But the only cases in which Section 113(f)(3)(B) would be "nullif[ied]" are cases in which the statute does not apply—cases in which liability is not "resolved" when the agreement is signed (and the limitations period begins to run). Pet. 32-33. Settling parties in those cases are not "den[ied]" relief (BIO 17)—they can recover costs under Section 107(a), as Guam tried to do here. Pet. 32 n.9. Only by ignoring Section 113(f)(3)(B)'s text and Section 107(a)'s existence does the United States arrive at its supposedly "anomalous result." BIO 17.

In the end, the United States' merits arguments simply confirm that the questions presented are squarely joined and ripe for this Court's review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LEEVIN T. CAMACHO
Attorney General
JAMES L. CANTO II
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
590 S. Marine Corps Drive
Suite 901
Tamuning, Guam 96913

JOHN D.S. GILMOUR
WILLIAM J. JACKSON
FABIO C. DWORSCHAK
KELLEY DRYE & WARREN LLP
515 Post Oak Boulevard
Suite 900
Houston, TX 77027

GREGORY G. GARRE
Counsel of Record
ROMAN MARTINEZ
BLAKE E. STAFFORD
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

BEZALEL STERN
KELLEY DRYE & WARREN LLP
3050 K Street, NW
Suite 400
Washington, DC 20007

Counsel for Petitioner

December 23, 2020

ADDENDUM

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United States' Reply in Support of Its Motion to Certify the Dismissal Orders for Interlocutory Appeal Under 28 U.S.C. § 1292(b), *Government of Guam v. United States*, No. 17-cv-2487 (D.D.C. Dec. 27, 2018), ECF No. 53 (excerpt) 14a

Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b), *Government of Guam v. United States*, No. 19-8001 (D.C. Cir. Mar. 11, 2019) (excerpt).....19a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT OF GUAM, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	1:17-cv-02487-KBJ [ECF No. 49-1]

THE UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO CERTIFY THE DISMISSAL ORDERS FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND REQUEST FOR STAY

* * *

In accordance with Local Rule 7(a), the United States respectfully submits this memorandum in support of its motion to certify the denial of the United States' motion to dismiss Guam's amended complaint for interlocutory appeal and request to stay all proceedings pending a decision by the United States Court of Appeals for the D.C. Circuit.[1]

[1] In the Parties' Joint Status Report, dated October 19, 2018, the United States promptly advised the Court that it was evaluating a potential interlocutory appeal. *See* ECF No. 40. This process involved coordinating with interested federal

I. INTRODUCTION

* * *

The purpose of this motion is not to re-argue the issues presented in the motion to dismiss. Rather, the United States respectfully requests that the Court certify its orders for immediate appeal under 28 U.S.C. § 1292(b).[2] As explained below, the Court's Rule 12(b)(6) decision involves controlling questions of law and there are substantial grounds for differences of opinion concerning the rulings on those issues. An immediate appeal to the United States Court of Appeals for the D.C. Circuit may materially advance the ultimate disposition of this CERCLA litigation. If the D.C. Circuit accepts the appeal, a

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agencies and seeking the necessary approvals within the United States Department of Justice, including from the Solicitor General. Although there is no specific deadline for seeking an interlocutory appeal, this request is being made now to ensure timeliness, pending the Solicitor General's determination on whether to authorize an appeal on behalf of the United States. As stated in the motion, we will promptly advise the Court when that determination is made.

[2] 28 U.S.C. § 1292(b) reads as follows: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [the judge] shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

reversal may result in the termination of this action and save both the Court and the Parties the enormous burden and expense of conducting discovery regarding the Ordot Dump's operations from World War II to the present, as well as save the additional costs of litigating the claims and defenses through summary judgment, a lengthy bench trial, and a possible appeal after a final judgment is entered.

II. THE ELEMENTS OF § 1292(b) ARE EASILY MET AND CERTIFIYING THE MOTION TO DISMISS DECISION FOR AN INTERLOCUTORY APPEAL WILL FURTHER THE SOUND ADMINSTRATION OF JUSTICE.

Appellate review ordinarily must await entry of a final judgment. However, district courts possess the discretion to allow a party to appeal a non-final order under 28 U.S.C. § 1292(b). *See Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 152 (D.D.C. 2018); *APCC Servs. Inc. v. AT& T Corp.*, 297 F. Supp. 2d 101, 104 (D.D.C. 2003). A trial court may certify an order for interlocutory appeal when three conditions are met: (1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion concerning the ruling exists, and (3) an immediate appeal may materially advance the disposition of the litigation. *See Howard v. Office of the Chief Admin. Officer of the U.S. House of Reps.*, 840 F. Supp. 2d 52, 55 (D.D.C. 2012) (granting a request to allow interlocutory review); *GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F. Supp. 2d 313, 316 (D.D.C. 1999) (same). Here, the three elements Congress specified in § 1292(b) are clearly satisfied and allowing the Parties to present the

issues raised in the motion to dismiss to the D.C. Circuit will promote judicial economy and efficiency. *See generally Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1265 (D.C. Cir. 2008) (accepting an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because "[w]ere [the D.C. Circuit] to conclude that the [appellant] should have prevailed on summary judgment, [its] consideration of [the] matter would eliminate the need for further proceedings and preserve judicial resources"); *see also Ahrenholtz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000) (emphasizing that it is the "duty" of district and appellate courts to allow an immediate appeal when the statutory criteria are met).

