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10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION  
12

13 GOLDEN GATE BRIDGE, HIGHWAY AND )  
TRANSPORTATION DISTRICT, )

14 Plaintiff, )

15 v. )

16 UNITED STATES DEPARTMENT OF )  
17 LABOR, et al. )

18 Defendants. )

Case No. 3:24-cv-04985-RS

**NOTICE OF MOTION AND MOTION TO  
DISMISS; MEMORANDUM OF POINTS AND  
AUTHORITIES**

Date: January 9, 2025  
Time: 1:30 p.m.  
Place: Courtroom 3, 17th Floor

The Honorable Richard Seeborg, Chief Judge

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1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 PLEASE TAKE NOTICE that on January 9, 2025 at 1:30 p.m., or as soon thereafter as the  
3 matter may be heard, in Courtroom 3, 17th Floor, of the United States District Court for the Northern  
4 District of California, located at 450 Golden Gate Avenue, San Francisco, California, before the  
5 Honorable Richard Seeborg, United States Chief District Judge, Defendants United States Department  
6 of Labor; Julie A. Su in her official capacity as Acting Secretary of Labor; Occupational Safety and  
7 Health Administration; and Douglas L. Parker in his official capacity as Assistant Secretary of Labor for  
8 Occupational Safety will, and hereby do, move for an order dismissing the Complaint of Plaintiff  
9 Golden Gate Bridge, Highway and Transportation District for lack of subject matter jurisdiction  
10 pursuant to Federal Rule of Civil Procedure 12(b)(1). This motion is based on this Notice; the  
11 Memorandum of Points and Authorities submitted herewith; the pleadings, records, and files in this case;  
12 other matters of which the Court takes judicial notice; and such other written or oral argument and additional  
13 evidence as may be presented at or before the time the Court takes this motion under submission.

14 Pursuant to Civil Local Rule 7-3, any opposition or statement of non-opposition of Plaintiff must  
15 be served and filed not more than fourteen days after the filing of this Motion.

16 **RELIEF REQUESTED**

17 Defendants seek an order dismissing the Complaint for lack of subject matter jurisdiction.

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. INTRODUCTION**

20 The public transportation district that operates the Golden Gate Bridge has asked this Court to  
21 review an interpretative letter published on the website of the Occupational Safety and Health  
22 Administration (OSHA) about how to calculate the weight that scaffolding must support. But curiously  
23 absent from Plaintiff's Complaint is any indication that it has been harmed in any way by the  
24 interpretive letter at issue. Federal courts are courts of limited jurisdiction, and plaintiffs must establish  
25 that they have standing before their claims can be heard. Standing famously includes an injury  
26 requirement. But Plaintiff's Complaint is simply silent about this crucial threshold issue. The  
27 Complaint must therefore be dismissed for lack of standing.

28 But lack of standing is not the only jurisdictional problem here. The interpretive letter that

1 Plaintiff seeks to challenge was not a “final agency action” subject to judicial review. It was a letter  
2 directed to a third party that answered a question in the abstract about how OSHA interprets a safety  
3 standard concerning scaffolding loads. It was informal, of a kind that OSHA issues dozens of times a  
4 year, with no legal significance in and of itself. Indeed, there is a separate OSHA enforcement regime  
5 by which the agency issues citations with legal consequences to noncompliant employers—but that is  
6 not what happened here. Because the interpretive letter was merely an “informational document”  
7 without independent legal consequence, the Court cannot review it under the APA.

8 For both of these reasons, the Complaint must be dismissed for lack of subject matter  
9 jurisdiction.

## 10 **II. ISSUES TO BE DECIDED**

11 1. Whether the Complaint must be dismissed for lack of subject matter jurisdiction because  
12 Plaintiff lacks Article III standing; and

13 2. Whether the Complaint must be dismissed for lack of subject matter jurisdiction because  
14 the challenged agency action is not a final agency action subject to judicial review.

