

1 ISMAIL J. RAMSEY (CABN 189820)  
United States Attorney  
2 PAMELA T. JOHANN (CABN 145558)  
Chief, Civil Division  
3 KELSEY J. HELLAND (CABN 298888)  
Assistant United States Attorney

4 450 Golden Gate Avenue, Box 36055  
5 San Francisco, California 94102-3495  
6 Telephone: (415) 436-6488  
7 FAX: (415) 436-7234  
kelsey.helland@usdoj.gov

8 Attorneys for Defendants

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

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

13 Plaintiff, )

14 v. )

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

17 Defendants. )  
18 )  
19 )  
20 )  
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Case No. 3:24-cv-04985-RS

**REPLY IN SUPPORT OF MOTION TO  
DISMISS FIRST AMENDED COMPLAINT**

Date: January 30, 2025

Time: 1:30 p.m.

Place: Courtroom 3, 17th Floor

The Honorable Richard Seeborg, Chief Judge

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1 **I. INTRODUCTION**

2 The Court lacks jurisdiction to hear the Golden Gate Bridge’s challenge to the Department of  
3 Labor’s non-binding interpretation of a scaffolding standard, both because Plaintiff lacks standing and  
4 because the interpretation was not final agency action reviewable under the APA. Nothing in Plaintiff’s  
5 Opposition alters these conclusions.

6 Although Plaintiff amended its Complaint to add economic injuries in an attempt to generate  
7 standing, Plaintiff fails to show in its Opposition that those alleged injuries were fairly traceable to the  
8 Department of Labor, or could be redressed by an order from the Court in this case. Indeed, it is clear  
9 that Plaintiff’s injuries stem from the independent actions of its contractors—not any action taken by  
10 OSHA—and that there is no way for the Court in this case to redress Plaintiff’s claimed economic  
11 injuries. Plaintiff therefore pivots and argues that it has “procedural standing” because its supposed  
12 “procedural right” to participate in the notice-and-comment process was violated. But that doctrine does  
13 not apply here, because the Standard Interpretation Letter was not required to go through notice-and-  
14 comment, either under the APA or any other law.

15 Nor has Plaintiff shown that the Standard Interpretation Letter was reviewable final agency  
16 action. Plaintiff contorts itself to argue that a non-binding announcement of an interpretation of a  
17 regulation is a conclusive determination of Plaintiff’s and other parties’ rights. But Plaintiff only does  
18 so by ignoring that Federal OSHA—where it even has jurisdiction—finally interprets its regulations  
19 with respect to specific parties in separate citation-enforcement proceedings, which are not (and could  
20 not be) at issue here.

21 The Court lacks jurisdiction, and Plaintiff cannot cure these defects. The Court should dismiss  
22 the FAC with prejudice.

23 **II. ARGUMENT**

24 **A. Plaintiff Lacks Standing.**

25 **1. Plaintiff Lacks Traditional Standing.**

26 The government previously explained that Plaintiff lacked Article III standing for its alleged  
27 economic injuries, because those injuries were neither “fairly traceable” to the 2020 Standard  
28 Interpretation Letter nor “redressable” by an order of this Court. *See* Mot. 8-11. To briefly summarize:

1 all of Plaintiff's injuries are the result of actions taken by Plaintiff's contractors (or Plaintiff itself), not  
2 Defendants; Plaintiff is under the jurisdiction of Cal/OSHA (which has its own scaffolding standard),  
3 not Federal OSHA; and no order by the Court in this case will allow Plaintiff to recover for its past  
4 losses. *See id.* Plaintiff's responses to these arguments are unpersuasive.

