UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE GEO GROUP, INC., and CORRECTIONS CORPORATION OFAMERICA, *Defendant-Intervenor-Appellants*, v. DETENTION WATCH NETWORK and CENTER FOR CONSTITUTIONAL RIGHTS, *Plaintiff-Appellees*.	DOCKET NO.: 16-3141

APPELLEES' MOTION TO DISMISS INTERVENORS' APPEAL FOR LACK OF APPELLATE JURISDICTION

PRELIMINARY STATEMENT

Plaintiffs Detention Watch Network ("DWN") and the Center for Constitutional Rights ("CCR") (collectively "Appellees") move to dismiss this appeal filed by the GEO Group, Inc. ("GEO") and Corrections Corporation of America ("CCA") (collectively, "the Contractors" or "Intervenor-Appellants"). The Contractors moved to intervene after the district court issued a decision and order directing Defendant Agencies United States Immigration and Customs Enforcement ("ICE") and the Department of Homeland Security ("DHS") (collectively, "the Government") to disclose, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.*, the terms of government

contracts with private detention companies, including the Contractors. This Court lacks jurisdiction over the Contractor's appeal and the appeal must be dismissed.

First, the Court lacks jurisdiction because the Government—the only party subject to the district court's judgment—has acceded to the district court's order and declined to appeal. Accordingly, there is no Article III "case" or "controversy" and no contested judgment for this Court to adjudicate. With no party against whom to enforce a judgment, the questions Intervenors seek to address are purely hypothetical and would produce nothing more than an advisory opinion. This fact alone compels dismissal of the appeal.

Second, the Contractors have no independent standing to appeal the lower court's judgment. Under settled Supreme Court precedent, the Contractors cannot establish standing by stepping into the shoes of the Government, the party-in-interest that has not appealed. *Diamond v. Charles*, 476 U.S. 54, 68 (1986). Nor can the Contractors meet the *constitutional* showing of an "injury in fact" even upon a showing of a bona fide *statutory* "interest" under Fed. R. Civ. P. 24 as intervenors in a now-extinguished dispute between the Appellees and the Government. Once the Government is no longer a party, the Contractors must establish Article III standing independently. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). But they cannot do so.

The Contractors have no cognizable injury-in-fact under Article III because when the district court determined that the Government could not withhold terms of its contracts, it did not adjudicate rights or claims of the Contractors. As the Supreme Court held in *Chrysler Corp. v. Brown*, 441 U.S. 281, 291-3 (1979), corporate entities have no rights under FOIA to prevent federal agencies from disclosing information to the public. For this reason, any purported injury to the Intervenors on account of the Government's planned release of documents pursuant to FOIA is not redressable by this Court. The FOIA grants courts no "authority to bar disclosure" of government information to the public. *See id.* at 292. Thus, even if this Court were to hear this case, it could not direct a non-party, the Government, to deliver the remedy the Contractors seek.

In the end, the Contractors' appeal of the district court's FOIA judgment in the Government's absence not only suffers from these fatal jurisdictional flaws, it threatens grave violence to FOIA and its overarching policy of public disclosure. Private entities were never intended to have veto power over government decisions regarding the release of government information to the public, and the Judiciary has no power under the statute to upset decisions by the elected branches that public disclosure is warranted. For all of these reasons, this Court lacks jurisdiction and the appeal must be dismissed.

STATEMENT OF FACTS

Plaintiff-Appellees DWN and CCR submitted a FOIA request to ICE and DHS in November 2013, seeking release of information regarding ICE's controversial implementation of the Detention Bed Quota, the annual Congressional appropriations provision that conditions over $5.39 billion in funding for ICE on the maintenance of 34,000 detention beds per day. Compl. ¶ 2.[1] Plaintiffs sought records related to ICE's contracts with private prison corporations in order to inform the public about the Contractors' influence on immigration detention policy. *Id.* ¶¶ 2, 8, 57.