## 15 **III. BACKGROUND**

### 16 **A. Statutory And Regulatory Framework.**

#### 17 **1. The OSH Act.**

18 After extensive investigation, Congress concluded in 1970 that “personal injuries and illnesses  
19 arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate  
20 commerce in terms of lost production, wage loss, medical expenses, and disability compensation  
21 payments.” 29 U.S.C. § 651(a). Accordingly, Congress enacted the Occupational Safety and Health  
22 Act (OSH Act) “to assure so far as possible every working man and woman in the Nation safe and  
23 healthful working conditions.” 29 U.S.C. § 651(b).

24 To effectuate the Act’s purpose, Congress authorized the Secretary of Labor to promulgate  
25 “occupational safety and health standards” following specified rulemaking procedures. *See* 29 U.S.C.  
26 § 655.<sup>1</sup> The OSH Act defines an occupational safety and health standard as a rule that “requires

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28 <sup>1</sup> The Secretary of Labor has delegated OSH Act authority to an Assistant Secretary who heads OSHA. *See, e.g.*, 85 Fed. Reg. 58393 (Sept. 18, 2020).

1 conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,  
2 reasonably necessary or appropriate to provide safe or healthful employment and places of  
3 employment.” 29 U.S.C. § 652(8). Any party adversely affected by the promulgation of an  
4 occupational safety and health standard may, “at any time prior to the sixtieth day after such standard is  
5 promulgated[,]” challenge “the validity of such standard” in “the United States court of appeals for the  
6 circuit wherein such person resides or has his principal place of business.” 29 U.S.C. § 655(f).

7 Employers must comply with the Secretary’s standards, and—where it has jurisdiction—OSHA  
8 can issue “citations” to employers for noncompliance. *See* 29 U.S.C. §§ 654(a)(2), 658, 659. OSHA  
9 citations are subject to review before the Occupational Safety and Health Review Commission—an  
10 independent adjudicative forum established by the OSH Act. *See* 29 U.S.C. §§ 659(c), 661; *see also*  
11 *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 147-48 (1991). Orders of the  
12 Review Commission are subject to judicial review in the federal courts of appeals. *See* 29 U.S.C. § 660.

13 However, the OSH Act also permits states to promulgate and enforce their own workplace  
14 standards subject to certain criteria. *See* 29 U.S.C. § 667(b). To do so, states must submit “State Plans”  
15 demonstrating that their own standards “are or will be at least as effective in providing safe and healthful  
16 employment and places of employment as the standards promulgated” by Federal OSHA. *Id.*  
17 § 667(c)(2). Once the State Plan has been approved, and subject to exceptions not applicable here,  
18 Federal OSHA no longer has jurisdiction over that state’s standards. *See id.* § 667(e). State Plans are  
19 required to cover state and local government employers. *Id.* § 667(c)(6). California has had an  
20 approved state plan since 1973, such that a California state agency—Cal/OSHA—exercises jurisdiction  
21 over workplace standards within the state as to private and state employers. *See* OSHA, California State  
22 Plan, <https://www.osha.gov/stateplans/ca> (last accessed Oct. 25, 2024); *see also* Cal/OSHA,  
23 <https://www.dir.ca.gov/dosh/> (last accessed Oct. 25, 2024).<sup>2</sup>

24 Separate from the formal citation process, OSHA routinely responds to questions from the public  
25 about how standards apply in particular situations by publishing “Standard Interpretations” on its  
26 website. *See* Standard Interpretations, <https://www.osha.gov/laws->

27  
28 <sup>2</sup> Defendants request that the Court take judicial notice of the websites referenced in this Motion under Federal Rule of Evidence 201.

1 [regs/standardinterpretations/publicationdate](#) (last accessed Oct. 25, 2024). As OSHA’s website makes  
2 clear:

3 OSHA requirements are set by statute, standards, and regulations. Our  
4 interpretation letters explain these requirements and how they apply to particular  
5 circumstances, but they cannot create additional employer obligations. Each letter  
6 constitutes OSHA’s interpretation of the requirements discussed. Note that our  
enforcement guidance may be affected by changes to OSHA rules. Also, from time  
to time we update our guidance in response to new information.