A. <u>The Decision Involved Controlling Questions of Law.</u>

The ruling on the United States' motion to dismiss encompasses several controlling questions of law, any one of which satisfies § 1292(b)'s first element. The United States' challenge to the legal sufficiency of Guam's complaint involves a threshold question of statutory construction, namely how to properly interpret CERCLA § 9613(f)(3)(B). *See, e.g.*, ECF No. 27-1 at 21-26 and ECF No. 33 at 19-25 (explaining the United States' legal position on this issue). Whether the 2004 judicial settlement with the United States allowed Guam to pursue a CERCLA contribution claim under CERCLA § 9613(f)(3)(B) is a legal issue that is subject to *de novo* review by the D.C. Circuit. *See*, *e.g.*, *Solutia, Inc. v. McWane, Inc.*, 672 F.3d 1230, 1235 (11th Cir. 2012) ("Whether § 107(a) of CERCLA grants parties a right to recover cleanup costs that they directly incur in complying with a consent decree is a matter of statutory interpretation subject to *de*

novo review."); *see also Nat'l Veterans*, 321 F. Supp. 3d at 152 (granting a petition for interlocutory appeal on an issue of statutory construction).

In addition, the dismissal decision turned on a legal interpretation of the 2004 consent decree's terms. The opinion discussed the legal significance of Guam's non-admission of liability in the consent decree, the scope of the reservation of rights, whether the release Guam obtained resolved any liability to perform the alleged response actions, and whether the release was conditioned on Guam fully performing all its obligations at the Ordot Dump. *See* ECF No. 33 at 23-25. The Court's rulings on the meaning of the consent decree's terms are conclusions of law. As with the statutory construction questions, the D.C. Circuit will interpret the consent decree's terms *de novo* on appeal. *See United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 337 (D.C. Cir. 2014) ("we review the district court's construction of the consent decree . . . de novo"); *see also NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 692 (7th Cir. 2014) (refusing to interpret § 9613(f)(3)(B) so narrowly that "no consent order could resolve a party's liability until the work under it was complete").

Under § 1292(b), a question of law is controlling when a reversal would be required if decided incorrectly. *Howard*, 840 F. Supp. 2d at 55. In other words, controlling questions of law include issues that would terminate an action if the district court's decision were reversed. *APCC*, 297 F. Supp. 2d at 105. Even a procedural determination that significantly impacts the action, but is not dispositive, can be considered a controlling issue if it would save the court and litigants time and expense. *Id.* Because the United States raised dispositive legal questions at

the outset in a motion to dismiss and the ruling allowed Guam's case to proceed, there is no doubt that the legal issues presented are "controlling" for purposes of § 1292(b). A different construction of CERCLA § 9613(f)(3)(B) or how the 2004 consent decree should be read in light of CERCLA and Guam's specific allegations (i.e., arguing that the settlement required Guam to perform CERCLA response actions) would likely change the outcome and terminate the case. If the D.C. Circuit agrees with the United States' longstanding interpretation of CERCLA § 9613(f)(3)(B) and applies the plain meaning to the 2004 consent decree, Guam's claims should be dismissed. Guam's CERCLA action would be barred by the three-year statute of limitations if the D.C. Circuit concludes that the 2004 consent decree resolved at least some of Guam's liability within the meaning of CERCLA § 9613(f)(3)(B) to perform the alleged response actions at the Ordot Dump. *See Trinity Indus. Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 136 (3d Cir. 2013) ("The statutory language of [§ 9613(f)(3)(B)] requires only the existence of a settlement resolving liability to the United States" for a response action); *ASARCO, LLC v. Celanese Chemical Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015) ("[A]ny contribution claim is subject to the three-year statute of limitations . . . . When a person resolves its liability to the United States or a State through an administrative or judicially approved settlement, a right to assert a contribution claim against other PRPs also accrues.").

B. <u>There Are Substantial Grounds for Differences of Opinion.</u>

There also are substantial grounds for differences of opinion concerning the legal issues addressed in the Court's ruling. Federal courts have frequently observed that CERCLA is a complex statutory regime and that some provisions are not a model of clarity. *See, e.g.*, *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 956-58 (9th Cir. 2013) (noting that CERCLA is a "complex regulatory statute" with a web of sections, subsections, definitions, exceptions, defenses, and administrative provisions); *Eagle-Picher Indust., Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985). Relative to other courts, the D.C. Circuit has decided few CERCLA cases and there is virtually no relevant case law in this Circuit on the interplay between CERCLA's cost recovery and contribution provisions. Indeed, the D.C. Circuit has not addressed the dispositive legal questions presented by the United States' motion to dismiss, including what is sufficient to "resolve" at least some liability for purposes of CERCLA § 9613(f)(3)(B), or how a federal consent decree reasonably should be interpreted consistent with common sense and in light of CERCLA's provisions and policies. As this Court has recognized, a "dearth of precedent" within the controlling jurisdiction often is sufficient to show that there are grounds for differences of opinion concerning a legal ruling. *APCC*, 297 F. Supp. 2d at 107; *see also Howard*, 840 F. Supp. 2d at 55-56 (discussing the fractured appellate opinions on a controlling issue). In performing its *de novo* review, the D.C. Circuit is free to make its own independent assessment on the legal viability of Guam's CERCLA claims.

Conflicting decisions in other circuits can establish that there is room for different judicial opinions concerning the controlling questions of law. *APCC*, 297 F. Supp. 2d at 107. Here, without the benefit of guidance from the D.C. Circuit, the Court's decision grappled with the conflicting views espoused by the Ninth and Sixth Circuits regarding the correct interpretation of CERCLA § 9613(f)(3)(B). *See*, *e.g.*, ECF No. 38 at 24-31. The Court chose to follow *Florida Power Corp. v. First Energy Corp*, 810 F.3d 996 (6th Cir. 2015), a decision that the United States argued was incorrect and inconsistent with both CERCLA's policies and EPA's longstanding CERCLA settlement practices. The circuit split nevertheless remains relevant and counsels in favor of allowing an interlocutory appeal under § 1292(b). *See In re Cintas Corp. Overtime Pay Arbitration Lit.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007) (granting a motion to certify an interlocutory appeal in light of a circuit split on a legal issue that was unresolved within the governing circuit).

