**No. 21-35751**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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NORTHWEST CENTER FOR ALTERNATIVES TO PESTICIDES, *et al.,*

*Plaintiffs-Appellants*,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.,*

*Defendants-Appellees*.

On Appeal from the United States District Court
for the District of Oregon
No. 3:20-cv-01816
Hon. Karin J. Immergut

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# APPELLANTS' OPENING BRIEF

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KELLY K. SIMON, OSB # 154213
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
Tel: (503) 227-6928
ksimon@aclu-or.org

NICHOLAS S. CADY, OSB # 113463
Cascadia Wildlands
PO Box 10455
Eugene, OR 97440
Tel: (541) 434-1463
nick@cascwild.org

ELISABETH HOLMES, OSB # 120254
Willamette Riverkeeper
P.O. Box 293
Eugene, OR 97440
Tel: (541) 870-7722
eli@willametteriverkeeper.org

BRENNA BELL, OSB # 015199
350PDX
3625 N. Mississippi Ave.
Portland, OR 97227
Tel: (503) 281-1485
brenna@350PDX.org

*Attorneys for Appellants*

## DISCLOSURE STATEMENT

Plaintiffs-Appellants Northwest Center for Alternatives to Pesticides, Willamette Riverkeeper, Cascadia Wildlands, Neighbors for Clean Air, and 350PDX have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Date: January 24, 2022

ACLU Foundation of Oregon

*s/ Kelly K. Simon*
KELLY K. SIMON, OSB # 154213
P.O. Box 40585
Portland, OR 97240
Tel: (503) 227-6928
ksimon@aclu-or.org

*Attorney for Appellants*

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## INTRODUCTION

On March 13, 2020, police officers in Louisville, Kentucky burst into the home of Breonna Taylor and shot her 8 times while she lay asleep in her bed. ER-80. On May 25, 2020, Minneapolis, Minnesota police officer Derek Chauvin murdered George Floyd by kneeling on his neck until he stopped breathing. *Id.* The disregard for Black lives in these and other events has called public attention to the violent and systemic racism present in the American policing system. *Id.* Millions of Americans, and people worldwide, have turned to protesting to call for Black lives to matter. Portland, Oregon, the traditional lands of Chinook, Clackamas, Cowlitz, Kalapuya, Kathlamet, Molalla, Multnomah, Tualatin, and Wasco Tribes ("Portland"), has seen consistent protests in which thousands of people mourn the loss of Black lives, demand an end to racist and brutal policing practices, and call for new models of public safety that value Black lives. *Id.*

In 2020, the U.S. Department of Homeland Security ("DHS") planned to quell the racial justice protests in Portland in an action called "Operation Diligent Valor." *Id.* As part of this operation, DHS repeatedly subjected people at or in the vicinity of the protests to an unprecedented volume of weapons including but not

limited to tear gas and other chemical munitions[1], impact munitions, marking munitions, rubber ball blast devices, flash bangs, and other military-style weapons and tactics. ER 80-81. On multiple occasions, DHS specifically targeted tear gas and other chemical munitions at people of all ages, races, and genders standing in groups that espoused support for the Black Lives Matter movement, at journalists and legal observers attempting to report on and record the abuse, and at medics present to provide care and safety to the protesters. *Id.* As Plaintiffs-Appellants Northwest Center for Alternatives to Pesticides, et al.'s (collectively "NCAP") standing declarations confirmed, often there has been no escape route for people to get away from the chemical clouds. *Id.*

Tear gas and other chemical munitions from Operation Diligent Valor have infiltrated nearby residences, schools, federal and local government buildings, businesses, and parks. *Id.* Further, tear gas and other chemical munitions may have permeated Portland's urban trees and other vegetation. ER-81. The excessive use of tear gas and other chemical weapons resulted in visible munitions residue and

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[1] NCAP uses the term "tear gas and other chemical munitions" to encompass all forms of noxious has and other chemical weapons used for crowd control, including but not limited to CS gas, which is the most commonly used type of tear gas, OC gas, HC smoke, and pepper balls. Limited information about specific chemical compounds and risks to human and environmental well-being are publicly available from the weapons manufacturers. ER-97. NCAP knows that the U.S. Army recently mandated changes to CS-gas use on its own troops due to "profound" health effects on servicemen and women. ER-95.

sediment[2] accumulations in and on Portland's streets, sidewalks, curbs, bioswales, stormwater system, buildings, and standing water, and have been transported and conveyed to the Willamette River banks and waters. *Id.*

This case challenges DHS's unprecedented use of tear gas and other chemical munitions in Operation Diligent Valor without ever evaluating the potentially severe environmental and human health impacts of these weapons in an EIS, EA, or otherwise complying with NEPA, the federal law demanding that executive agencies think about these very impacts before they undertake such a major action.

## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Northwest Center for Alternatives to Pesticides, Willamette Riverkeeper, Cascadia Wildlands, Neighbors for Clean Air, and 350PDX (collectively "NCAP") appeal from the district court's opinion and order granting Defendants' U.S. Department of Homeland Security and its Secretary Alejandro Mayorkas (collectively "DHS") Motion to Dismiss. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. Pursuant to Fed. R. App. P. 4(a)(1)(B), NCAP filed a timely notice of appeal on September 1, 2021. ER-1-2.

[2] Residue and sediment can include actual munition pieces and parts, as well as residual chemical residue and other particles that concentrate on surfaces and in water.

## ISSUES PRESENTED

1. Whether the district court applied an incorrect standard of review when it granted DHS's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1).

2. Whether Operation Diligent Valor, as NCAP describes it, is a final agency action subject to judicial review under the Administrative Procedures Act.

3. Whether the district court applied an incorrect standard of review when, in the alternative, it granted DHS's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6).

4. Whether Operation Diligent Valor, as NCAP describes it, amounts to "bringing a judicial or administrative…criminal enforcement action" that is exempted from the National Environmental Policy Act ("NEPA"), definition of "major federal action" as defined in 40 C.F.R. § 1508.18 (1978).

***(Addendum is also filed with pertinent statutes, regulations, and rules.)***

## STATEMENT OF THE CASE

### *I. Legal Background*

**The Administrative Procedure Act** ("APA"), 5 U.S.C. § 551 *et seq.*, governs judicial review of federal agency action. Under the APA, courts "shall hold unlawful and set aside" agency action, findings, or conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A),

(D). The APA also posits that courts "shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

"Agency action" is a concept that includes "comprehensively every manner in which an agency may exercise its power." *San Francisco Herring Ass'n v. Department of Interior*, 946 F. 3d 564, 575-76 (9th Cir. 2019) (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001). "Agency action" includes the whole or a part of an agency rule order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. 5 U.S.C. § 551(13). The only agency actions that are subject to judicial review are "final agency actions for which there is no other adequate remedy in court." 5 U.S.C. § 704. Finality does not turn on whether or not there has been an application for a declaratory order, for any form of reconsideration, or for an appeal to superior agency authority. *Id.*

**The National Environmental Policy Act** directs all federal agencies to assess the environmental impacts of and consider alternatives to proposed actions that "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). NEPA urges that Federal agencies "use all practicable means and measures" to achieve its policy goals. 42 U.S.C. § 4331(a). NEPA's disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to ensure that the public has sufficient information to evaluate the agency's decision. *See, e.g.*,

*Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 113-14 (D.C. Cir. 1971). NEPA requires its duties be carried out "to the fullest extent possible." 42 U.S.C. § 4332. To this end, the Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 *et seq.* (1978).[3]

NEPA and its implementing regulations require federal agencies to prepare an environmental impact statement ("EIS") for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).[4] If it is not clear whether an agency action requires preparation of an

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[3] In July 2020, the CEQ made revisions to the longstanding NEPA regulations. *See* 85 Fed. Reg. 43304 *et seq.* (July 16, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-07-16/pdf/2020-15179.pdf. The new rules did not take effect until September 2020. *Id.* The implementation memorandum has been withdrawn and the new regulations are under review subject to Executive Order 13990 (January 20, 2021). *See*, "Memorandum for Heads of Federal Departments and Agencies: Implementation of NEPA Regulations," https://ceq.doe.gov/docs/laws-regulations/memo-implementation-updated-regs-2020-07-16-withdrawn.pdf. NCAP will refer to the longstanding 1978 CEQ regulations throughout because those rules were operative and binding on DHS at the time DHS planned and launched Operation Diligent Valor.