On January 30, 2014, Appellees filed a Complaint in the Southern District of New York to compel DHS and ICE to search for and produce documents, *Id.* ¶¶ 73-74, followed by a Motion for Preliminary Injunction on February 2, 2014, Mot. Prelim. Inj. (ECF No. 6). By Order dated July 3, 2014, the district court directed ICE to produce a minimum of 1,200 pages of responsive documents per month, and directed DHS to either review 4000 pages or produce 1,200 per month. Order, at 1 (ECF No. 48). Once ICE began producing documents to Plaintiffs, including its detention contracts, it redacted critical terms, including unit prices, bed-day rates, and staffing plans pursuant to 5 U.S.C. § 552(b)(4) ("Exemption 4"). That FOIA exemption allows the Government to protect "trade secrets and commercial

[1] Docket entries here refer to *Detention Watch Network et al. v. United States Immigration and Customs Enforcement et al.*, No. 14 CIV. 583 (S.D.N.Y.) (LGS).

or financial information obtained from a person" that is "privileged or confidential." 5 U.S.C. § 552(b)(4).

ICE later reported that, pursuant to DHS's FOIA regulation 6 C.F.R. § 5.8, it would provide notice to private contractors that a FOIA requester sought information involving entities "from whom the Department obtains business information" and granting them the opportunity to "object to disclosure." 6 C.F.R. § 5.8(d), (f). ICE Letter to Pls., Mar. 13, 2015 (ECF No. 58-2 at 3). After receiving the Contractors' input, ICE continued to withhold the contract terms pursuant to Exemption 4. ICE Letter to Pls., Jun. 15, 2015 (ECF No. 61-2).

On November 17, 2015, Appellees filed a Motion for Partial Summary Judgment challenging the Government's withholding of unit prices, bed-day rates, and staffing plans in its contracts with private entities pursuant to FOIA Exemption 4. Br. in Supp. of Pls.' Mot. for Partial Summ. J., at 7 (ECF No. 75). Appellees asserted that Government contract terms are not information "obtained from a person" pursuant to Exemption 4 because such terms exist only once the Government awards a contract; this information is thus Government information, not the proprietary information of corporate contractors. *Id.* at 8-13. Appellees further argued that such information is not "confidential" under Exemption 4, because release of such information would not cause substantial competitive harm. *Id.* at 13-22.

The Government cross-moved for summary judgment, adding the argument that staffing plans may be withheld under FOIA Exemption 7(E), which protects information compiled for law enforcement purposes.[2] Br. in Supp. of Gov't Opp'n and Partial Summ. J. Mot., at 22 (ECF. No. 87). In support of its arguments, the Government filed declarations from both ICE and DHS officials, as well as several private contractors, contending that the contract terms should be kept secret. *Id.* The six declarations that were filed from private contractors, including Intervenor-Appellants, totaled 56 pages. Decls. in Supp. of Gov't's Mot. (ECF Nos. 90-93; 106-107).

On July 14, 2016, the district court granted Appellees' motion for partial summary judgment, holding that FOIA Exemptions 4 and 7(E) "do not apply to unit prices, day-bed rates and staffing plans." *Det. Watch Network v. ICE*, No. 14 CIV. 583 (LGS), 2016 WL 3926451, at *10 (S.D.N.Y. July 14, 2016). The court rejected the Government's claim that such information was "obtained from a person" under Exemption 4. Applying this Court's decision in *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.,* 601 F. 3d 143, 147 (2d Cir. 2010), the

[2] Exemption 7(E) protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7) (emphasis added).

lower court reasoned that such information was not "obtained from a person" because "the contracts and their terms did not come into existence until each party to the contract— the private party and the Government—took 'executive action' to enter into the contract." *Id.* at *5 (quoting *Bloomberg*, 601 F.3d at 149).

The district court further concluded that the bed-day rates, unit pricing and staffing plans were not "confidential" under Exemption 4 because it was not likely that disclosure would cause the contractors "substantial competitive harm." *Id.* The court reasoned that the "record shows a limited competitive market for detention services and does not show that prices, or more importantly, profit, could be derived with the specificity needed to meet Defendants' burden of showing competitive harm." *Id.* Finally, the court determined that Exemption 7(E) did not justify the withholding of staffing plans given that the Government did "not even attempt to show what investigations or prosecutions are occurring. . . or how a staffing plan constitutes a technique or procedure used for law enforcement investigations or prosecutions." *Id.* at *8. Accordingly, the district court declared that "the information must be produced." *Id.* at *1.