Moreover, there is a strong dissent to the Sixth Circuit's panel opinion, *see Florida Power*, 810 F.3d at 1016 (Suhrheinrich, J., dissenting), further demonstrating that reasonable jurists on the same appellate court can and do disagree regarding the dispositive legal questions presented by the United States' motion to dismiss. Even the holdings of the Sixth Circuit decisions that preceded *Florida Power* are subject to different interpretations within the Sixth Circuit and the different outcomes in those cases are difficult to reconcile, as explained in the *Florida Power* dissent and by the subsequent Ninth Circuit decision in *Asarco*. *See Asarco LLC v. Atlantic Richfield Co.*, 866 F.3d 1108, 1124-25 (9th Cir. 2017)

(disagreeing with Sixth and Seventh Circuit decisions finding that the United States "must divest itself of its ability to enforce" a settlement by forgoing standard reservations of rights in a consent decree).

Although the Court cited *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2013), *see* ECF No. 38 at 20-22, a recent decision by a district court within the Seventh Circuit read CERCLA and the relevant cases much differently and ruled consistently with the legal arguments the United States presented here. *See Refined Metals Corp. v. NL Indust., Inc.*, No. 1:17-cv-02565- SEB-TAB, 2018 WL 4592110, at *4-6 (S.D. Ind. Sept. 25, 2018). Specifically, *Refined Metals* held that a Clean Air Act and RCRA consent decree entered with the United States resolved at least some of the plaintiff's liability to perform response actions and that the plaintiff's CERCLA action was untimely because it had not filed a lawsuit within three years of the settlement. *Id.* ("The point is that Refined unconditionally assumed a legal obligation and unconditionally received a legal benefit in order to resolve a legal dispute — not that it pronounced a legal *mea culpa*."). Given the conflicting statutory interpretations and different outcomes in both circuit and district courts, there are adequate grounds to believe that the D.C. Circuit – in conducting its own *de novo* review – may align with the majority view on these legal questions and find substantial merit in the United States' Rule 12(b)(6) arguments.[3]

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[3] The Court did not directly address several of Guam's legal arguments, including its sweeping assertion that a Clean Water Act consent decree can never constitute a settlement for purposes of CERCLA § 9613(f)(3)(B). *See* ECF No. 38 at 35, n.13. Although the D.C. Circuit has not ruled on this question of law, the United States believes that the D.C. Circuit will follow the

In sum, in the absence of controlling law to the contrary, the D.C. Circuit may very well adopt the reasoning in *Asarco*, which explained why the Ninth Circuit believed that *Florida Power* was wrongly decided and would undermine CERCLA's goals. *See generally Kahl v. Bureau of Nat'l Aff., Inc.*, Civil Action No. 09-0635 (KBJ), 2015 WL 13546450, at *2 (D.D.C. Aug. 21, 2015) (granting a petition for interlocutory review based on the uncertainty of determining the D.C. Circuit's views on the intent element of a defamation claim).[4] Thus, notwithstanding the Court's understandable belief in its ruling, substantial grounds for differences of opinion exist concerning the legal sufficiency of Guam's CERCLA claims.

C. <u>An Interlocutory Appeal Will Advance The Efficient Disposition Of This Complex CERCLA Matter.</u>

An immediate appeal of the Court's denial may materially advance the disposition of the litigation. If the D.C. Circuit finds the interpretation of CERCLA § 9613(f)(3)(B) set forth in the subject orders is erroneous, a reversal is likely and Guam's case should be dismissed with prejudice. *See Nat'l Veterans*, 321

Third Circuit's decision in *Trinity*, 735 F.3d at 136-37, and the Ninth Circuit's decision in *Asarco*, 866 F.3d at 1118-20, when given the opportunity. *See also Refined Metals,* 2018 WL 4592110, at *4-6 (rejecting the same "position of doubtful vitality" advocated by Guam).

[4] *Kahl* illustrates that interlocutory appellate review can promote efficiency and benefit the district court and parties. On appeal, the D.C. Circuit clarified the applicable legal standards and reversed the denial of summary judgment, thereby avoiding an unnecessary trial on Kahl's defamation claims. *See* 856 F.3d 106 (D.C. Cir. 2017).

F. Supp. 3d at 155 ("As previously explained, if the Court's Order is reversed in the government's favor, the litigation will be over."); *Howard*, 840 F. Supp. 2d at 57 ("Conversely, if, post judgment, the Court of Appeals were to conclude that it was error to allow Howard's transfer claims to go forward, then the legislative branch would have been improperly subjected to the burden of defending those claims."). Moreover, appellate review of the decision *now* would be efficient because discovery will cover issues ranging from World War II military engagements on the Island to the many decades of Guam's subsequent waste disposal operations at the Ordot Dump. There likely will be additional dispositive motions practice at the summary judgment stage of the case and a bench trial (if necessary) will consume judicial resources. The fact that Guam is located thousands of miles away from District of Columbia (and Guam did not choose to the file its lawsuit on Guam) makes this a more difficult, expensive, and time-consuming matter to litigate. As noted above, in addition to Guam's government agencies and instrumentalities, many large businesses and commercial interests sent waste to the Ordot Dump for decades. Other parties that arranged for the disposal of hazardous waste at the Ordot Dump or transported such waste to the Dump face CERCLA liability and may be joined in this case. In sum, allowing an interlocutory appeal could save both Parties substantial time and money as well as conserve the judicial resources that otherwise may be necessary to supervise discovery, decide dispositive motions at the summary judgment stage, and preside over what could be a lengthy bench trial. *See Nat'l Veterans*, 321 F. Supp. 3d at 155 (finding that different outcomes on appeal "would

conserve judicial resources and save the parties from needless expenses"); *GTE*, 44 F. Supp. 2d at 316 (noting that discovery would entail numerous depositions, plus documentary discovery, and the trial would take "several weeks").