[4] An EIS is a "detailed statement" that must describe (1) the "environmental impact of the proposed action," (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) alternatives to the proposed action, (4) "the relationship between local short term uses of man's environment and the maintenance and enhancement of long-term productivity," and (5) any "irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332. The agency must prepare an EIS "if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Klamath-Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006) (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). To trigger this

EIS, the regulations direct agencies to prepare an Environmental Assessment ("EA") to determine if an EIS is required. 40 C.F.R. §§ 1501.4(b), 1508.9.[5] If, based on an EA, an agency determines that an action may have a significant environmental impact, the agency must prepare an EIS. 40 C.F.R. § 1501.4(c). If the agency determines that the impacts will not be significant, the agency must prepare a Finding of No Significant Impact ("FONSI"). 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13.

The DHS NEPA Manual provides that "NEPA applies to a majority of DHS actions." Instruction Manual 023-01-0001-01, Revision 01, "Implementation of the National Environmental Policy Act" (Nov. 6, 2011) at V-1, https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508compliantversion.pdf [*hereinafter*, "DHS NEPA Manual"]. The DHS NEPA Manual states that an EIS is "normally" required when an action includes "activities where the effects on the human

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requirement, a "plaintiff need not show that significant effects will in fact occur, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared." *Id.* (emphasis in original). This "is a low standard." *Id.*

[5] An EA is a "concise public document" that must "briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a). An EA "shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b).

environment are likely to be highly controversial in terms of environmental impacts or involve unique or unknown environmental risks." DHS NEPA Manual at V-14; *see also* 40 C.F.R. § 1508.27(b)(4) ("[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" is a factor an agency must consider in evaluating the intensity of its actions). The DHS NEPA Manual contemplates actions that can be "categorical exclusions" from NEPA, including crowd control training for homeland security personnel, *unless* that training "involves the use of live chemical, biological, or radiological agents." DHS NEPA Manual at A-12.

Even in the event of an emergency, NEPA and its implementing regulations require agencies to consider whether an action will have significant environmental impacts. 40 C.F.R. § 1506.11. In an emergency context, NEPA requires federal agencies to consult with CEQ regarding alternatives to the proposed action, and to limit agency actions to those necessary to control the immediate impact of the emergency. *Id.*

The DHS NEPA Manual emergency protocols require the agency, prior to acting, to (1) consider probable environmental consequences of its actions and to mitigate those consequences to the fullest extent possible; (2) determine the applicability of NEPA; (3) notify or seek approval from the Sustainability and

Environmental Programs (SEP); and (4) determine the appropriate NEPA analysis. DHS NEPA Manual at VI-1.

The CEQ Emergencies Memorandum requires the preparation of a focused, concise EA even if the emergency action is not expected to have significant environmental impacts. Nancy H. Sutley, CEQ, "Memorandum for Heads of Federal Departments and Agencies: Emergencies and NEPA," Attachment 1 (May 12, 2010), *available at* https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Emergencies_and_NEPA_Memorandum_12May2010.pdf (*hereinafter* "CEQ Emergencies Memorandum"). If the action is likely to have significant environmental impacts, DHS can determine whether an existing EA covers the proposed action if there is no existing EA, DHS may consult with CEQ about the potential for "alternative arrangements" to replace an EIS. *Id.* If sufficient time does not exist to complete an EA before starting the proposed emergency action, the agency must complete its NEPA obligations "at the earliest opportunity." DHS NEPA Manual at VI-3.

## *II. Factual Background*

On June 26, 2020, in direct response to racial justice protests, former President Trump issued Executive Order 13933, "Executive Order on Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence." 85 Fed. Reg. 40081-40084 (Jul. 2, 2020) ("Exec. Order 13933"); ER-

90. Section five of Exec. Order 13933 states that "the Secretary shall provide, as appropriate and consistent with applicable law, personnel to assist with the protection of Federal monuments, memorials, statues, or property." *Id.*

In response to Exec. Order 13933, DHS and DHS former-acting Secretary Wolf ("Wolf") established the Protecting American Communities Task Force ("PACT") to "coordinate Departmental law enforcement agency assets in protecting our nation's historic monuments, memorials, statues, and federal facilities." ER-90. Subsequently, beginning on or around July 4, 2020, Wolf deployed approximately 114 law enforcement personnel and agents in the City of Portland with the stated purpose of quelling protests and protecting federal property. *Id.* DHS named this tactical deployment to Portland, which included large volumes of munitions for crowd control, "Operation Diligent Valor." *Id.*

Operation Diligent Valor included DHS forces from (1) Customs and Border Patrol ("CBP"), including the Border Patrol Tactical Unit ("BORTAC"); (2) Immigration, Customs and Enforcement ("ICE"); and (3) Federal Protective Services ("FPS"). ER-91. Operation Diligent Valor involved the repeated and sustained deployment of tear gas and other chemical munitions, including but not limited to CS gas, OC spray and HC smoke, and other weapons. ER-91-93. These weapons have been fired in both downtown Portland and in the South Waterfront neighborhood. *Id.* Operation Diligent Valor included shooting tear gas and other

chemical munitions at peaceful protesters, with little or no warning, and in locations well beyond the federal property DHS purported to protect. *Id.*

### *III. Proceedings Below*

NCAP seeks a judicial order holding unlawful and setting aside Operation Diligent Valor for failing to comply with NEPA, 42 U.S.C. § 4321 *et seq*., and a judicial order compelling the NEPA review that was unlawfully withheld or unreasonably delayed for Operation Diligent Valor. ER-102-103. Specifically, NCAP's Complaint challenges that DHS undertook this major federal action without identifying and analyzing its environmental and human health impacts. ER-102. NEPA requires that DHS *at least* prepare an EA for Operation Diligent Valor to determine whether the impacts are potentially significant, *or* to recognize that Operation Diligent Valor's context and intensity factors indicate significance such that an EIS is required. *Id.* DHS did neither. *Id.* DHS also did not follow any of the CEQ's or its own emergency NEPA regulations. *Id.*

DHS moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, arguing NCAP lacked standing, NCAP's case was moot, and that NCAP failed to allege a "final agency action" as required by the APA. In support of these arguments, DHS submitted three exhibits. *See* ER-4, fn 1. At oral argument, DHS indicated it was only proceeding on the latter grounds—no final agency action. ER-33-34. DHS also argued that NCAP's case should be dismissed

under Fed. R. Civ. P. 12(b)(6) for failure to state a claim because Operation Diligent Valor was a criminal enforcement action that is exempt from NEPA. ER-17.