5 *First*, Plaintiff argues that, because its contractors' actions were allegedly influenced by the 2020  
6 Standard Interpretation Letter, that is sufficient for Plaintiff's injuries to be "fairly traceable" to the  
7 government. *See* Opp. 12-13. But the very authority Plaintiff cites refutes the premise. In *Bennett v.*  
8 *Spear*, the Supreme Court reaffirmed that "it does not suffice if the injury complained of is the result of  
9 the *independent* action of some third party not before the court." 520 U.S. 154, 169 (1997) (emphasis in  
10 original; otherwise cleaned up). The Court distinguished government action that has a "determinative or  
11 coercive effect upon the action of someone else." *Id.* Here, Federal OSHA did not determine what  
12 Plaintiff's contractors would do or coerce them; those contractors were free to (and apparently did)  
13 make their own evaluations of the applicable scaffolding requirements, and to negotiate with Plaintiff  
14 about the actions to be taken in Plaintiff's projects. The federal government did not control the timing  
15 or substance of those discussions. This is all the more so considering that the federal Scaffolding  
16 Standard (and by extension the 2020 Standard Interpretation Letter) does not directly apply to Plaintiff  
17 or its contractors, as discussed previously, *see* Mot. 3-4, 6, 10, and further below. In short, the  
18 *independent* actions of Plaintiff's contractors defeat any causal connection for standing purposes here,  
19 such that Plaintiff's alleged injuries are not fairly traceable to the government. *See, e.g., Pritkin v. Dep't*  
20 *of Energy*, 254 F.3d 791, 798 (9th Cir. 2001).

21 *Second*, Plaintiff is mistaken that Cal/OSHA is irrelevant here.<sup>1</sup> Plaintiff does not dispute that  
22 California has opted out of Federal OSHA's statutory enforcement authority by obtaining approval of its  
23 own State Plan administered by Cal/OSHA. *Compare* Mot. 3-4, *with* Opp. 15-16. Nor does Plaintiff  
24 dispute that Cal/OSHA has its own scaffolding standard, or that that standard applies to Plaintiff's  
25 projects. *Compare* Mot. 6, *with* Opp. 15-16. Nor does Plaintiff dispute that it is an arm of the California  
26

27 <sup>1</sup> Plaintiff asserts without citation that "the Court must accept as true" Plaintiff's assertion that it  
28 must comply with federal safety standards. Opp. 15. But of course, this is merely a legal conclusion,  
and "the tenet that a court must accept as true all of the allegations contained in a complaint is  
inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1 State government that is expressly excluded from the OSH Act. *Compare* Mot. 10, *with* Opp. 15-16.  
2 Nevertheless, Plaintiff argues that the federal Scaffolding Standard applies because Plaintiff voluntarily  
3 entered into (certain unspecified) federal highway funding contracts, which the Department of  
4 Transportation (not Labor) requires to include certain terms set forth in a document titled “FHWA-  
5 1273” (the “Standard Contract Terms”). *See* Opp. 15-16.<sup>2</sup> The argument misses the mark.

6 The Standard Contract Terms do not purport to strip Cal/OSHA of its authority; they merely  
7 provide that “the contractor and any subcontractor shall not permit any employee to work in  
8 surroundings or under conditions which are unsanitary, hazardous or dangerous to his/her health or  
9 safety, as determined under construction safety and health standards (29 CFR Part 1926) promulgated by  
10 the Secretary of Labor.” Dkt. No. 29 at 13, FHWA-1273 p.10, § VII, ¶ 2. They also provide that “the  
11 Secretary of Labor *or authorized representative thereof*, shall have right of entry to any site of contract  
12 performance to inspect or investigate the matter of compliance with the construction safety and health  
13 standards and to carry out the duties of the Secretary under Section 107 of the Contract Work Hours and  
14 Safety Standards Act.” *Id.* § VII, ¶ 3 (emphasis added). In other words, federal contractors cannot  
15 create conditions that are less safe than federal standards, and must submit to inspection by the  
16 appropriate authorities. But California has a State Plan, which by statute must be “at least as effective”  
17 as the federal standards, 29 U.S.C. § 667(c)(2), and through which the federal Secretary of Labor has  
18 authorized Cal/OSHA to perform inspection and enforcement actions. Because State Plans must be “at  
19 least as effective” as the federal enforcement scheme, compliance with State Plan requirements  
20 necessarily subsumes compliance with federal requirements.