As a practical matter, given the large sum of money Guam is demanding, the United States cannot lightly abandon the dispositive legal arguments it made without strongly considering an eventual appeal to the D.C. Circuit. *See APCC*, 297 F. Supp. 2d at 100 ("it would be far better for all concerned, including plaintiffs, to have these matters resolved now, as opposed to sometime in the distant future"). According to its complaint, Guam is seeking more than $160 million. As set forth in the prior motion to dismiss briefing and the United States' counterclaim, however, Guam is liable under CERCLA as both the longtime owner and operator of the Ordot Dump. The United States also will show that Guam operated the Ordot Dump in violation of RCRA and the Clean Water Act for decades. Even after entering a federal consent decree in 2004, Guam still did not meet its legal obligations to take corrective actions and to close the Ordot Dump. Instead, the United States was forced to return to the federal court to compel Guam's compliance with the consent decree, and the court ultimately determined that appointing a receiver was necessary to take over the management of Guam's solid waste operations. A decade later, the court has not concluded that Guam is prepared to meet its obligations and resume its own waste management operations without the receiver.

Nevertheless, Guam's allegations will require ample discovery and Guam already has served broad discovery requests on the United States. The case will

take at least several years to litigate even under Guam's case management proposal. The Parties likely will spend many thousands of hours and the United States will incur hundreds of thousands of dollars in discovery and expert-related expenses to defend this CERCLA case all the way through trial, all of which would be unnecessary if the D.C. Circuit concludes that Guam's CERCLA claims should have been terminated at the motion to dismiss stage. Thus, both the law and the equities strongly weigh in favor of allowing an interlocutory appeal.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GOVERNMENT OF GUAM, Plaintiff and Counterclaim Defendant, v. UNITED STATES OF AMERICA, Defendant and Counterclaim Plaintiff.	1:17-cv-02487-KBJ [ECF No. 53]

DEFENDANT AND COUNTERCLAIM PLAINTIFF UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF ITS MOTION TO CERTIFY THE DISMISSAL ORDERS FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

The requirements for interlocutory appeal are clearly met here. *See* 28 U.S.C. § 1292(b). In its opposition, the Government of Guam ("Guam") concedes that one of the three statutory elements is satisfied. *See* ECF No. 52 at 8 (admitting that the Court's dismissal order was based on a "controlling question of law"). Guam also acknowledges that there is room for courts to disagree on the controlling

questions of law, but disputes that: (1) "substantial" grounds for differences of opinion exist, and that: (2) an interlocutory appeal will materially advance this CERCLA litigation. *Id.* at 9-11. Guam's arguments are wrong on both counts.

Guam briefly questions whether the Solicitor General will approve the United States' appeal if the Court grants the § 1292(b) motion. *Id.* at 6. That is not an issue. As described below, the Solicitor General has authorized the United States' appeal in this matter. The Government is prepared to pursue an appeal in the D.C. Circuit upon certification of the dismissal orders. As demonstrated in the United States' motion and memorandum of law, *see* ECF Nos. 49 & 49-1, § 1292(b) is fully satisfied and judicial economy and efficiency strongly favor certification. If the Court certifies the orders for appeal, a stay also is appropriate. There is no immediate need for further litigation in this Court or to commence burdensome discovery if the United States is permitted to take the next step and petition the D.C. Circuit to resolve the dispositive legal questions raised in the United States' motion to dismiss.

I. SECTION § 1292(b)'S FACTORS WEIGH STRONGLY IN FAVOR OF ALLOWING THE UNITED STATES' INTERLOCUTORY APPEAL.

A. Substantial Grounds for Differences of Opinion Exist

Guam's opposition acknowledges that there is no governing law in the D.C. Circuit on the CERCLA issues addressed in the Court's decision and agrees that there are clear differences of opinion in the courts of appeal and district courts regarding the controlling

issues of law. *See* ECF No. 52 at 9-10. Guam simply asserts that those differences of opinion are not substantial. It is evident, however, that the Ninth Circuit's rejection of the Sixth Circuit's statutory interpretation and the strong dissenting opinion in *Florida Power* describing the flaws and inconsistencies in the Sixth Circuit's case law meet the § 1292(b) standard. *See* ECF No. 49-1 at 14-16 (U.S. brief noting that there is also a more recent district court decision in *Refined Metals*, which is on appeal to the Seventh Circuit, that conflicts with the *Guam* decision). The Court's 43-page opinion noted that various federal courts have "reached different conclusions" on the dispositive legal issues and discussed those differences at length. ECF No. 38 at 20, *see also id.* at 20-27. Given the sharp split of legal authority on the controlling questions of law and with *de novo* review on appeal, it is reasonable to believe that the D.C. Circuit will seriously consider aligning with the Ninth Circuit's view of CERCLA on the dispositive legal questions. Thus, there is ample basis to conclude that substantial grounds for differences of opinion exist regarding the legal sufficiency of Guam's CERCLA claims. *See* ECF No. 49-1 at 13-14. And if the D.C. Circuit agrees with the United States that a CERCLA contribution claim was available to Guam following the 2004 consent decree, there is no dispute that Guam's action is untimely and must be dismissed as a matter of law.

* * *

II. THE SOLICITOR GENERAL HAS AUTHORIZED THE UNITED STATES TO PURSUE AN APPEAL IN THE D.C. CIRCUIT.

Guam's opposition questions whether the United States has the necessary approval from the Solicitor General or if the Government will pursue an appeal should the Court choose to certify it. *See* ECF No. 52 at 6. Guam has no cause for concern in this regard.

As contemplated by the Court's Minute Order dated December 10, 2018, we can confirm that the Solicitor General has provided the requisite authorization for the United States to proceed with an appeal of the dismissal orders in this matter. The United States' § 1292(b) request was not illusory, as Guam has suggested, and the Court can be assured that the United States will diligently pursue the appeal if this motion is granted.