After briefing and oral argument, on August 3, 2021, the district court granted DHS's Motion to Dismiss without prejudice, denied NCAP's Motion to Strike DHS's Exhibits to their Motion to Dismiss,[6] and entered a Judgment dismissing the case without prejudice. ER-5; ER-4 n. 1, ER-20. The district court concluded that it did not have jurisdiction because Operation Diligent Valor was not a final agency action within the meaning of the APA. ER-5, 20. Even assuming jurisdiction, the district court further concluded that NCAP did not state a claim for relief because Operation Diligent Valor was exempt from NEPA's definition of "major federal action," adopting a broad construction of the criminal enforcement action exception. ER-19-20.

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[6] NCAP moved to strike Exhibit 1 (DHS Policy on the Use of Force (2018)), Exhibit 2 (DHS Information Regarding First Amendment Protected Activities, First Amendment Policy (2019)), and Exhibit 3 (Declaration of Gabriel Russell, Federal Protective Service Regional Director and DHS Rapid Deployment Force Commander for Operation Diligent Valor) on the grounds these exhibits contain redundant, immaterial, impertinent, or scandalous matter and are improper extra-record evidence not subject to the narrow exceptions for administrative record cases. ER-215 (Dkt. No. 34). The district court claimed to have considered the exhibits "solely for Defendants' jurisdictional challenge." ER-4 n. 1, ER-11 n. 5. NCAP maintains the position that, especially with respect to the Russell Declaration (ER-204-209), DHS's factual allegations are not properly before the court in the first place and should not be considered in this type of case.

Concerning final agency action, the district court construed DHS's 12(b)(1) Motion to Dismiss as a factual attack. ER-11; *see also* ER-60 (transcript of DHS's counsel telling the district court that their argument "doesn't really revolve around a facial or a factual inquiry" but the court may still consider it's exhibits). The court then looked at facts outside of the Complaint to conclude that Operation Diligent Valor was "routine, temporary, tentative, and responsive to the actions of others." ER-13, 16. The court further concluded that "the record does not support" NCAP's "claim that Operation Diligent Valor included a planned policy to use munitions on peaceful people gathered near federal properties." ER-13. In analyzing the finality of the court's characterization of Operation Diligent Valor, the district court relied on the *Bennett* test articulated by the Supreme Court which holds that an "agency action is 'final' when (1) the agency reaches the 'consummation' of its decision[-]making process and (2) the action determines the 'rights and obligations' of the parties or is one from which 'legal consequences will flow.'" ER-12; *Rattlesnake Coal. v. U.S. E.P.A.,* 509 F.3d 1095, 1103 (9th Cir. 2007) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The district court concluded Operation Diligent Valor did not satisfy the first and second prongs of *Bennett*. ER-13, 16-17.

Regarding NEPA's criminal enforcement action exception and DHS's 12(b)(6) motion, DHS only cursorily raised this point in their briefing without legal

or factual support. At oral argument, DHS similarly offered no context of the legal requirements under which the narrow exception applies, cited to the incorrect regulation, *and* incorrectly informed the district court that the applicable regulation had not changed in the 2020 CEQ amendments it relied on.[7] Nevertheless, the district court concluded that Operation Diligent Valor was DHS merely "sending additional law enforcement officers to address criminal activity on a temporary basis to prevent crime and enforce criminal laws," without citing any record or evidence. ER-19. The district court further concluded that because NCAP failed to present legal authority showing that the court's characterization of Operation Diligent Valor was *not* a "criminal enforcement action," then it would grant DHS's 12(b)(6) motion. ER-19-20.

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[7] *See* note 3, *supra* (discussing the history of the CEQ regulation revisions); *see also* ER-60 (transcript of counsel for DHS incorrectly telling the district court that the regulation "has not been altered in any way"). As NCAP discusses on page 44, *infra*, the 2020 revisions dropped a critical word in its articulation of the relevant exception. [8] *See* ER-42-43 (NCAP counsel describing to the district court the risk of converting the motion to dismiss into a motion for summary judgment without NCAP having an opportunity for discovery).

## SUMMARY OF THE ARGUMENT

The district court applied the incorrect standard of review in granting both DHS's 12(b)(1) and 12(b)(6) motions, and misconstrued NEPA's exception for "bringing judicial or administrative…criminal enforcement actions" as a broad exception for all manner of crowd control activity. The Ninth Circuit should find the district court improperly dismissed NCAP's Complaint and remand the case for review consistent with the correct standards.

Pursuant to controlling Supreme Court and Ninth Circuit precedent, when a case relies on federal question jurisdiction, before the district court can grant a motion to dismiss for lack of subject matter jurisdiction, it is required to find that either the federal claim was immaterial and made solely for the purpose of obtaining federal jurisdiction *or* wholly insubstantial and frivolous. *Sun Valley Gas., Inc. v. Ernst Enters.,* 711 F.2d 138, 140 (9th Cir. 1983) ("Jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional and must satisfy the requirements specified in [*Bell v. Hood*, 327 U.S. 678 (1946)]"). The district court erred by failing to comply with *Bell*.

The district court also should have presumed the truth of NCAP's allegations but instead rejected them. ER-11 ("[The court] also need not presume the truthfulness of the plaintiffs' allegations." (citations omitted)). Instead the district court gave deference to DHS's scant additions to the record. This decision to

dismiss NCAP's Complaint was also well before NCAP had a chance to investigate or interrogate the facts through discovery and before requiring DHS to produce a record of is decisionmaking. The district court's wrong approach infected both the 12(b)(1) and12(b)(6) analyses. That was inevitable because both the jurisdictional and merits questions turn on the factual characterization of Operation Diligent Valor; the analyses are inextricably intertwined.

NCAP alleged that Operation Diligent Valor was DHS's tactical plan to quell protest in Portland, a plan that included the sustained use of large volumes of tear gas and other chemical munitions. *See, e.g.,* ER-80-81, ER-90. NCAP's allegations described not only an agency action, but also a final and a major one. NCAP also alleged that DHS did no NEPA review when it was required to do so. *See, e.g.,* ER-102-103.

Operation Diligent Valor qualifies as a "final agency action" under the APA because the plan's implementation indicated there was a consummation of DHS's decision-making process on how it would achieve its goals of quelling protest and protecting federal property in Portland. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (articulating the first prong of the two-part final agency action test). Operation Diligent Valor also had direct consequences for the legal rights and obligations of protesters and police alike. *See id.* at 178 (articulating the second prong of the final agency action test).

Furthermore, NEPA's narrow exception for actions that amount to "bringing a judicial or administrative…criminal enforcement action" does not shield DHS from its NEPA obligations for Operation Diligent Valor. It is inapposite whether some people among or alongside the protesters in Portland were engaged in criminal activity. Operation Diligent Valor was not a targeted criminal enforcement response; it espoused a broader mission. NCAP presented clear and detailed factual allegations that Operation Diligent Valor included severe and sustained weapon use on peaceful protesters and was a generalized crowd control plan. Common sense and the United States Constitution's guarantee of basic freedoms militate against applying the criminal enforcement exception broadly in this context because it criminalizes peaceful protest well beyond the plain meaning of the regulatory language. *See, e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 919 (1982) ("guilt by association alone is an impermissible basis upon which to deny First Amendment freedoms").

NCAP's allegations plainly satisfy their pleading burdens under NEPA and the APA. Both DHS's motion and the district court's order fail to show how NCAP's allegations are deficient and warrant dismissal. Therefore, the district court should be reversed and the case should be remanded for review under the appropriate standards.