7 *Id.* OSHA’s website contains hundreds of such letters dating back to 1972. *See id.* In recent years,  
8 OSHA has published between approximately one to three dozen letters each year. *See id.*

## 9 **2. The Scaffolding Standard and OSHA’s Interpretation Letters.**

10 In 1996, pursuant to the OSH Act, OSHA issued the Scaffolding Standard at issue here: “each  
11 scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at  
12 least 4 times the maximum intended load applied or transmitted to it.” 29 C.F.R. § 1926.451(a)(1); *see*  
13 *also* Compl. ¶¶ 2, 27-29. The “maximum intended load” is defined by the 1996 standard as “the total  
14 load of all persons, equipment, tools, materials, transmitted loads, and other loads reasonably anticipated  
15 to be applied to a scaffold or scaffold component at any one time.” 29 C.F.R. § 1926.450(b); *see also*  
16 Compl. ¶ 28. OSHA promulgated the Scaffolding Standard following a formal notice-and-comment  
17 rulemaking process. *See* Compl. ¶¶ 16-29; *see also* 61 Fed. Reg. 46026 (Aug. 30, 1996).

18 In 2011, OSHA’s Directorate of Construction received a letter from a member of the public  
19 named Steve Karasik, who identified himself as the Chief Engineer of the contracting firm PERI  
20 Formwork Systems, Inc. in Elkridge, Maryland. *See* Compl. ¶ 30; *see also* Standard Interpretation  
21 Letter (Dec. 6, 2013; rev. Apr. 24, 2020), *available at* [https://www.osha.gov/laws-](https://www.osha.gov/laws-regs/standardinterpretations/2013-12-06)  
22 [regs/standardinterpretations/2013-12-06](https://www.osha.gov/laws-regs/standardinterpretations/2013-12-06). Mr. Karasik had posed the question: “For scaffolds used in  
23 construction work, how is the weight of the scaffold taken into consideration in determining whether the  
24 4 to 1 factor required by 29 CFR 1926.451(a)(1) is satisfied? How do the scaffolding requirements for  
25 general industry work differ from construction?” Compl. ¶ 32; *see also* Standard Interpretation Letter.

26 In 2013, James G. Maddux, Director of OSHA’s Directorate of Construction, responded to Mr.  
27 Karasik’s questions by issuing the Standard Interpretation Letter at issue here. *See* Compl. ¶ 30;  
28 Standard Interpretation Letter. The Standard Interpretation Letter explained that “Under section

1 1926.451(a)(1), each component of a scaffold system must be able to support at least 4 times the  
2 maximum intended load on that component, in addition to the weight of the component.” Compl. ¶ 33;  
3 Standard Interpretation Letter.

4 For example, on a multi-level scaffold, each bottom leg must be able to support its  
5 own weight and four times the load reasonably anticipated to be imposed on that  
6 leg. Part of the load imposed on a bottom leg will arise from the weight of the part  
7 of the scaffold that the bottom leg supports. Part will arise from the weight of  
8 persons, equipment, tools, and materials on the scaffold, and part will arise from  
9 other sources, such as wind.

10 Compl. ¶ 34; Standard Interpretation Letter.

11 In 2020, OSHA published a revised version of the Standard Interpretation Letter. *See* Compl.  
12 ¶ 37; Standard Interpretation Letter. OSHA explained when it released the revised letter that “The letter  
13 issued on 12/6/2013 had raised some confusion in the scaffold industry regarding what loadings were  
14 included in the maximum intended load and the application of 4 to 1 factor to the maximum intended  
15 load as required by 29 CFR 1926.451(a)(1).” Standard Interpretation Letter. “This letter has been  
16 modified to clarify these requirements for scaffolds as intended in the standard. This revision of the  
17 letter does not add any burdens or additional requirements that the standard did not intend, and reflects  
18 current OSHA regulations and policies.” *Id.* The online version of the revised letter struck through  
19 prior text that OSHA removed, and identified new text in bold. *See* Standard Interpretation Letter.

20 The 2020 version of the Standard Interpretation Letter provided the following amended response  
21 to Mr. Karasik’s question: “Under section 1926.451(a)(1), each component of a scaffold system must be  
22 able to support its own weight (the weight of the component itself, in addition to the portion of the  
23 scaffold’s weight that is transmitted to that component), and at least 4 times the maximum intended load  
24 transmitted to that component.” Compl. ¶ 41; *see also* Standard Interpretation Letter.