Moreover, the United States sought certification within a reasonable time after the Court's dismissal order and decision explaining the rationale. *See Ahrenholtz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 676-77 (7th Cir. 2000) (noting that Congress created no specific deadline for requesting a district court's permission to pursue an interlocutory appeal under § 1292(b)). The United States promptly advised both Guam and the Court of its interest in a potential appeal shortly after the decision, *see* ECF No. 40 at 1, ¶ B.1, and provided appropriate updates as matters progressed. *See*, *e.g.*, ECF No. 48 at 7, ECF No. 51 at 2-3. Given the need for the United States to consult with and coordinate its legal position with multiple federal agencies and within the Department of Justice, including within the Environment and

Natural Resources Division and the Office of the Solicitor General, there was no inordinate delay in filing the § 1292(b) motion three weeks ago. *See, e.g.*, *generally Gamboa v. City of Chicago*, Case No. 3-C-219, 2004 WL 2877339, at *2 (N.D. Ill. Dec. 13, 2004) (finding an adequate explanation for a 75-day interval before filing a § 1292(b) motion); *Marriott Int'l Resorts, L.P. v. U.S.*, 63 Fed. Cl. 144, 145 (2004) (granting the United States' motion to certify a decision for appeal following a 74-day interval after the district court's order).[2]

* * *

[2] The D.C. Circuit accepted the interlocutory appeal in *Marriott* and reversed the district court's ruling. *See* 437 F.3d 1302 (D.C. Cir. 2006). The lone case that Guam cites on timeliness – *Memphis Publishing Co. v. FBI*, 195 F. Supp. 3d 1, 2-3 (D.D.C. 2012) – is inapposite. *Memphis Publishing* arose in entirely different circumstances and did not consider what is a *reasonable* amount of time for the United States to file a § 1292(b) motion in the circumstances presented here. The issue there was whether to put the FBI's FOIA obligations on hold while the Solicitor General considered an appeal on a discovery ruling. Here, the United States filed its § 1292(b) motion on December 6, and did not come close to reaching the 125-day period referenced in *Memphis Publishing*. Nor did we ask to defer any case management obligations or seek a stay until filing the motion.

No. 19-8001

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GOVERNMENT OF GUAM,

Plaintiff-Respondent,

v.

UNITED STATES OF AMERICA,

Defendant-Petitioner.

On Petition for Permission to Appeal from the United States District Court for the District of Columbia (No. 1:17-cv-02487-KBJ)

PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

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* * *

INTRODUCTION

Pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, the United States respectfully petitions this Court for permission to appeal an interlocutory order of the United States District Court for the District of Columbia, dated September 30, 2018, in Case No. 17-2487. A copy of that order is appended to this petition. *See* Addendum (Add.) 2. The district court certified the order for interlocutory appeal on February 28, 2019. *See* Add. 44-66.

STATEMENT OF CONTROLLING QUESTION OF LAW

The Government of Guam sued the United States under Sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), seeking to recover costs of closing Guam's Ordot Dump. All parties and every court of appeals to address the issue agree that the two statutory sections create mutually exclusive causes of action, such that where a party has "resolved its liability to the United States . . . for some or all of a response action" within the meaning of Section 113, that party is limited to a Section 113 action and may not bring a Section 107 action. 42 U.S.C. § 9613(f)(3)(B). The question presented by the certified order is whether a 2004 consent decree in which Guam agreed to take specific actions to close Ordot resolved liability for costs of a response action within the meaning of Section 113, such that Guam is limited to proceeding under that section.

PRELIMINARY STATEMENT

This case arises out of the United States' long-running efforts to require Guam to address environmental violations at the Ordot Dump. In 2004, Guam entered into a Clean Water Act consent decree with the United States Environmental Protection Agency ("EPA"), in which Guam agreed to take certain actions to close the overburdened and illegally operated dump site. After years of inaction by Guam following entry of the consent decree, a federal court in Guam took the extraordinary step of appointing a receiver to supervise the performance of Guam's responsibilities under the consent decree, with Guam to pay the costs incurred by the receiver.

In 2017, Guam filed this suit to recover costs, including costs incurred by the federal receiver, from the United States, which Guam alleges contributed waste to the Ordot Dump while the U.S. Navy governed the island, from 1898 to 1950, and thereafter.

Guam pleaded claims under two separate sections of CERCLA, which federal courts of appeal have uniformly held provide mutually exclusive remedies. Section 107(a)(4)(A) allows a State to recover "all costs of removal or remedial action" from a person that is potentially liable under the statute. Section 113(f)(3)(B), on the other hand, provides a contribution action for "[a] person who has resolved its liability to the United States . . . for some or all of a response action." 42 U.S.C. §§ 9607(a)(4)(A), 9613(f)(3)(B).

The United States moved to dismiss Guam's suit in its entirety, on the grounds that the 2004 consent decree between Guam and the EPA "resolved" Guam's liability for some or all of a response action at the Ordot Dump, and that Section 113 thus provided Guam's exclusive remedy for suing the United States. Add. 10-11. Under the statute, such claims must be brought within three years of the entry of the consent decree. 42 U.S.C. § 9613(g)(3)(B). Guam's effort to raise such claims in the present suit is more than a decade too late.

The district court accepted that under the law of all circuits to address the issue, to the extent the 2004 consent decree triggered now-tardy Section 113 contribution claims, Guam is barred from attempting instead to proceed with a Section 107 cost-recovery claim. Add. 16-17. The court nevertheless denied the United States' motion to dismiss because it believed

that the 2004 consent decree did not resolve Guam's liability for some or all of a response action as required by Section 113. Add. 18-19. According to the court, even though Guam agreed in the consent decree to perform actions that qualify as response actions under CERCLA, the decree did not trigger a contribution claim under Section 113 because the consent decree provisions did not resolve whether Guam was liable for the costs of the cleanup or determine the scope of Guam's liability. *See* Add. 43.