## STANDARD OF REVIEW

This Court reviews *de novo* the district court's grant of DHS's motion to dismiss for Fed. R. Civ. P. 12(b)(1) lack of subject matter jurisdiction, and, assuming jurisdiction, for Fed. R. Civ. P. 12(b)(6) failure to state a claim for relief. *See Bishop Paiute Tribe v. Inyo Cty.,* 863 F.3d 1144, 1151 (9th Cir. 2017) (stating the standard for 12(b)(1)); *see also Wilson v. Lynch,* 835 F.3d 1083, 1090 (9th Cir. 2016), *cert. denied sub nom.* (stating the standard for 12(b)(6)).

## ARGUMENT

### I. The District Court applied the incorrect standard of review to DHS's 12(b)(1) motion.

The district court applied the incorrect standard of review to DHS's Fed. R. Civ. P. 12(b)(1) argument, which sought to dismiss NCAP's Complaint for lack of subject matter jurisdiction. Rule 12(b)(1) attacks can be either facial, addressing the legal sufficiency of a complaint's allegations, or factual, where a defendant "disputes the truth of allegations that, *by themselves*, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). While DHS never claimed to be making a factual attack, the district court construed their arguments as one. ER-11 n. 5. In a Rule 12(b)(1) factual challenge, the court may look beyond the complaint to materials provided by defendants and also need not presume the

truthfulness of the plaintiff's allegations. *White v. Lee*, 227 F.3d at 1241-2 (citations omitted). However, "a jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Safe Air*, 373 F.3d at 1039 (quoting *Sun Valley*, 711 F.2d at 139) (internal quotations omitted)).

Consistent with the above rule of avoiding factual findings on the merits at the motion to dismiss stage, the Ninth Circuit has held that "a dismissal for lack of statutory standing is properly viewed as a dismissal for failure to state a claim rather than a dismissal for lack of subject matter jurisdiction." *Vaughn v. Bay Environmental Management, Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009); *accord Steel Co. v. Citizens for a Better Environment*, 523 U.S 83, 92-3 (1998) (describing why a scheme that would turn every statutory question into a jurisdictional one is something "to condemn"). As discussed in Part I.B., *infra*, the district court is required to take NCAP's factual allegations as true when considering a motion to dismiss for failure to state a claim. *See also National Council of La Raza v. Cegavske*, 800 F.3d. 1032, 1039 (9th Cir. 2015) (citing *Vaughn* for the premise that review of a dismissal for lack of statutory standing requires the Court to presume facts alleged in the complaint are true).

When a case, like this one, is premised on federal-question jurisdiction, jurisdictional dismissals are "exceptional." *Safe Air*, 373 F.3d at 1039. In such cases, defendants must meet the high bar established in *Bell v. Hood*, 327 U.S. 678 (1946). *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 140 (9th Cir. 1983) ("Jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional and must satisfy the requirements specified in *Bell*…"). In *Bell,* the Supreme Court held that when a suit is brought under the Constitution or a federal statute, the court "*must* entertain the suit" (emphasis added), and jurisdictional dismissals are warranted only in two situations: (1) "where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction" or (2) "where such claim is wholly insubstantial and frivolous." 327 U.S. at 682-83.

NCAP's case is premised on federal question jurisdiction, arising under the APA and contending that DHS's failed to comply with NEPA. ER-83, ER-103. Thus, the district court was required to make the findings required by *Bell*. The district court did not consider *Bell,* let alone make the requisite findings. DHS also never argued they satisfied *Bell.* The district court's acceptance of DHS's post-hoc characterization of events instead of NCAP's allegations and supporting declarations was wholly improper.

### *A. NCAP's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction, nor is it wholly insubstantial and frivolous.*

NCAP's case has one claim - that DHS violated the APA by failing to comply with NEPA's primary requirement that agencies undertake environmental analysis for actions that may significantly impact the human environment. ER-103. Similar to the plaintiffs in *Bell*, NCAP's claim "form[s] the sole basis of the relief sought" and thus is not immaterial and made solely for the purpose of obtaining federal jurisdiction. *Bell v. Hood,* 327 U.S. 678, 683, 66 S. Ct. 773, 776 (1946). If NCAP did not have this sole federal claim, or had other claims and merely "tacked on" a federal claim in an effort to obtain jurisdiction, a federal court would not have jurisdiction over the case and could not properly disregard allegations in the complaint to the contrary. This is not the situation here. NCAP's sole claim is federal, and thus cannot be deemed "immaterial" under Rule 12(b)(1). Here, the district court clearly had subject matter jurisdiction over NCAP's one APA claim. 28 U.S.C. §§ 1331; 1346; 2201; 2202; 5 U.S.C. § 706.

Neither is NCAP's claim wholly insubstantial and frivolous. NCAP claims that Operation Diligent Valor was unlawful because it did not comply with NEPA is a recognized cause of action under the APA. *Churchill Cty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001) ("NEPA does not contain a separate provision for judicial review; we therefore review an agency's compliance with NEPA under [the

APA]"). NEPA ensures that certain agency actions, to be lawful, grant the public access to a particular type of information, provide transparent analysis and thoughtful government decision-making, permit public participation in the government's decision-making process, and provide an opportunity to challenge those decisions. *See, e.g.*, *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 113-14 (D.C. Cir. 1971); *accord Oregon Natural Desert Ass'n v. BLM,* 625 F.3d 1092, 1101-02 (9th Cir. 2010) (citing *Calvert Cliffs* with approval). When DHS launched Operation Diligent Valor, it undertook a "final agency action" that triggered the need for environmental analysis under NEPA. *See*, Part II, *infra*. Furthermore, DHS has an instructional manual that required the agency to perform specific NEPA compliance actions, even in emergency situations, and required NEPA review for crowd control trainings that involved live, uncontained chemical munitions. DHS NEPA Manual at VI-1, A-12. It can be hardly frivolous or insubstantial for NCAP to take a position consistent with DHS's own understanding of the law.

Finally, in *Bell,* the Supreme Court found that just because defendants argued that the statute at issue did not apply and arguably did not authorize the damages being sought by the plaintiffs, this "does not show that petitioners' cause is insubstantial or frivolous" and thus lacking in subject matter jurisdiction at the motion to dismiss stage. 327 U.S. at 683. Similarly, even though DHS argues that

the APA does not apply because Operation Diligent Valor is not a "final agency action," they only proffer factually-dependent disputes over the nature of Operation Diligent Valor, not that NCAP's case is wholly insubstantial and frivolous. NCAP's case should not be punished with the extraordinary remedy of dismissal.

### *B. DHS's 12(b)(1) motion depends on the same facts central to the merits of NCAP's case so the Court should presume the truth of NCAP's allegations.*

DHS and the district court both had to describe the nature of Operation Diligent Valor to answer the questions about whether Operation Diligent Valor was a reviewable action under the APA (jurisdiction) and whether Operation Diligent Valor was a lawful action warranting relief under the APA (merits). Where jurisdictional and substantives issues are so intertwined, a Rule 12(b)(1) dismissal is inappropriate. *Safe Air*, 373 F.3d at 1039-40. Furthermore, the district court should have presumed the truth of NCAP's allegations because DHS attacked NCAP's statutory standing.