21 In any event, any dissatisfaction Plaintiff may have with the terms of its federal highway contract  
22 and/or its contract with Shimmick/Danny’s is not “fairly traceable” to OSHA’s interpretation of its  
23 scaffolding standard, but rather to Plaintiff’s own voluntary decisions to enter into those contracts. *See*

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26 <sup>2</sup> The government does not oppose Plaintiff’s Request for Judicial Notice of FHWA’s “Required  
27 Contract Provisions.” *See* Dkt. No. 29. However, the government notes that the version of FHWA-  
28 1273 that Plaintiff submits became effective in October 2023, well after the contractor disputes alleged  
in the FAC. *See* FAC ¶¶ 53-56. Plaintiff also does not identify any specific federal contracts to which it  
or its contractors are parties, nor whether any such contracts included language such as the DOT’s  
Standard Contract Terms.

1 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Plaintiff thus lacks standing to challenge OSHA’s  
2 action.

3 *Third*, Plaintiff’s claimed economic injuries cannot be redressed by this APA action. *See* Mot.  
4 11. Indeed, Plaintiff all but concedes the point, instead arguing solely that its supposed “procedural”  
5 injuries could be redressed by certain “procedural” actions the Court could order. *See* Opp. 17-18. The  
6 “procedural standing” doctrine does not apply here, for reasons discussed at length below. But for  
7 purposes of traditional Article III standing, the crucial point is that the economic injuries on which  
8 Plaintiff now relies in the FAC cannot be redressed by this litigation. *See Pritkin*, 254 F.3d at 799-801.  
9 And Plaintiff does not argue otherwise. *See* Opp. 17-18; *see also Pecover v. Elec. Arts Inc.*, 633 F.  
10 Supp. 2d 976, 984 (N.D. Cal. 2009) (“[P]laintiffs have effectively conceded, by failing to address the  
11 issue in their opposition memorandum, that their claims . . . should be dismissed.”).

## 12 **2. Plaintiff Cannot Rely On The “Procedural Standing” Doctrine.**

13 Having failed to establish Article III standing under the traditional test, Plaintiff argues that it  
14 nevertheless has “procedural standing” here. Opp. 10. Not so. The procedural standing doctrine  
15 requires a plaintiff to “demonstrate (1) that he has a procedural right that, if exercised, could have  
16 protected his concrete interests, (2) that the procedures in question are designed to protect those concrete  
17 interests, and (3) that the challenged action’s threat to the plaintiff’s concrete interests is reasonably  
18 probable.” *California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018); *see also Citizens for Better Forestry v.*  
19 *USDA*, 341 F.3d 961, 969 (9th Cir. 2003). But Plaintiff fails to establish it has any “procedural rights”  
20 regarding revisions to the Standard Interpretation Letter, and so it cannot satisfy even the first prong of  
21 the test.

22 Indeed, Plaintiff confines its discussion of this issue to a single footnote, arguing that it  
23 “sufficiently pleads that OSHA was required, but failed, to comply with rulemaking requirements” when  
24 OSHA published the 2020 Standard Interpretation Letter. Opp. 11 n.2. But the 2020 Standard  
25 Interpretation Letter was not a “rule,” or an “amendment” to the Standard itself. As the government has  
26 explained, the Letter was an informal guidance document with no independent legal weight. *See* Mot.  
27 11-14.

1 It is well-established that an agency need not launch a formal rulemaking process every time it  
2 articulates an interpretation of the law. By their own terms, the APA’s notice-and-comment rulemaking  
3 procedures do not apply “to interpretative rules, general statements of policy, or rules of agency  
4 organization, procedure, or practice.” 5 U.S.C. § 553(b)(A). “[T]he critical feature of interpretive rules  
5 is that they are ‘issued by an agency to advise the public of the agency’s construction of the statutes and  
6 rules which it administers.’” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 97 (2015) (quoting *Shalala v.*  
7 *Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995)). “The absence of a notice-and-comment obligation  
8 makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative  
9 rules. But that convenience comes at a price: Interpretive rules ‘do not have the force and effect of law  
10 and are not accorded that weight in the adjudicatory process.’” *Id.* (quoting *Guernsey*, 514 U.S. at 99).