In deciding that the 2004 consent decree did not give rise to a Section 113 contribution action, the district court rejected the approach of a recent Ninth Circuit decision assessing when a consent decree triggers Section 113, and instead relied on cases from the Sixth and Seventh Circuits. Add. 19-32. The existence of a circuit split on which this Court has not yet taken a side is, by itself, proof that there is substantial ground for difference of opinion on the district court's resolution of the issue, as the district court itself recognized. *See* Add. 55-56.

Resolving that issue in the government's favor will materially advance the termination of this case. By contrast, further proceedings on the merits of Guam's claims would be lengthy, complicated, and burdensome, requiring the parties to reconstruct decades of past naval operations on Guam—including activities that took place over a century ago—as well as Guam's own management of the dump from 1950 to the present. *See* Add. 58-63.

Accordingly, the Court should consider the controlling legal issue now, so that time and resources are not expended on unnecessary proceedings.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

* * *

III. Proceedings below

* * *

The district court denied the United States' motion to dismiss. Add. 5. The court accepted the uniform view of the federal appellate courts that "cost-recovery claims under CERCLA section 107(a) and contribution claims under CERCLA section 113(f)(3)(B) are exclusive of one another, such that Guam is permitted to proceed against the United States" for recovery of costs under Section 107(a) "*only if* Guam's right to contribution under section 113(f)(3)(B) has not been triggered." Add. 17-18 (emphasis added). It nevertheless refused to dismiss because, in its view, the 2004 consent decree did not resolve Guam's liability for all or even some of a response action within the meaning of Section 113. Add. 19-43.

In reaching that conclusion, the district court relied in large part on the fact that the 2004 consent decree, while making Guam responsible for taking specific response actions by dates certain, expressly withholds any admission of Guam's statutory liability. *See* Add. 26-29, 33-34. The district court acknowledged that, while this Court has not yet addressed the question, the Ninth Circuit recently held that a consent decree containing such a disclaimer of statutory liability may still give rise to a Section 113 action, so long as the decree conclusively establishes the party's obligation to take all or even some part of a response action. Add. 26-28 (citing *Asarco LLC* 866 F.3d at 1124–25). But the court

rejected the Ninth Circuit's approach, instead citing decisions of the Sixth and Seventh Circuits to support its view that a consent decree which declines to resolve *statutory* liability cannot be read to resolve liability for all or part of a response action. Add. 22-25, 28-29 (citing *Florida Power Corp. v. First Energy Corp.*, 810 F.3d 996, 1004 (6th Cir. 2015); *Bernstein*, 733 F.3d at 212–16; *ITT Indus.*, 506 F.3d at 460).

The district court likewise cited decisions of the Sixth and Seventh Circuits, and rejected the approach of the Ninth Circuit, in holding that certain other provisions of the 2004 consent decree—specifically, provisions reserving the EPA's rights to enforce the decree's terms and making the United States' covenant not to sue Guam conditional on Guam's performance of its obligations under the decree—militated against finding that the decree triggered Section 113. *See* Add. 26-30.

On February 28, 2019, the district court certified its order denying the United States' motion to dismiss for interlocutory appeal under 28 U.S.C. § 1292(b). Add. 44. In the certification opinion, the court explained that there was "no dispute" that the order denying the motion to dismiss raised controlling issues of law, particularly "how one best interprets agreement language that expressly eschews liability and reserves the right to sue, when the court undertakes to evaluate whether a particular agreement resolved the liability of a CERCLA plaintiff for section 113(f)(3)(B) purposes." Add. 54-55. The court further reasoned that substantial ground for difference of opinion on that issue exists, given the dearth of in-circuit precedent on the issue and the existence of a circuit-split among other courts to have addressed the question. Add. 54-58. Finally,

it determined that interlocutory appeal would "materially advance" the litigation, in light of the "potential for conservation of judicial resources and avoidance of 'needless expense' to the parties," by obtaining this Court's ruling on a dispositive threshold legal question before the parties engage in "wide-ranging and extensive" discovery. Add. 58-60.

REASONS WHY THE PETITION SHOULD BE GRANTED

The standards for interlocutory appeal under 28 U.S.C. § 1292(b) are met in this case. In certifying the order for appeal, the district court correctly determined that the order presents a controlling question of law with respect to which there is substantial ground for difference of opinion, and that immediate appeal may materially advance the ultimate termination of the litigation.

I. The certified order presents controlling questions of law as to which there is substantial ground for difference of opinion.

Whether the 2004 consent decree resolves Guam's liability for some or all of a response action within the meaning of Section 113 turns on the proper construction of both Section 113 and the terms of the consent decree itself—questions of law, which this Court reviews *de novo*. *See, e.g.*, *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) ("Our review of the District Court's statutory interpretation is de novo."); *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 337 (D.C. Cir. 2014) ("we review the district court's construction of the consent decree . . . de novo").

Under 28 U.S.C. § 1292(b), a question of law is controlling when reversal would be required if the

question was decided incorrectly by the lower court. *Howard v. Office of the Chief Admin. Officer of the U.S. House of Reps.*, 840 F. Supp.2d 52, 55 (D.D.C. 2012); *APCC Servs. Inc. v. AT&T Corp.*, 297 F. Supp.2d 101, 105 (D.D.C. 2003). Whether the 2004 consent decree triggered a Section 113 claim plainly meets that standard: if this Court agrees with the United States that the 2004 consent decree resolved Guam's liability for some or all of the response actions Guam agreed to undertake in that decree, then the district court's order declining to dismiss the case must be reversed, because Guam would be limited to bringing a Section 113 claim, the statutory period for bringing which has already expired. *See* 42 U.S.C. § 9613(g)(3)(B). Indeed, Guam conceded as much below. *See* Add. 54.