Two weeks later and before the Government's time to appeal had elapsed, the GEO Group moved to intervene to "protect" its purported "right to appeal from the Court's orders." GEO's Ltr. Mot. to Intervene (ECF No. 127). On August 10, 2016, CCA followed suit, seeking intervention should the Government not appeal.

CCA's Ltr. Mot. to Intervene (ECF No. 133). Plaintiffs-Appellees objected on grounds that allowing the Contractors to intervene after a final judgment was untimely and prejudicial, and that the Contractors' interest was adequately represented through its participation in the Government's opposition to Plaintiffs' motion. Pls.' Opp'n to GEO's Mot. (ECF No. 130) and Opp'n to CCA's Mot. (ECF. No. 134).

On August 17, 2016, the Government notified the parties that it would not appeal. Shortly thereafter, the court granted CCA and GEO's motions to intervene under Federal Rule of Civil Procedure 24(a) "for the sole purpose of appealing the Court's July 14, 2016 Opinion and Order." Order, Sept. 2, 2016, at 9 (ECF No. 141). The district court reasoned that "[d]isposition of this action may impede [the Contractors'] abilities to protect their interest in preventing disclosure," *id.* at 7, but did not evaluate whether the intervenors would have appellate standing to protect such interest if the Government did not appeal.

ARGUMENT

I. THE APPEAL MUST BE DISMISSED BECAUSE THERE IS NO ARTICLE III CASE OR CONTROVERSY WHERE THE GOVERNMENT, THE ONLY PARTY BOUND BY THE DISTRICT COURT DISCLOSURE ORDER, HAS NOT APPEALED.

This appeal does not present a redressable case or controversy and must be dismissed because the Government-Defendants—the only entities bound by the district court's order below and the only entities entitled to assert claims for

withholding under FOIA—declined to appeal and are not parties before this Court. Article III constrains the power of federal courts to deciding actual "cases" or "controversies." U.S. Const. art. III, § 1; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (noting appellate courts' "special obligation" to satisfy themselves that the court has jurisdiction over an appeal). The absence of the Government in this appeal means that there is no decision the Court can render that would bind the party bound by the district court's order; the Government is beyond the reach of the Court. *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004) ("[A] party not bound by a judgment cannot appeal a district court's decision on the sole ground that the decision sets a precedent unfavorable to the would-be appellant."). Simply put, the "absence" of the Government as an appellant means "there is no case for [Intervenors] to join." *Diamond*, 476 U.S. at 64.

Consequently, any decision this Court renders would be unenforceable and constitute an impermissible advisory opinion. *See Town of Deerfield, N.Y. v. F.C.C.*, 992 F.2d 420, 428 (2d Cir. 1993) ("[A] decision that "binds no one […] is no judgment in the legal sense of the term.") (quoting *Gordon v. United States*, 117 U.S. 697, 705 (1865)). "Hypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101. The Court therefore lacks jurisdiction and the appeal must be dismissed. *See id.* at 94

(when jurisdiction "ceases to exist, the only function remaining" to an appellate court is "announcing the fact and dismissing the cause") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1869)).

II. THIS COURT LACKS JURISDICTION AND THE APPEAL MUST BE DISMISSED BECAUSE THE CONTRACTORS HAVE NO STANDING TO APPEAL A FOIA JUDGMENT WHICH THE GOVERNMENT ACCEPTS.

This Court also lacks jurisdiction because in the absence of the party-in-interest, the Government, the Contractors lack standing to appeal the district court's FOIA order. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 549 (1986) (case must be dismissed where party lacks standing on appeal). First, the Contractors may not stand in the shoes of the Government as if it had appealed; they must establish their own independent standing to appeal. Second, the Contractors' interest as intervenors below is insufficient to establish standing to appeal a FOIA judgment where the Government accedes to the public release of documents. Third, the Contractors cannot establish their own standing to appeal because the challenged disclosure order determined the Government's lacking legal basis for withholding the redacted contract terms, not the rights or claims of the Contractors. Moreover, as the Supreme Court held in *Chrysler Corp. v. Brown*, 441 U.S. 281, 291-93 (1979), corporations have no standing to compel government secrecy under FOIA, and a court has no power under FOIA to order the

government to keep documents secret. Intervenor-Appellants therefore lack standing, this Court lacks jurisdiction, and the appeal must be dismissed.