25 For example, on a multi-level scaffold, each bottom leg must be able to support the  
26 scaffold weight transmitted to that component, including the component weight  
27 itself, and four times the portion of the maximum intended load reasonably  
28 anticipated to be imposed on that leg, which include the maximum intended load  
transmitted to that component and the maximum intended load directly applied to  
that component. (Note that the maximum intended load, as defined under section  
1926.450, does not include the weight of the scaffold.) Part of the maximum  
intended load will arise from the weight of persons, equipment, tools, and materials  
on the scaffold, and part will arise from other sources, such as wind.

Standard Interpretation Letter.

1           However, Cal/OSHA has promulgated its own regulation regarding scaffolding weight. The  
2 state regulation provides, “Each scaffold shall be designed and constructed using a dead load safety  
3 factor that will ensure the scaffold supports, without failure, its own weight and 4 times the maximum  
4 intended working (live) load applied or transmitted to it.” 8 Cal. Code Reg. § 1637(b)(2). The  
5 regulation goes on to specify various “maximum intended working loads” for different types of  
6 scaffolds. *Id.* § 1637(b)(2)(A)-(E).

#### 7           **B. Procedural History.**

8           Plaintiff is the Golden Gate Bridge, Highway and Transportation District, “a public agency  
9 existing under the laws of California” that “owns, operates, and maintains the Golden Gate Bridge.”  
10 Compl. ¶ 7. Plaintiff alleges that, in 2020, it sent a letter to OSHA’s Directorate of Construction, asking  
11 them to withdraw the 2020 version of the Standard Interpretation Letter. *Id.* ¶ 47. Plaintiff alleges that  
12 “OSHA declined to withdraw the letter.” *Id.*

13           Plaintiff filed this lawsuit on August 9, 2024. *See* Compl. Plaintiff invokes this Court’s  
14 jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* *See id.* ¶ 12. Plaintiff brings  
15 two claims: (1) for a declaration that the 2020 version of the Standard Interpretation Letter is unlawful  
16 and should be set aside because OSHA did not issue it following notice-and-comment rulemaking, *see*  
17 Compl. ¶¶ 48-63; and (2) for a declaration that the 2020 version of the Standard Interpretation Letter is  
18 arbitrary and capricious and therefore invalid, because OSHA allegedly failed to consider or explain  
19 certain issues related to its interpretation, *see id.* ¶¶ 64-73.

### 20           **IV. LEGAL STANDARD**

#### 21           **A. Rule 12(b)(1)**

22           Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) if the district court lacks  
23 subject matter jurisdiction over the claim. “Federal courts are courts of limited jurisdiction. They  
24 possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co.*,  
25 511 U.S. 375, 377 (1994). Limits on federal jurisdiction must be neither disregarded nor evaded. *Owen*  
26 *Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). As courts of limited jurisdiction,  
27 federal courts are “presumed to lack jurisdiction in a particular case unless the contrary affirmatively  
28 appears.” *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.3d 1221, 1225 (9th

1 Cir. 1989). Federal subject matter jurisdiction must exist at the time the action is commenced. *Morongo*  
2 *Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir 1988), *cert.*  
3 *denied*, 488 U.S. 1006 (1989).

#### 4 **V. ARGUMENT**

5 The Court lacks subject matter jurisdiction over this matter for two reasons: (1) Plaintiff lacks  
6 Article III standing; and (2) the letter of interpretation was not “final agency action” subject to judicial  
7 review. Both are independent reasons why the Complaint must be dismissed.

##### 8 **A. Plaintiff Lacks Article III Standing.**

9 A plaintiff who seeks to invoke federal jurisdiction bears the burden of establishing “the  
10 irreducible constitutional minimum” of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).  
11 Standing to sue “is part of the common understanding of what it takes to make a justiciable case.” *Steel*  
12 *Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101 (1998) (citation omitted). Courts “presume that  
13 federal courts lack jurisdiction unless the contrary appears affirmatively from the record.” *Renne v.*  
14 *Geary*, 501 U.S. 312, 316 (1991) (quotation and citations omitted).