Equally plain is the fact that there is substantial ground for difference of opinion regarding whether the 2004 consent decree triggered a Section 113 action. This Court has never addressed what it means to "resolve . . . liability" for "some or all of a response action" under Section 113(f)(3)(B), nor what a consent decree must include to meet that standard. *See* Add. 55. A "dearth of precedent" on an issue within the controlling jurisdiction is, by itself, often sufficient to show that substantial grounds for difference of opinion with a legal ruling exist. *APCC*, 297 F. Supp. 2d at 107; *see also Howard*, 840 F. Supp.2d at 55–56 (discussing fractured appellate opinions on controlling issue).

Here, that dearth of within-circuit authority is compounded by the fact that the law outside this circuit is split on the controlling legal questions. *See* Add. 55-56. As the district court acknowledged both in its certification order and the order denying the

motion to dismiss, while the Sixth, Seventh, and Ninth Circuits all agree that a Section 113 action is not triggered "simply and solely because interested parties 'sign[ed] a settlement agreement,'" Add. 20 (quoting *Bernstein*, 733 F.3d at 213), some decisions from those circuits diverge with regard to what precisely such an agreement must contain to trigger a contribution action. *See* Add. 55-56. In particular, the Ninth Circuit on one hand and at least some decisions of the Sixth and Seventh Circuits on the other have taken different views on whether certain features present in the 2004 consent decree—including disclaimers of statutory liability and conditional covenants not to sue—show that the decree does not trigger a Section 113 action. *See* Add. 21-28, 56.

The district court sided with the Sixth and Seventh Circuit decisions in finding that such features precluded the 2004 consent decree from resolving Guam's liability for all or part of a response action under Section 113. *See* Add. 33-37. But it recognized that the fact that another of this Court's sister circuits may have resolved the issue differently is itself compelling evidence that substantial ground for difference of opinion exists. Add. 55-56; *see, e.g.*, *In re Cintas Corp. Overtime Pay Arbitration Lit.*, No. M:06-cv-01781-SBA, 2007 WL 1302496, at *2 (N.D. Cal. May 2, 2007) (granting motion to certify interlocutory appeal in light of circuit split on legal issue unresolved within the governing circuit). Indeed, had Guam filed its CERCLA lawsuit in its home forum within the Ninth Circuit, there is little doubt that it would have no CERCLA cause of action.

That substantial ground for difference of opinion exists—and that this Court accordingly might well

diverge from the district court's resolution of the question—is further demonstrated here by the persuasiveness of the Ninth Circuit position, which the district court rejected.

First, the Ninth Circuit view that a consent decree that, like the decree here, declines to establish a party's *statutory* liability may nevertheless trigger a Section 113 contribution action, is consistent with both the text and purpose of CERCLA. The text of Section 113(f)(3)(B) provides an action for contribution when a party has "resolve[d]" its "liability" for "some or all of a response action." 42 U.S.C. § 9613(f)(3)(B). Here, the district court did not dispute that Guam agreed in the 2004 consent decree to perform certain acts that qualify as "response actions" with CERCLA's broad definition of that phrase. *See generally* 42 U.S.C. § 9601(25) (defining "response" to include "remove, removal, remedy, and remedial action").

Nevertheless, the district court, like the Sixth and Seventh Circuit opinions it cited, assumed that, to trigger Section 113(f)(3)(B), a consent decree must conclusively determine that the party is liable *under the statute* to perform those actions—or, at least, cannot expressly disclaim a finding of statutory liability. *See* Add. 22-26, 28-29. But that is not what the text of Section 113 requires; the provision merely requires that the party's liability for—that is, legal obligation to perform—the response actions at issue be resolved—that is, conclusively settled—by the consent decree. 42 U.S.C. § 9613(f)(3)(B). The statutory text takes no position on whether that legal obligation stems from the party's liability under CERCLA, or from some other statute (such as the

Clean Water Act), or merely from the terms of the settlement agreement itself. *See id.*

Moreover, as the Ninth Circuit has recognized, reading a requirement that the consent decree establish liability for the response action *under the statute* is at odds with CERCLA's evident purpose. *See Asarco*, 866 F.3d at 1125. As the Ninth Circuit explained, "Congress' intent in enacting § 113(f)(3)(B) was to encourage prompt settlements that establish [potentially responsible parties'] cleanup obligations with certainty and finality." *Id.* "[R]equiring a [potentially responsible party] to concede liability" under the statute in order to trigger a Section 113 contribution claim—as the district court did—"may discourage [potentially responsible parties] from entering into settlements" that enable prompt cleanup in the first place. *Id.*

Second, the Ninth Circuit view that a consent decree that preserves the government's right to enforce the decree and makes covenants not to sue contingent on the party's actual performance of its obligations under the decree may still resolve the party's liability for a response action is also persuasive. As previously stated, Section 113(f)(3)(B) is triggered when a consent decree "resolve[s]" liability for a response action. 42 U.S.C. § 6213(f)(3)(B). The term "resolve" certainly contemplates that a consent decree will settle conclusively the question of whether a party must perform the response actions in question. *See* Add. 19 (citing *Asarco*, 866 F.3d at 1122; *Bernstein*, 733 F.3d at 211). But there is nothing *un*settled about a consent decree that clearly states what steps the party is obligated to take, while also affirming that the government may enforce the decree's terms or

decline to perform its corresponding promises, if the party reneges on those obligations. As the Ninth Circuit explained, "[a]n agreement may 'resolve[]'" liability for response actions—as required by Section 113(f)(3)(B)—"without hobbling the government's ability to enforce its terms if [that party] reneges." *Asarco*, 866 F.3d at 1125.