11 The Supreme Court’s decision in *Mortgage Bankers* is especially instructive here. In that case,  
12 the Department of Labor—Defendant here—had promulgated a formal regulation in 2004 through  
13 notice-and-comment rulemaking that identified categories of employees who were exempt from certain  
14 minimum wage and overtime requirements. *Id.* at 97. “In 2006, the Department issued an opinion letter  
15 finding that mortgage-loan officers fell within the administrative exemption under the 2004 regulations.”  
16 *Id.* at 98. “Four years later, however, the Wage and Hour Division again altered its interpretation of the  
17 FLSA’s administrative exemption as it applied to mortgage-loan officers.” *Id.* The Department  
18 “withdrew its 2006 opinion letter” and published its “2010 Administrator’s Interpretation,” concluding  
19 that mortgage loan officers did not qualify for the exemption. *Id.* Both the 2006 opinion letter and the  
20 2010 Administrator’s Interpretation were “issued without notice or an opportunity for comment.” *Id.* at  
21 99.

22 The plaintiff in *Mortgage Bankers*—like Plaintiff here—challenged the Department of Labor’s  
23 revised interpretation as “procedurally invalid” for failing to comply with the APA’s notice-and-  
24 comment rulemaking procedures. *Id.* The Supreme Court rejected the claim, holding that, “[b]ecause  
25 an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is  
26 also not required to use those procedures when it amends or repeals that interpretive rule.” *Id.* at 101.  
27 In short, “Congress decided to adopt standards that permit agencies to promulgate freely such rules—  
28 whether or not they are consistent with earlier interpretations.” *Id.* at 102. The plaintiff in *Mortgage*

1 *Bankers* therefore had no “procedural right . . . to notice and an opportunity to comment when an agency  
2 changes its interpretation of one of the regulations it enforces.” *Id.*

3 *Mortgage Bankers* is fatal to Plaintiff’s “procedural standing” argument here. As in that case, all  
4 the Department of Labor has done here is revise a letter interpreting a regulation. The Standard  
5 Interpretation Letter is merely an announcement of the agency’s interpretation; as its name suggests, it is  
6 only “interpretive” and does not have the “force and effect of law.” *Mortg. Bankers*, 575 U.S. at 97; *see*  
7 *also, e.g., Guernsey*, 514 U.S. at 97-100 (“We also believe it was proper for the Secretary to issue a  
8 guideline or interpretive rule in determining that defeasance losses should be amortized.”); *Lane v.*  
9 *Salazar*, 911 F.3d 932, 949 (9th Cir. 2018) (“Assuming for the sake of argument that the BOP’s  
10 interpretation constituted a change in course, its interpretation did not create a new substantive rule.”);  
11 *Erringer v. Thompson*, 371 F.3d 625, 632-33 (9th Cir. 2004) (“Under the APA, then, the manual  
12 provisions governing creation of LCDs by Medicare contractors do not have the force of law and  
13 therefore are interpretive and not legislative rules.”).

14 Because the APA’s notice-and-comment rulemaking requirements do not apply, Plaintiff has no  
15 “procedural right” implicated by the publication of the 2020 Standard Interpretation Letter. *See Mortg.*  
16 *Bankers*, 575 U.S. at 102. And with no such “procedural right” at issue, Plaintiff cannot rely on the  
17 procedural standing doctrine. *See Citizens for Better Forestry*, 341 F.3d at 969; *see also, e.g., Women’s*  
18 *Student Union v. U.S. Dep’t of Educ.*, No. 21-cv-01626-EMC, 2022 WL 484956, at \*7 (N.D. Cal. Feb.  
19 16, 2022) (“Plaintiff’s theory of injury, however, fails to satisfy the first prong of the procedural injury  
20 standard: it does not allege a violation of a statute or regulation that *guarantees* a particular procedure.”)  
21 (emphasis in original; internal quotation marks omitted).