15 As explained below, Plaintiff does not itself have standing under the Supreme Court’s traditional  
16 three-part test. Nor can Plaintiff rely on the doctrines of organizational standing, third-party standing, or  
17 procedural standing here. As a result, the Court lacks subject-matter jurisdiction for Plaintiff’s claims.

##### 18 **1. Plaintiff Does Not Have Traditional Standing.**

19 To satisfy the traditional elements of standing, the plaintiff must have (1) suffered an injury in  
20 fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be  
21 redressed by a favorable judicial decision. *Spokeo*, 578 U.S. at 338 (citing *Lujan v. Defenders of*  
22 *Wildlife*, 504 U.S. 555, 560-61 (1992)). Injury in fact is the “[f]irst and foremost” of standing’s three  
23 elements. *Steel Co.*, 523 U.S. at 103. “[T]he plaintiff must have suffered an injury in fact -- an invasion  
24 of a legally protected interest” that is concrete, particularized, and actual or imminent, rather than  
25 conjectural or hypothetical. *Lujan*, 504 U.S. at 560. The plaintiff’s injury must also be “fairly traceable  
26 to the challenged conduct of the defendant,” as well as “likely to be redressed by a favorable judicial  
27 decision.” *Spokeo*, 578 U.S. at 338. The redressability element requires a showing that “it is likely,  
28

1 although not certain, that his injury can be redressed by a favorable decision.” *Wolfson v. Brammer*, 616  
2 F.3d 1045, 1056 (9th Cir. 2010).

3 Article III’s standing requirements apply with full force to plaintiffs challenging agency action  
4 under the Administrative Procedure Act. *See, e.g., Lujan*, 504 U.S. at 559 (plaintiffs lacked standing in  
5 APA case); *Safer Chems., Healthy Families v. EPA*, 943 F.3d 397, 410-11 (9th Cir. 2019). At the  
6 pleading stage, the plaintiff must “clearly . . . allege facts demonstrating” each element of the standing  
7 inquiry. *Spokeo*, 578 U.S. at 338.

8 Plaintiff’s allegations here fall far short of this requirement. The Complaint is entirely devoid of  
9 allegations that Plaintiff was injured in any way by OSHA’s publication of the revised Standard  
10 Interpretation Letter. *See generally* Compl. It bears repeating: There is not a single allegation in the  
11 Complaint indicating that the Golden Gate Bridge, Highway and Transportation District was harmed in  
12 any way by the 2020 version of the Standard Interpretation Letter. *See id.*

13 Moreover, any unidentified injury Plaintiff may claim would not be “fairly traceable” to  
14 Defendants, because Federal OSHA lacks jurisdiction over Plaintiff and cannot enforce federal safety  
15 and health standards against it. *See* 29 U.S.C. § 652(5) (defining “employer” to specifically exclude  
16 “any State or political subdivision of a State”). The Golden Gate Bridge is in California, and Plaintiff is  
17 an arm of the California state government. *See* Compl. ¶ 7. As explained above, California has assumed  
18 responsibility for occupational safety and health within its own boundaries by enacting a State Plan.  
19 Such State Plans must be at least as effective as Federal OSHA standards, but they may be *more* worker-  
20 protective if a state desires. *See* 29 U.S.C. § 667(b), (c). Accordingly, it would be Cal/OSHA – not  
21 Federal OSHA – that would regulate Plaintiff’s occupational safety practices. And Cal/OSHA has  
22 indeed promulgated a standard governing scaffolding weight in California. *See* 8 Cal. Code Reg.  
23 § 1637. Plaintiff therefore brings this lawsuit to challenge a regulation that does not even directly apply  
24 to it. Whatever Plaintiff’s underlying concerns may be, they are not fairly traceable to Defendants, who  
25 do not exercise jurisdiction over Plaintiff. *See Daniel v. National Park Serv.*, 891 F.3d 762, 766-68 (9th  
26 Cir. 2018).

27 Because Plaintiff has not alleged any injury to itself whatsoever, nor could it fairly trace any  
28 purported injury to Defendants, Plaintiff lacks standing under Article III, and the Court must dismiss the

1 Complaint. *See Safer Chems.*, 943 F.3d at 415 (alleged injury from EPA’s regulatory interpretation  
2 insufficient without actual threat of harmful enforcement).