The district court made unsupported characterizations of DHS's actions, and relied on an inaccurate portrayal of NCAP's allegations untethered to NCAP's Complaint. The district court's factual findings were based upon two policy documents irrelevant to NCAP's claim, on an untailored declaration that closely mirrored one that DHS filed in an unrelated lawsuit, as well as information not put

into the record by either party. In liberally finding facts, the district court concluded, for purposes of its jurisdictional analysis, that Operation Diligent Valor was "routine, temporary, tentative, and responsive to the actions of others." ER-16. Notably, in its merits analysis, the district court similarly described Operation Diligent Valor as "sending additional law enforcement officers to address criminal activity on a temporary basis to prevent crime and enforce criminal laws." ER-19. In short, the district court's presumed temporary and reactive nature of Operation Diligent Valor drove both the jurisdictional and merits analyses, and the decision cannot stand.

The district court should have presumed the truth of NCAP's detailed allegations that Operation Diligent Valor was a planned operation to use large volumes of chemical and other munitions on peaceful protesters. In *Vaughn*, this Court considered the appropriate standard of review for an ERISA case in which the defendant employer challenged whether plaintiffs alleged facts showing they were a "participant" for purposes of having statutory standing to bring their ERISA claims. 567 F.3d at 1024. Similarly, DHS challenges whether NCAP has alleged an element that would give them standing to bring an APA claim – final agency action. The *Vaughn* court concluded that considering whether a plaintiff alleges an element giving rise to statutory standing should be considered under the 12(b)(6) standard, including taking facts alleged in the complaint as true. *Id.* Under this

standard, Operation Diligent Valor is a final agency action subject to judicial review under the APA. *See,* Part II, *infra*.

If not a dismissal for lack of statutory standing, then the district court's dismissal is better understood as a grant of summary judgment. *Safe Air*, 373 F.3d at 1040. However, that grant was improper because DHS did not move for summary judgement, DHS has so far refused to produce an administrative record, and at no point was NCAP given an opportunity to conduct discovery.[8] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (discussing the purpose of Rule 56 indicates that summary judgment is only proper "after adequate time for discovery and upon motion" such that there is an "utter failure of proof" rendering facts immaterial). Facts were central to the district court's decision, not immaterial, and NCAP should at least be given a chance to interrogate them prior to having their case dismissed.

This approach is consistent with judicial policies of fundamental fairness and maintaining an appropriate separation of powers. If the federal executive's sovereign immunity is protected by judicial deference to a limited set of facts or a post-decisional rationalization that an agency chooses to present, the executive could manipulate APA review in any context where the executive controls public

[8] *See* ER-42-43 (NCAP counsel describing to the district court the risk of converting the motion to dismiss into a motion for summary judgment without NCAP having an opportunity for discovery).

access to information regarding the action or decision. Reliance on *Bell* and applying the 12(b)(6) standard properly mitigates these concerns, while protecting the federal government from unnecessary litigation expenses.

## II. Operation Diligent Valor is a final agency action subject to review in federal court.

Taking NCAP's allegations as true, Operation Diligent Valor is a final agency action subject to judicial review under the APA. Operation Diligent Valor arose out of the July 1, 2020, establishment of the Protecting American Communities Task Force (PACT) which DHS created in response to the June 26, 2020, Executive Order. ER-90. Operation Diligent Valor was DHS's plan to quell protest and protect federal property in Portland. ER-80-81 ¶¶ 4-7; ER-92-93 ¶¶ 64-70. DHS planned to achieve that mission by deploying a unique and large contingent of law enforcement to the City of Portland, including SWAT-like border patrol units, who were armed with an unprecedented volume of tear gas and other chemical munitions to be used on peaceful protesters. *Id.*; ER-91 ¶ 54. In addition to physically harming protestors, bystanders, and others present or in the vicinity, Operation Diligent Valor harmed the environment by introducing chemicals, sediment, and munitions debris into the Willamette River ecosystem. Operation Diligent Valor subjected the river, wildlife, and recreationalists to potentially severe hazards. ER-93-99.

Operation Diligent Valor is a "final agency action" subject to review under the APA. The APA defines "agency action" to include "the whole or a part of an agency, rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The definition of "agency action" is meant to be "expansive" and "to cover comprehensively every manner in which an agency may exercise its power." *Wild Fish Conservancy v. Jewell,* 730 F.3d 791, 800 (9th Cir. 2013) (citation omitted); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.,* 460 F.3d 13 (D.C. Cir. 2006). Indeed, the district court did not conclude that Operation Diligent Valor was not an "agency action," only that it was a "temporary, tentative action," not a final one. ER-13.

However, the district is incorrect. Operation Diligent Valor *is* a "final" agency action subject to review under the APA. The Supreme Court articulated the *Bennett* test to determine if an agency action is "final." Under this test, an "agency action is 'final' when (1) the agency reaches the 'consummation' of its decision[-]making process and (2) the action determines the 'rights and obligations' of the parties or is one from which 'legal consequences will flow.'" *Rattlesnake Coal. v. U.S. E.P.A.,* 509 F.3d 1095, 1103 (9th Cir. 2007) (citing *Bennett v. Spear,* 520 U.S. at 177-78). The finality determination considers "both legal and practical consequences." *Las Americas Immigrant Advocacy Ctr. v. Trump,* 475 F. Supp. 3d

1194, 1216 (D. Or. 2020). Operation Diligent Valor satisfies both prongs of the *Bennett* test.

### *A. Operation Diligent Valor is a consummation of DHS's decision-making process.*

Under Ninth Circuit case law, DHS's decision-making is sufficiently consummated to satisfy the first prong of *Bennett*. NCAP alleged that this deployment prescribed a particular set of violent tactics (chemical and other munitions) in a particular location (Portland) for a particular purpose (to quell protest). *Cf. Whitewater Draw Natural Resources Conservation District v. Mayorkas*, 5 F.4th 997, 1008 (9th Cir. 2021) (concluding that the DHS NEPA Manual is not a final agency action because "it does not prescribe any action in any particular matter").

First, DHS determined that it has *jurisdiction* to create the PACT and send a special unit to engage in crowd control throughout Portland as part of protecting federal properties. *See Navajo Nation v. U.S. Dep't of Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016) (for "first *Bennett* requirement, an agency's determination of its jurisdiction is the consummation of agency decisionmaking regarding that issue."). It is inapposite that DHS relied on 42 U.S.C. § 1315(a) to make its determination. *See* ER-13 (emphasizing that Operation Diligent Valor was a decision "taken pursuant to DHS's existing statutory authority"). Of course a federal agency has to rely on *some* legal authority for its actions. It is common

sense that the source of the authority to make a specific type of plan does not determine the finality of a particular operational plan exercising that general authority.

The July 1, 2020 PACT directive to deploy agents to Portland indicates that decisions establishing the Operation Diligent Valor were consummated by July 2020. *See Wash. v. DHS,* 2020 WL 1819837, at *4 (holding ICE's directive authorizing civil immigration arrests inside courthouses satisfies *Bennett* test because it "constitutes ICE's most recent and 'final' word on who may be arrested *inside a courthouse*[.]") (emphasis in original).

Second, the method and content of the July 1, 2020 PACT directive to deploy agents is the type of "formal notice" that courts recognize as final agency action. *SF Herring*, 946 F.3d at 579-81 (when agency states a "definitive position in formal notices, confirm[s] that position orally, and then send[s] officers out into the field to execute on the directive," then the decisionmaking is "clearly consummated…[b]y taking the additional step of enforcing its formal notices against the fishermen, the in-water 'no fishing' orders reflected…the 'consummation of the agency's decisionmaking process[.]'") (citation omitted).