22 Nor do Plaintiff’s citations to OSHA-specific statutes and regulations create the necessary  
23 procedural right here. *See* Opp. 11 n.2 (citing 29 U.S.C. § 655 and 29 C.F.R. Part 1911). Those  
24 authorities concern OSHA actions to “promulgate, modify, or revoke any occupational safety or health  
25 standard.” 29 U.S.C. § 655; *see also* 29 C.F.R. § 1911.1. Here, as both parties agree, the underlying  
26 Scaffolding Standard was properly issued by notice-and-comment rulemaking back in 1996. *See* Mot. 4;  
27 FAC ¶¶ 17-30. Neither of the two Standard Interpretation Letters “promulgated, modified, or revoked”  
28 the Scaffolding Standard itself—they merely clarified an otherwise undefined aspect of the Standard.

1 Indeed, Plaintiff does not (and cannot) dispute that the relevant text of the Scaffolding Standard has  
2 remained the same since 1996. *See* 29 C.F.R. §§ 1926.450(b), 1926.451(a)(1); *see also* 61 Fed. Reg.  
3 46026, 46105, 46107 (Aug. 30, 1996). And as the government has repeatedly explained, if OSHA were  
4 to ever take any enforcement action regarding the Scaffolding Standard, it is the Scaffolding Standard  
5 itself, not the Standard Interpretation Letter, that would govern. *See, e.g.*, Mot. 14 (citing 29 U.S.C.  
6 § 658(a)). Because OSHA has not taken any of the procedural actions covered by 29 U.S.C. § 655 or 29  
7 C.F.R. Part 1911, Plaintiff has no right to any particular procedure described therein, and they do not  
8 supply standing here. *See Women’s Student Union*, 2022 WL 484956, at \*7.

9 **B. The Letter of Interpretation Is Not a Final Agency Action.**

10 Plaintiff mistakenly argues that the Standard Interpretation Letter was reviewable “final agency  
11 action” by misapplying the applicable standard. *See* Opp. 18-22. The Standard Interpretation Letter was  
12 not the “consummation of the agency’s decisionmaking process” in the relevant way, nor does it have  
13 “legal consequences.” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016).

14 Plaintiff argues that the publication of the revised Standard Interpretation Letter in 2020  
15 consummated the process of publishing that letter. *See* Opp. 18. Well, sure—any action an agency  
16 takes, no matter how trivial or interlocutory, can be described as the consummation of the process to  
17 take *that* action. But “[t]he general rule is that administrative orders are not final and reviewable unless  
18 and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of  
19 the administrative process.” *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (cleaned  
20 up). The Standard Interpretation Letter does none of those things. As Defendants have explained—and  
21 Plaintiff has not yet disputed—where Federal OSHA has jurisdiction, the enforcement of the federal  
22 Scaffolding Standard would be performed by OSHA issuing a citation to an employer, which would be  
23 subject to review by the Occupational Safety and Health Review Commission and, thereafter, the federal  
24 courts of appeals. *See* Mot. 3 (citing 29 U.S.C. §§ 654-61). In such proceedings, OSHA and the  
25 reviewing bodies would determine whether the Scaffolding Standard was violated, not whether the  
26 Standard Interpretation Letter was violated. *See* Mot. 14 (citing 29 U.S.C. § 658(a)). It is in the  
27 consummation of *that* process that obligations would be imposed and legal relationships would be fixed,  
28 not in the OSHA Directorate of Construction’s non-binding announcement of its interpretation on the

1 internet. *See Advanced Integrative Medical Science Institute, PLLC v. Garland*, 24 F.4th 1249, 1259  
2 (9th Cir. 2022) (“*AIMSI*”) (no final agency action when “in a later enforcement action, the regulated  
3 party would face liability only for noncompliance with the underlying statutory commands, not for  
4 disagreement with the agency’s determination.”) (citation and internal quotation marks omitted).