3 **2. Plaintiff Does Not Have Organizational Standing.**

4 Rather than actually allege any injury to itself, Plaintiff claims that that “Defendants’ failure to  
5 consider essential safety margins in their revised interpretation exposes *construction workers* to  
6 significant risks and undermines the protective intent of the regulations.” *Id.* ¶ 73 (emphasis added).  
7 But Plaintiff is not a “construction worker”; it is “a public agency” that “owns, operates, and maintains  
8 the Golden Gate Bridge.” *Id.* ¶ 7. True, Plaintiff claims that it has “a long history of protecting  
9 construction workers.” *Id.* But this is not enough to supply Article III standing here.

10 Under the doctrine of “organizational standing,” an organization may demonstrate Article III  
11 standing in two separate ways: either “on behalf of their own members” or “in their own right.” *E. Bay*  
12 *Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021). The former is not at issue here, as  
13 Plaintiff does not allege it has any “members.” *See* Compl. ¶ 7.

14 For the latter, “an organization has direct standing to sue where it establishes that the defendant’s  
15 behavior has frustrated its mission and caused it to divert resources in response to that frustration of  
16 purpose.” *E. Bay Sanctuary*, 993 F.3d at 663. But Plaintiff’s “mission” is to own, operate, and maintain  
17 the Golden Gate Bridge. *See* Compl. ¶ 7; *see also* About the District,  
18 <https://www.goldengate.org/district/about-the-district> (last accessed Oct. 25, 2024) (“The mission of the  
19 Golden Gate Bridge, Highway and Transportation District (District) is to provide safe and reliable  
20 operation, maintenance and enhancement of the Golden Gate Bridge and to provide transportation  
21 services, as resources allow, for customers within the U.S. Highway 101 Golden Gate Corridor.”).  
22 Plaintiff is not an advocacy organization seeking to protect construction workers; it is a transportation  
23 district. And neither its allegation that it has a history of protecting workers, *see* Compl. ¶ 7, nor its goal  
24 of providing “safe” operations, mean that its “mission” for Article III purposes broadly includes  
25 protecting construction workers such that it has standing to challenge an interpretation letter about  
26 scaffolding weights. *See One Fair Wage, Inc. v. Darden Restaurants Inc.*, 687 F. Supp. 3d 881, 889  
27 (N.D. Cal. 2023) (“OFW does not contend its mission is to provide direct services to employees . . .  
28 Rather, its mission is to lobby and advocate.”).

1 Nor can Plaintiff articulate any way in which it has had to “divert resources in response to [any]  
2 frustration of [its] purpose.” *E. Bay Sanctuary*, 993 F.3d at 663; *see also One Fair Wage*, 687 F. Supp.  
3 3d at 889 (alleged diversion of resources was “indirect and derivative of the putative effect of the  
4 challenged policy”). Plaintiff does not allege that complying with the 2020 version of the Standard  
5 Interpretation Letter would be more costly than complying with any prior interpretations. *See generally*  
6 *Compl.* Indeed, it is hard to see how it could be, given Plaintiff alleges the standard has been relaxed.  
7 *See id.* ¶¶ 1, 6. And of course, Plaintiff is free to use what it considers to be a safer load requirement in  
8 its own scaffolding; nothing in the Standard Interpretation Letter or otherwise precludes Plaintiff from  
9 exceeding the letter’s requirements to “protect” the construction workers maintaining the Golden Gate  
10 Bridge.