Third, even if the "agency has not dressed its decision with the conventional procedural accoutrements of finality," the agency's "own behavior" can "belie[] the claim that its interpretation is not final." *Whitman v. Am. Trucking*

*Associations,* 531 U.S. 457, 478-79 (2001). Despite multiple lawsuits (including this one), negative international attention (ER-93 ¶ 72), and a recent change in Presidential and agency leadership, DHS's continued use of the chemical and other munitions on protesters in Portland into 2021(ER-169-76) illustrates the agency viewed Operation Diligent Valor as final. Implemented agency action is unquestionably final.

Finally, the decision to arm agents with chemical munitions for crowd control use is also consummated agency action. *See Forest Service Employees for Environmental Ethics v. USFS,* 397 F. Supp. 2d 1241, 1252 (D. Mont. 2005) (U.S. Forest Services' "decision to use chemical fire retardant" to fight wildfires "is the consummation of the agency's decisionmaking, this decision is not tentative or interlocutory, [and] the agency does not intend to change its mind[.]") (citing *Bennett*, 520 U.S. at 177-78). DHS attempted in the briefing below to frame their extended use of significant quantities of chemical munitions as merely "the decisions of individual law enforcement personnel [whether] to use," (ER-214, No. 30, p. 22) but this argument ignores the role of DHS in providing the munitions, training the agents, and giving agents authority to use munitions. *See FSEEE,* 397 F. Supp. 2d at 1251 (holding that case-by-case decisions by local incident commanders to use chemical fire retardants was still "final agency action"

consistent with the policy that NEPA applies to "the fullest extent possible") (quoting *Jones v. Gordon,* 792 F.2d 821, 826 (9th Cir. 1986)).

The district court's attempt to distinguish *FSEEE* from this case is misguided. As the *FSEEE* court noted, the Forest Service effectively had a policy to use chemical fire retardant to fight fires, and the use of chemical fire retardants was an important tool in the agency's toolbox. *FSEEE,* 397 F. Supp. 2d at 1244. Similarly, DHS effectively had a policy to use tear gas and chemical munitions when conducting crowd control. Without such a policy, the individual law enforcement agents who participated in Operation Diligent Valor would not have the munitions or authority to deploy tear gas and other chemical munitions against protestors without any condemnation or reprimand from their supervisors, agency leadership, or other executive leadership. In *FSEEE*, the district court held that even case-by-case decisions to use chemical fire retardants were a "final agency action" subject to NEPA. *FSEEE*, 397 F. Supp. 2d at 1251. It is not disputed that here, Operation Diligent Valor involved one or many final, irreversible decisions to deploy large volumes of tear gas and other chemical munitions into protest crowds in downtown Portland. ER-7.

It is notable that even the district court characterizes Operation Diligent Valor as an "agency decision." ER-13. The district court only concluded that somehow despite making a decision, it was not final because the decision could be

changed. *See* ER-13-15 (showing the district court repeatedly using the word "temporary" to describe Operation Diligent Valor).

This argument – noticeably devoid of *any* case support – also fails. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.,* 578 U.S. 590, 598 (2016) (holding the possibility that an agency "may revise" its decision based on "new information" is a "common characteristics of agency action [] and does not make an otherwise definitive decision nonfinal."); *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider…does not suffice to make an otherwise final agency action nonfinal.").

Operation Diligent Valor was not an action that was "merely tentative or interlocutory" in nature. In *Bennett,* the Supreme Court determined that actions which were purely advisory and in no way affected the legal rights of the relevant actors did not constitute final agency action. *Bennett*, 520 U.S. at 178. The Supreme Court observed that in *Franklin v. Massachusetts,* 505 U.S. 788 (1992), the Secretary of Commerce's presentation of a report concerning the decennial census was not a "final agency action" because the report carried "no direct consequences" and served "more like a tentative recommendation than a final and binding determination." *Bennett*, 520 U.S. at 178. Operation Diligent Valor was not a purely advisory action and is not akin to *Franklin v. Massachusetts*. Operation Diligent Valor carried direct consequences for the people in Portland

who were subjected to tear gas and other chemical munitions while at or near protests, even those well beyond the vicinity of federal property, and for DHS employees transported to Portland to implement Operation Diligent Valor. Also, Operation Diligent Valor was not "like a tentative recommendation." A recommendation is a suggestion or proposal on a course of action. Characterizing Operation Diligent Valor in that manner defies logic.

Second, in *Bennett*, the Supreme Court observed that the action in *Dalton v. Specter,* 511 U.S. 462 (1994) was also not a "final agency action" because the Secretary of Defense's base closure recommendations to the President were not binding on the President in any way, leaving the President free to take a different course of action. *Bennett*, 520 U.S. at 178. As noted above, Operation Diligent Valor is not merely a recommendation of action – it caused real events with real consequences - and this action challenges a course of action that went beyond consideration of alternative actions and well into implementation.

The fact that there may have been a "prompt" reduction of presence of personnel does not diminish the finality of the original agency action. ER-14. The fact remains that DHS did decide to and did send law enforcement personnel to Portland, that these personnel used tear gas and other chemical munitions against protestors for several months and that these chemicals continue to be present in the human environment. ER-80-82.

### *B. Operation Diligent Valor caused direct legal consequences.*

The second prong of the *Bennett* test is that agency action is final when "the action determines the 'rights and obligations' of the parties or is one from which 'legal consequences will flow.'" *Rattlesnake*, 509 F.3d at 1103 (citing *Bennett,* 520 U.S. at 177). Again, Ninth Circuit case law provides ample support that Operation Diligent Valor satisfies this prong.

Legal consequences flow from DHS's decision to use chemical munitions for crowd control, including the environmental impact of that decision. *See FSEEE*, 397 F. Supp. 2d at 1252 ('legal consequences' flow from the USFS' decision "to use chemical fire retardant" in fighting wildfires because "chemical retardant has been dumped on [plaintiff employees] and has resulted in fish kills.").

Additionally, legal consequences flow from DHS's decision to use force against protesters in Portland. *See Wash. v. DHS,* 2020 WL 1819837, at *4 (holding ICE's directive authorizing arrests inside a courthouse was final agency action because it had the requisite "legal consequences" for individuals who might be arrested); *SF Herring,* 946 F.3d at 580-81 (by taking "additional step" of enforcing formal notices against fishermen, the orders reflected agency's determination to create "legal consequences" for violators) (internal quotation marks and citation omitted). The First and Fourth Amendment rights of those who

were subjected to Operation Diligent Valor's force while they were simply trying to protest certainly experienced legal consequences.

An agency action may also be final if the action has a "direct and immediate" effect on "the day-to-day business" of the subject party. *Oregon Natural Desert Ass'n v. U.S. Forest Service,* 465 F.3d 977, 987 (9th Cir. 2006) (citing *Ukiah Valley Med. Ctr.,* 911 F.2d 261, 264 (9th Cir. 1990)). Using the threat of sanction for force compliance with an agency's directive is the type of finality *Bennett* contemplates. *See* 465 F.3d at 987 (concluding that annual operating instructions to grazing permittees met the second prong of *Bennett* because they carried legal consequences of a sanction for failure to comply with the permit directives). While Operation Diligent Valor did not put forth directives via a formal permit, NCAP has alleged it involved the use of violence (i.e. a sanction) to enforce a directive to disperse protesters in Portland. Furthermore, Operation Diligent Valor caused tear gas and other chemical munitions to enter storm drains leading directly to the Willamette River. ER-96. The presence of chemicals, sediment, and munitions debris from Operation Diligent Valor in the Willamette River negatively impacts water quality, and recreationalists who use the river for a variety of reasons on a regular basis. ER-96-97. Further, wildlife whose habitat is the river are subject to negative effects, which in turn also negatively impacts recreationalists who regularly bird-watch, fish and otherwise

enjoy the presence of wildlife in the Willamette River. *Id.* These effects came directly and immediately from the barrels of Operation Diligent Valor's tear gas and chemical munitions guns.