5 Plaintiff’s cited authorities are not to the contrary. In *Navajo Nation v. Department of Interior*,  
6 the agency action at issue was a decision to continue inventorying Native American remains and  
7 artifacts, over a tribe’s protest that the inventory should immediately stop and the remains be reinterred.  
8 819 F.3d 1084, 1089-90 (9th Cir. 2016). That action “finally” resolved the disputed question whether  
9 the inventory process could continue—which included a determination of ownership over the remains—  
10 and was therefore reviewable. *Id.* at 1091-93. And in *Faith International Adoptions v. Pompeo*, the  
11 State Department changed its policy and directed an adoption accreditation agency not to process  
12 specific renewal applications, resulting in other adoption agencies losing their status as accredited. 345  
13 F. Supp. 3d 1314, 1321-22 (W.D. Wash. 2018). In granting a preliminary injunction, the court reasoned  
14 that the State Department’s policy change “clearly ha[d] legal consequences for” the plaintiff adoption  
15 agencies: “State’s directive converting COA’s deferral into a refusal . . . has prohibited Faith from  
16 legally carrying out adoptions for the lengthy duration of the re-application process.” *Id.* at 1325. In  
17 both cases, the agency actions at issue immediately and materially determined the rights of affected  
18 parties. *See also Frozen Foods Exp. v. United States*, 351 U.S. 40, 43-44 (1956) (“The determination by  
19 the Commission that a commodity is not an exempt agricultural product has an immediate and practical  
20 impact on carriers who are transporting the commodities . . .”). Neither one dealt with a situation like  
21 the one here, where an agency made a non-binding announcement of its legal interpretation in one  
22 forum, but there exists an entirely separate enforcement process where both the agency’s final  
23 interpretation and the affected parties’ rights are actually determined. *See Mot. 14; cf. AIMSI*, 29 F.4th  
24 at 1259.

25 In Plaintiff’s other cited case, *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*,  
26 the Ninth Circuit held—contrary to Plaintiff’s argument, *see Opp. 19*—that the Army Corps of  
27 Engineers’ determination that certain waters were subject to the Clean Water Act was “not final agency  
28 action.” 543 F.3d 586, 589 (9th Cir. 2008). Even though the determination reflected the Corps’

1 definitive view of the legal question as to specific property, “[i]t does not itself command Fairbanks to  
 2 do or forbear from anything; as a bare statement of the agency’s opinion, it can be neither the subject of  
 3 ‘immediate compliance’ nor of defiance.” *Id.* at 592-94. In that latter way, the determination in  
 4 *Fairbanks* is similar to the Standard Interpretation Letter—they are legal interpretations without  
 5 immediate impact.

6 Plaintiff bends over backwards trying to portray the non-binding 2020 Standard Interpretation  
 7 Letter as a final determination of OSHA’s legal position that directly affects parties’ rights and  
 8 obligations. But it is no such thing. Plaintiff ignores the separate OSHA enforcement process where  
 9 such final determinations are made. The Standard Interpretation Letter is not final agency action, and so  
 10 the Court lacks jurisdiction to review it under the APA.

11 **C. The FAC Should Be Dismissed With Prejudice.**

12 Plaintiff does not dispute that “[f]utility alone can justify the denial of a motion to amend.”  
 13 *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *cf.* Opp. 22. Plaintiff has not suggested it  
 14 could allege any different facts such that the Standard Interpretation Letter was required to go through  
 15 notice-and-comment rulemaking, or was reviewable final agency action. To the contrary, the Court can  
 16 readily—and finally—resolve these questions as straightforward matters of law. The Court should  
 17 dismiss the FAC with prejudice because Plaintiff cannot overcome the jurisdictional deficiencies  
 18 inherent in its challenges to the Standard Interpretation Letter.

19 **III. CONCLUSION**

20 For the reasons set forth above, Defendants respectfully request that the Court dismiss the FAC  
 21 with prejudice for lack of subject matter jurisdiction.

22 DATED: January 17, 2025

Respectfully submitted,

23 ISMAIL J. RAMSEY  
 24 United States Attorney

25 /s/ Kelsey John Helland  
 26 KELSEY JOHN HELLAND  
 27 Assistant United States Attorney

28 Attorneys for Defendant