### 11 **3. Plaintiff Does Not Have Third-Party Standing.**

12 Nor is this a case where Plaintiff can invoke the doctrine of “third-party standing.” The Supreme  
13 Court has recognized “that there may be circumstances where it is necessary to grant a third party  
14 standing to assert the rights of another.” *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). “But [the  
15 Court has] limited this exception by requiring that a party seeking third-party standing make two  
16 additional showings.” *Id.* at 130. “First, we have asked whether the party asserting the right has a  
17 ‘close’ relationship with the person who possesses the right.” *Id.* “Second, we have considered whether  
18 there is a ‘hindrance’ to the possessor’s ability to protect his own interests.” *Id.*

19 Even assuming that some undefined group of “construction workers” had standing to bring  
20 Plaintiff’s claims (which Defendants do not concede), Plaintiff cannot make the “two additional  
21 showings” required by *Kowalski*. Indeed, other than vaguely alleging it has a history of protecting them,  
22 Plaintiff does not describe its relationship to any construction workers whatsoever. *See Compl.* ¶ 7. In  
23 *Kowalski*, plaintiff attorneys did not have a sufficiently “close relationship” with hypothetical future  
24 clients affected by a state procedure for appointing indigent counsel. 543 U.S. at 127. Plaintiff’s  
25 relationship here is no closer. Nor can Plaintiff show that “construction workers” would be “hindered”  
26 in bringing a challenge themselves—indeed, there is no conceivable basis why they would be. *See id.* at  
27 132-33 (insufficient showing that indigent defendants were hindered by lack of appellate counsel).



1 be a final agency action: (1) “the action must mark the consummation of the agency’s decisionmaking  
2 process -- it must not be of a merely tentative or interlocutory nature,” and (2) “the action must be one  
3 by which rights or obligations have been determined, or from which legal consequences will flow.” *U.S.*  
4 *Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (quoting *Bennett v. Spear*, 520 U.S.  
5 154, 177-78 (1997)). “The general rule is that administrative orders are not final and reviewable ‘unless  
6 and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of  
7 the administrative process.’” *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990)  
8 (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

9         The Ninth Circuit recently addressed the “final agency action” standard in *Advanced Integrative*  
10 *Medical Science Institute, PLLC v. Garland*, 24 F.4th 1249 (9th Cir. 2022) (“*AIMSI*”). There, the Drug  
11 Enforcement Administration had responded to a question from the public about the administration of  
12 certain drugs by “identifying the available exemptions in the [Controlled Substances Act] and indicating  
13 that the [Right to Try Act] did not create any additional exemptions.” *Id.* at 1252. In considering  
14 whether the DEA’s letter qualified as “final agency action,” the Ninth Circuit explained that “courts  
15 differentiate between an informational document that merely provides the agency’s interpretation of a  
16 statute, and a decision that determines how a statute or regulation applies to facts for enforcement  
17 purposes.” *Id.* at 1258 (citation omitted). “An agency’s informational document, in which ‘an agency  
18 merely expresses its view of what the law requires of a party,’ is not a final agency action.” *Id.* As prior  
19 examples of mere informational documents, the court identified “a letter written by the EPA, stating it  
20 planned to apply the Ocean Pollution Reduction Act to the City’s future application for renewal of its  
21 wastewater discharge permit,” and “an agency’s informational manual on compliance with the National  
22 Environmental Policy Act.” *Id.* (citing *City of San Diego v. Whitman*, 242 F.3d 1097 (9th Cir. 2001), &  
23 *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021)).

24         “By contrast, a decision document that marks the conclusion of an agency’s decisionmaking  
25 process and has legal consequences for the regulated party is a final agency action.” *AIMSI*, 24 F.4th at  
26 1259. The court cited examples of “a determination issued by the Army Corps of Engineers giving its  
27 definitive view on whether a particular piece of property contained wetlands,” and “a series of  
28 enforcement orders” by the National Park Service “stating it had jurisdiction over the Golden Gate

1 National Recreation Area (GGNRA), and announcing its intention ‘to enforce the prohibition on  
2 commercial fishing’ in those waters,” after which, ““critically, the Park Service then put its declared  
3 position into action when its uniformed officers and California wardens (allegedly acting at the federal  
4 government's direction) took to the waters to order herring fishermen to stop fishing in the GGNRA.”  
5 *Id.* at 1259-60 (citing *Hawkes*, 578 U.S. 590, & *S.F. Herring Ass’n v. Dep’t of the Interior*, 946 F.3d 564  
6 (9th Cir. 2019)).