The repeated enforcement of dispersal orders and attendant use of chemical and other weapons against large swaths of the public, for which DHS is facing several lawsuits, surely suffice to satisfy the second prong of the *Bennett* test.

## III. The District Court applied the incorrect standard of Review to DHS's 12(b)(6) motion.

The district court improperly ruled that even if it had jurisdiction over NCAP's claim, the claim should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim because Operation Diligent Valor was subject to a "criminal enforcement action" exception to the CEQ definition of "major federal action" triggering NEPA review. ER-17. The general rule to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss is that a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of [the] claim which would entitle [plaintiff] to relief." *Buckey v. County of Los Angeles,* 968 F.2d 791, 794 (9th Cir.1992) (quoting *Love v. United States,* 915 F.2d 1242, 1245 (9th Cir.1989)) (further citations omitted). All allegations of material fact are taken as

true and construed in the light most favorable to the plaintiff. *See id.* For the purposes of a 12(b)(6) motion, "[r]eview is limited to the contents of the complaint." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 755 (9th Cir. 1994).

NCAP here properly alleged in the Complaint that DHS's Operation Diligent Valor was a major federal action subject to NEPA, ER-82-83 ¶¶ 16-19, ER-102 ¶ 123, and alleged facts to demonstrate that DHS's activities fell well outside of the criminal enforcement exception. NCAP alleged that DHS was implementing Operation Diligent Valor pursuant to the White House's June 26, 2020 Executive Order to protect "Federal Monument, memorials, statutes, or property." ER-90 ¶¶ 50-53. By its own terms, the protection of federal property is not criminal enforcement.

NCAP further alleged that DHS was attempting to quell public protests by engaging and firing chemical munitions at peaceful demonstrators with little or no warning and well beyond federal property DHS was purportedly protecting. ER-80-81 ¶¶ 4-7; ER-92-93 ¶¶ 64-70. This is not criminal enforcement. These allegations in the Complaint were bolstered by supporting declarations. *See, generally,* ER-105-188.

The district court acknowledged NCAP's allegations: "Plaintiffs characterize as DHS's planned mission to deploy personnel to quell protests using large volumes of chemical and other munitions" ER-12; ER-13 ("Plaintiffs claim that

Operation Diligent Valor included a planned policy to use munitions on peaceful people gathered near federal properties."). However, the district court did not presume the truth of NCAP's factual allegations, instead explicitly relied on DHS's Russell Declaration which it asserts "makes clear that Operation Diligent Valor constituted a temporary infusion of law enforcement officials to assist overwhelmed officials on the ground" and not "an operation that would use significant amounts of tear gas and other munitions that might cause environmental harm." ER-13. In doing so, the district court erred because it was relying on materials outside of the complaint and dismissing the truthfulness of NCAP's allegations.

The district court erred in that it did not "presum[e] that the general allegations [in a complaint] embrace those specific facts necessary to support the claim." *Am. Fed'n of Gov't Employees Local 1 v. Stone*, 502 F.3d 1027, 1032-32 (9th Cir. 2007) (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990)). Instead, the district court stated its analysis framework was based on *Shroyer*. However, it did not properly state the standard, ignored the U.S. Supreme Court and Ninth Circuit case law which the *Shroyer* decision relied upon, and conducted its analysis completely independent of the parameters established by that case law.

*Shroyer* states that "A motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when

the complaint lacks sufficient factual allegations to state a facially plausible claim for relief." *Shroyer v. New Cingular Wireless Servs. Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). The district court cited this standard, but then proceeded to discount and disregard the facts in the Complaint, adopting its own characterizations of Operation Diligent Valor. The district court shoehorned its decision through an incorrect rationale and relied on a narrow NEPA exception to do so. The result is inappropriate on a motion to dismiss.

*Shroyer* relied on *Navarro*, which states "A claim may be dismissed only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) (rehearing and rehearing *en banc* denied) (citing *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957), *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996)).[9] Under *Shroyer*, and *Navarro*, NCAP present provable facts sufficient to support a NEPA claim, and a clearly cognizable legal theory under NEPA.

In *Shroyer*, this Court agreed the plaintiff had successfully stated a claim for breach of contract, but not his fraud and deceit claims which require pleading with

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[9] *Navarro* predates *Twombly* and *Iqbal*, and *Shroyer* postdates these two cases. The Ninth Circuit has continued to maintain the language stated in the *Navarro* standard. *See, e.g., Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) ("A Rule 12(b)(6) motion tests the legal sufficiency of a claim. A claim may be dismissed only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") (citing *Navarro* and *Conley*).

greater specificity. 622 F.3d at 1044. The district court held, and this Court agreed, that the *Shroyer* plaintiff had based his fraud claims on "information and belief," on "commercial puffery" that a reasonable consumer could not rely, and the mistaken belief he did not have to prove actual reliance. *Shroyer*, 622 F.3d at 1042-43. [10] NCAP has not relied solely on "information and belief" allegations, unreliable information, or a mistake in understanding the burden of proof.

At this stage of the proceedings, where NCAP presented one single claim for relief, all the Complaint must show is that it is *plausible* that DHS acted unlawfully as to NEPA. Only if it appears "beyond doubt" that *no set of facts* will support the claim can it be dismissed. Instead, the district court discredited all of NCAP's factual allegations, apparently construed the factual allegations as legal conclusions, and relied on DHS's limited factual allegations. The district court's analysis was incorrect under *Shroyer, Navarro, Cahill,* and *Iqbal*, and this case must be reversed and remanded.

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[10] Of the 72 factual allegations in NCAP's Complaint, only 3 were identified as being on information and belief. *See* ER-90, ¶ 53, n. 4 (DHS deployment included several sub-agencies and potentially private entities); ER-91 ¶ 60 (alleging at least seven stormwater drains in the vicinity of the Justice Center and the ICE Detention Center); ER-92 ¶ 64 (photograph showing a device used to emit what Plaintiffs believe to be HC smoke). None of these 3 facts justify dismissal of NCAP's entire case.

## IV. Operation Diligent Valor was not a criminal enforcement action that is exempt from NEPA.

In addition to incorrectly reviewing the 12(b)(6) argument under *Iqbal, Shroyer, and Navarro,* the district court's decision erred in its conclusion that even if NCAP successfully pleaded a claim for a final agency action, it did not plead that Operation Diligent Valor was unlawful under NEPA because the regulatory criminal enforcement exception exempts Operation Diligent Valor from NEPA's requirements. First, at the motion to dismiss stage, it is improper to dismiss NCAP's entire case on DHS's unsubstantiated criminal enforcement argument. There have been no cases that have interpreted this criminal enforcement exemption from NEPA, and its application turns on the factual characterization of Operation Diligent Valor as discussed above. This Court ruled similarly in *Navarro* when it allowed plaintiff's case to proceed even with defendants' claims of indemnification, as discovery and summary judgment would be the appropriate procedural tool to address those defenses. *Navarro*, 250 F.3d at 733-34. Second, NCAP's complaint did not describe Operation Diligent Valor as "bringing a judicial or administrative…criminal enforcement action." *See, e.g.*, ER-80 ¶ 4 ("The Department of Homeland Security (DHS) planned to quell []protests in Portland in an action called 'Operation Diligent Valor' "), ER-94 ¶ 77 (describing Operation Diligent Valor's use of expired tear gas "on Portland demonstrators"); ER-100 ¶ 115 (describing calls for investigations into Operation Diligent Valor,

including "the nightly use of tear gas and munitions against peaceful protesters"). NCAP's Complaint describes violent crowd control tactics used on peaceful protesters in Portland, and protest is not a crime, and therefore would not fit within the criminal enforcement exception.