Indeed, as the Ninth Circuit recognized, the contrary approach suggested by the Sixth and Seventh Circuit decisions is at odds with both CERCLA's statutory context and Congressional intent for that statute. *See id.* at 1124–25. With regard to statutory context, CERCLA Section 122 provides that any covenant not to sue entered into by the government will not "take effect until the President certifies that remedial action has been completed." 42 U.S.C. § 9622(f)(3). Requiring that a CERCLA consent decree nevertheless include an unconditional covenant in order to resolve liability under Section 113(f)(3)(B) would make it "unlikely" that such an agreement "could *ever* resolve a party's liability," given that such an unconditional covenant would run afoul of Section 122. *Asarco*, 866 F.3d at 1124.

With regard to Congressional intent, CERCLA's legislative history expressly authorizes the government to include in consent decrees "any provisions allowing future enforcement action . . . that [the government] determines are necessary and appropriate to assure protection of public health, welfare, and the environment." H.R. Rep. No. 99-253, at 102 (1985). As the Ninth Circuit noted, it would be odd for Congress to promote inclusion of such provisions in CERCLA consent decrees if Congress contemplated that doing so would foreclose the

consent decrees from triggering the right to seek contribution under Section 113(f)(3)(B). *Asarco*, 866 F.3d at 1125.

For these reasons, the Ninth Circuit approach that the district court rejected is more persuasive than the approach that the district court adopted. Indeed, the decisions on which the district court relied have met with controversy and/or inconsistent application. For example, the district court credited the Sixth Circuit's analysis in *Florida Power Corp.*, a decision that the United States argued was incorrect and inconsistent with both CERCLA's policies and EPA's longstanding CERCLA settlement practices, and which drew a strong dissent. *See* 810 F.3d at 1015-19 (Suhrheinrich, J., dissenting). Moreover, the Sixth Circuit decisions that preceded *Florida Power*, on which the *Florida Power* majority relied, are difficult to reconcile, as explained by the *Florida Power* dissent and by the Ninth Circuit in *Asarco*. *Id.*; *Asarco*, 866 F.3d at 1124–25.

There is accordingly substantial ground to believe that this Court would reverse the district court's decision in light of the Ninth Circuit's cogent legal analysis on the controlling question of whether the 2004 consent decree resolved Guam's liability for some or all of a response action within the meaning of CERCLA Section 113.

II. Immediate appeal may materially advance the ultimate termination of this case.

An immediate appeal may materially advance the disposition of this litigation. If this Court agrees with the United States that the 2004 consent decree resolved Guam's liability for some or all of a response action within the meaning of Section 113(f)(3)(B),

then the certified order should be reversed and Guam's case dismissed in full. As explained above, to the extent the 2004 consent decree triggered a contribution claim under Section 113(f)(3)(B), Guam may not proceed with the Section 107 claim pleaded in its complaint. *See, e.g.*, *Asarco*, 866 F.3d at 1117; *Bernstein*, 733 F.3d at 206; *Solutia*, 672 F.3d at 1236–37; *Morrison Enters.,* , 638 F.3d at 603–04; *Agere*, 602 F.3d at 229; *Niagara Mohawk*, 596 F.3d at 128; *ITT Indus.*, 506 F.3d at 458. And the Section 113 claim that Guam pleaded in the alternative is time-barred. *See* 42 U.S.C. § 9613(g)(3)(B). Immediate appeal is therefore appropriate because resolution of an interlocutory appeal in favor of the United States would terminate this litigation in its entirety without the need for further substantive proceedings in the district court. *See Howard*, 840 F. Supp.2d at 57.

Deferring appellate review until a final judgment, however, would require the parties to engage in extensive discovery that may well be rendered unnecessary if this Court ultimately decides that Guam's claims must be dismissed as a matter of law, as the district court recognized. Add. 60. Guam seeks to establish that the United States is liable for contamination at the Ordot Dump based in part on alleged United States activities that ceased nearly 70 years ago. *See* Add. 3. Discovery in this case will therefore require the parties to establish a historical record on issues ranging from World War II military engagements on Guam, to the Navy's historic interactions with Ordot, to Guam's waste disposal operations in the ensuing decades. The fact that Guam is located thousands of miles away from District of Columbia (and Guam did not choose to the file its lawsuit in Guam courts) will also make

discovery into historical practices on Guam more difficult, expensive, and time-consuming.

Furthermore, as noted, in addition to Guam's government agencies and instrumentalities, many large businesses and commercial interests sent waste to Ordot for decades. Other parties that arranged for the disposal of hazardous waste at Ordot or transported such waste to the landfill face CERCLA liability and may ultimately be joined in this case, further complicating and expanding the potential scope of the CERCLA litigation in the district court. *See generally* 42 U.S.C. § 9607(a).

Beyond the burden on the existing and potential future parties to this litigation, the burden on judicial resources will be significant if litigation proceeds. *See* Add. 60. In addition to presiding over the extensive discovery, the district court will likely be called upon to hear dispositive motions at the summary judgment stage and, if such motions are denied, to preside over a bench trial.

In sum, allowing an interlocutory appeal at this time could save the parties substantial time and money, and also conserve judicial resources that would otherwise be necessary to supervise discovery, decide dispositive motions, and preside over a potentially lengthy bench trial. These considerations weigh in favor of permitting an immediate appeal, which may obviate the need for further burdensome litigation. *See Nat'l Veterans Legal Servs. Program v. United States*, 321 F. Supp. 3d 150, 155 (D.D.C. 2018); *APCC*, 297 F. Supp. 2d at 99-100; *GTE New Media Servs. Inc. v. Ameritech Corp.*, 44 F. Supp. 2d 313, 316 (D.D.C. 1999).

CONCLUSION

For the foregoing reasons, the petition for leave to appeal should be granted.

Respectfully submitted,

/s/Rachel Heron
JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
JENNIFER SCHELLER NEUMANN
RACHEL HERON
Attorneys, Appellate Section
Environment and Natural Resources Division
U.S. Department of Justice

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