7 “In short, in considering whether an agency’s informational document is a final agency action,  
8 [courts] take a ‘pragmatic approach.’” *AIMSI*, 24 F.4th at 1260. “If the informational document is more  
9 analogous to the ‘the type of workaday advice letter that agencies prepare countless times per year in  
10 dealing with the regulated community,’ and is little more than a restatement of statute and regulations in  
11 a response to a ‘request for assistance,’ it is not the consummation of a decisionmaking process or an  
12 order from which ‘legal consequences will flow.’” *Id.* (citations omitted). “By contrast, if the  
13 informational document ‘is issued after extensive factfinding,’ or after a public hearing, or after ‘a series  
14 of formal written notices,’ and thus indicates the agency’s determination that a regulated party disobeys  
15 the order at its peril of incurring criminal penalties or sanctions, it satisfies the *Bennett* conditions and is  
16 a final agency action.” *Id.* (citations omitted).

17 Here, the Standard Interpretation Letter is merely an “informational document” that does not rise  
18 to the level of a reviewable “final agency action.” First, it is the type of workaday letter that OSHA  
19 prepares dozens of times per year in response to requests for assistance from the public. Indeed, OSHA  
20 initially issued the letter in 2013 in response to a question from a specific individual, *see* Compl. ¶ 30,  
21 and revised it in 2020 in response to “confusion in the scaffold industry,” Standard Interpretation Letter  
22 (explaining reason for 2020 update). By its own terms, the letter largely restates the Scaffolding  
23 Standard itself. *See* Standard Interpretation Letter. OSHA has published dozens of such letters on its  
24 website in recent years, and hundreds of them going back to 1972. *See* Standard Interpretations,  
25 <https://www.osha.gov/laws-regs/standardinterpretations/publicationdate>.

26 Second, the Standard Interpretation Letter does not itself lead to legal consequences for the  
27 person who requested the information, for Plaintiff, or for anyone else. Indeed, the OSHA website on  
28 which the letter is published explains that “OSHA requirements are set by statute, standards and

1 regulations,” and that OSHA’s “interpretation letters explain these requirements and how they apply to  
 2 particular circumstances, but they cannot create additional employer obligations.” Standard  
 3 Interpretation Letter. The letter does not purport to be the culmination of any formal factfinding  
 4 process; it was not issued after a public hearing; and it does not itself threaten any penalties for  
 5 noncompliance. *See id.*; *see also* Compl. ¶ 62 (“In promulgating the 2020 Revised Interpretation Letter,  
 6 OSHA did not give the public prior notice or an opportunity through comment to participate in the rule’s  
 7 formulation.”). To the contrary, if any employer is cited for violating the Scaffolding Standard, the  
 8 administrative process laid out in the OSH Act will determine whether that employer complied with the  
 9 Scaffolding Standard itself, not whether the employer complied with the Standard Interpretation Letter.  
 10 *See* 29 U.S.C. § 658(a).<sup>3</sup>

11 All indicia point to the fact that the Standard Interpretation Letter is merely an informational  
 12 document, not final agency action. *See AIMS*, 24 F.4th at 1259 (no final agency action when “in a later  
 13 enforcement action, the regulated party would face liability only for noncompliance with the underlying  
 14 statutory commands, not for disagreement with the agency’s determination.”) (citation and internal  
 15 quotation marks omitted); *see also Whitewater Draw*, 5 F.4th at 1008 (agency’s informational manual  
 16 on statutory compliance was not a final agency action). The Court therefore lacks jurisdiction here. *See*  
 17 *AIMS*, 24 F.4th at 1252.

## 18 VI. CONCLUSION

19 For the reasons set forth above, Defendants respectfully request that the Court dismiss the  
 20 Complaint for lack of subject matter jurisdiction.

22 DATED: October 25, 2024

Respectfully submitted,

23 ISMAIL J. RAMSEY  
 24 United States Attorney

27 <sup>3</sup> As explained in the Background above, the employer could appeal any citation to the Review  
 28 Commission, and thereafter to the Court of Appeals. *See* 29 U.S.C. §§ 659(c), 660. But again, Plaintiff  
 does not allege it is being threatened with citation here, *see generally* Compl., and in any event  
 jurisdiction over Plaintiff lies with Cal/OSHA, not Federal OSHA.