In fact, NCAP clearly identify factual support – culled from DHS's own NEPA Manual - that pushes NCAP's Complaint well over the "plausible'" threshold. DHS's own NEPA Manual concludes that an Environmental Assessment is "normally" required for "[n]ew law enforcement field operations for which the environmental impacts are unknown, for which or any potential significant environmental impacts could be mitigated to the level that they are no longer significant, or for which the potential for significant environmental controversy is likely." DHS NEPA Manual at V-9. NCAP alleged facts that established that Operation Diligent Valor was a novel deployment of federal personnel, ER-91, which involved potentially significant environmental and human health impacts. ER-93-99 ¶¶ 72-108. The DHS NEPA Manual further requires NEPA analysis for "activities for actions that are likely to receive high-level executive branch and/or national attention, including those that are likely to require the attention of either the Deputy Secretary or the Secretary." DHS NEPA Manual at IV-2. NCAP alleged facts that established that Operation Diligent Valor received high-level attention. ER-93 ¶¶ 70-72. The DHS NEPA Manual also

further specifies that any deployment of chemical agents outside of controlled environments, even in training exercises, would implicate NEPA. DHS NEPA Manual at A-11. NCAP alleged that Operation Diligent Valor involved the deployment of chemical agents. ER-90 ¶ 49. Thus, pursuant to DHS's own regulations, NCAP's alleged facts support for their claims. The district court acknowledged that DHS actions were "taken pursuant to DHS's existing statutory authority to 'protect the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government,' 40 U.S.C. § 1315(a)." ER-13. While this can include criminal enforcement, *see* 40 U.S.C. § 1315(b)(2)(A), (C), it is not limited to that activity. 40 U.S.C. § 1315(b)(2)(F) (includes "such other activities for the promotion of homeland security as the Secretary may prescribe."). All of these facts support a conclusion that NEPA applies, and that the criminal enforcement exception is to be narrowly construed. The district court incorrectly concluded here that NCAP did not satisfy their burden.

Third, in making its decision, the district court improperly extracted factual support from some unidentified source. ("[T]he decision to send reinforcement personnel to a temporary hotspot to respond to criminal activity, protect people and property from criminal activity, and enforce criminal laws, falls within NEPA's exception for criminal enforcement actions." ER-20. These statements in the district court's opinion are unsupported by the Russell Declaration, which paints

Operation Diligent Valor as generalized crowd control that appears to have made no exceptions for peaceful protesters. ER-206 (Russell Declaration describing DHS's actions "to safely disperse crowds" to "deescalate the situation in Portland," while the "Portland Police Bureau dealt with criminal conduct in the public streets."). These statements in the district court's opinion are certainly not from NCAP's Complaint or standing declarations identifying peaceful protesters subjected to chemical munitions, much less, "constru[ing] them in the light most favorable to the non-moving party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, the district court independently re-characterized DHS's actions as a "hotspot" or "temporary" response, ignored NCAP's allegations, and then concluded that Operation Diligent Valor fit within NEPA's narrow criminal enforcement exception. ER-20; *and see* ER-36.

NCAP reassert their argument that a plain language reading of the operative CEQ Regulations supports that "bringing a judicial or administrative…criminal enforcement action" means the investigation and prosecution of a specific criminal law violation, and not general crowd control or the entire scope of activities involved in Operation Diligent Valor of which the parties still do not fully understand because an administrative record has yet to be produced. ER-49-50. The district court considered the "plain text" of the wrong CEQ regulations. The now-withdrawn CEQ regulations dropped the word "bringing" in the articulation

of the exception. *See* n. 3, *supra.* The text of the operative regulation and the word "bringing" indicate a narrow understanding of a targeted, specific enforcement action – not general law enforcement activity of any kind. *See* 40 C.F.R. § 1508.18.

Further, that some present in a crowd commit a crime, does not permit DHS or the courts to criminalize everybody present. Guilt by association flies in the face of First Amendment freedoms. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886, 919 (1982) (noting the Supreme Court's consistent disapproval of imposing criminal sanctions or denying a person's rights because of their association with an unpopular group). A lack of justification for the application of severe force to peaceful protesters or even those engaged in minor criminal activity plainly violates the Fourth Amendment. *See, e.g., Nelson v. City of Davis,* 685 F.3d 867, 881 (9th Cir. 2012) ("the general disorder of the complex cannot be used to legitimize the use of pepperball projectiles against non-threatening individuals"). Interpreting the criminal enforcement exception broadly and inconsistent with these basic principles of constitutional freedoms risks exempting the Department of Homeland Security from NEPA, which conflicts with the statute and DHS's own acknowledgement through its regulations and manuals that NEPA applies. The Court should avoid doing so here.

/ /

## CONCLUSION

The district court's application of the incorrect standard of review and improper analyses in evaluating DHS's Rule 12(b)(1) and 12(b)(6) challenges must be corrected. Without this Court's reversal and remand, NCAP's rights remain unprotected and severely prejudiced, all the while DHS continues to delay, and even eschew, their legal responsibility to identify and analyze Operation Diligent Valor's significant impacts on the human environment.

Date: January 24, 2022

ACLU Foundation of Oregon

*s/ Kelly K. Simon*
KELLY K. SIMON, OSB # 154213
ksimon@aclu-or.org

ELISABETH HOLMES, OSB # 120254
Willamette Riverkeeper
eli@willametteriverkeeper.org

NICHOLAS S. CADY, OSB # 113463
Cascadia Wildlands
nick@cascwild.org

BRENNA BELL, OSB # 015199
350PDX
brenna@350PDX.org

*Attorneys for Appellants*

# STATEMENT OF RELATED CASES

**9th Cir. Case Number: 21-35751**

The undersigned attorney or self-represented party states the following:

[ X ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

**Signature** *s/ Kelly K. Simon* **Date** January 24, 2022

KELLY K. SIMON, OSB # 154213
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
Tel: (503) 227-6928
ksimon@aclu-or.org

# CERTIFICATE OF COMPLIANCE

**9th Cir. Case Number: 21-35751**

I am the attorney. **This brief contains 11,376 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it was prepared in a proportionally spaced typeface using Times New Roman in 14 point size.

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KELLY K. SIMON, OSB # 154213
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
Tel: (503) 227-6928
ksimon@aclu-or.org

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| Appellants' Opening Brief, Addendum, Excerpts of Record |

**Signature** *_s/ Kelly K. Simon*_____ **Date** ___January 24, 2022_____

KELLY K. SIMON, OSB # 154213
ACLU Foundation of Oregon
P.O. Box 40585
Portland, OR 97240
Tel: (503) 227-6928
ksimon@aclu-or.org