A. The Contractors Can Neither "Piggyback" on the Would-Be Standing of the Government Nor Rely Upon Their Status as Intervenors Below When There is No Case for Intervenors to Join.

To pursue a FOIA appeal in the absence of the Government, the Contractors must establish standing independently. Intervenors cannot "step into the shoes of the original party" who is absent from the appeal; the intervenor must independently satisfy "the requirements of Article III." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); *Diamond*, 476 U.S. at 68 ("An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III[.]"). It is immaterial that the Government would have had standing had it appealed; in its absence, the Contractors must meet the requirements of Article III.

Indeed, *Diamond v. Charles*, a case similarly addressing an intervenor's standing on appeal once the Government elected not to appeal, forecloses the Contractors from bootstrapping their appellate standing on the would-be standing of the Government. 476 U.S. at 63. There, the Supreme Court held that an intervenor lacked standing on appeal to defend the 1975 Illinois Abortion Law in lieu of the State where the State had "indicated its acceptance of the decision" by

not appealing and was thus not "an appellant before the Court." *Id.* at 64. The Court acknowledged that Diamond, "as an intervening defendant below, also would be entitled to seek review" *had* the State *elected* to appeal. *Id.* But the Court concluded that "this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, *there is no case for Diamond to join*." *Id.* (emphasis added).

Likewise, a mere *statutorily-recognized* "interest" under Rule 24 that might justify intervention below cannot, of its own force, establish the constitutional requirements of Article III standing to litigate "in the absence of the party on whose side intervention was permitted[.]" *Id.* at 68; *see also id.* at 69 (intervenors' interests below were "plainly . . . insufficient to confer standing" on appeal); *Tummino v Hamburg*, 260 F.R.D. 27, 30 (E.D.N.Y. 2009) (internal citation omitted) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III."); *Didrickson v. U.S. Dept. of Interior*, 982 F.2d 1332, 1338 (9th Cir. 1992) (an interest permitting intervention "not necessarily a sufficient basis" for an appeal "abandoned by the other parties").[3]

[3] Courts have denied prospective parties intervention to appeal judgments the original parties chose not to appeal. *See Floyd v. City of New York*, 302 F.R.D. 69, 128 (S.D.N.Y. 2014) (denying law enforcement unions intervention where they

Here, the Government's choice not to appeal leaves the Contractors with no case to join and "leaves the Court without a 'case' or 'controversy'" to resolve. *Diamond*, 476 U.S. at 64. The Contractors may not rely upon the putative standing of non-parties, but must satisfy Article III requirements on their own. As shown below, they cannot do so.

B. The Contractors Have No Independent Standing to Appeal a FOIA Judgment in the Absence of the Government.

To establish Article III standing, Intervenor-Appellants must show an "injury in fact that is fairly traceable to the challenged action and that is likely to be redressed by the relief requested." *Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Contractors have no "direct stake" in the outcome of a FOIA dispute that the Government no longer contests, and FOIA does not empower this Court to redress the Contractors' purported injury by enjoining the release of information. The Contractors therefore lack standing, and the appeal must be dismissed.

1. The Contractors have no "injury in fact traceable" to the Government's decision to release information to the public.

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lacked standing to appeal a preliminary injunction after the city withdrew its appeal), *aff'd*, 770 F.3d 1051 (2d Cir. N.Y. 2014); *Tummino*, 260 F.R.D. at 31 (denying organizations post-judgment intervention because they lacked standing to appeal judgment binding upon the FDA where agency did not appeal); *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir. 2011) (affirming denial of intervention to organization to appeal decision declaring unconstitutional California law prohibiting same-sex marriages, after the state did not appeal).

Intervenor-Appellants cannot establish an injury under Article III because the disclosure order they challenge adjudicated the Government's right to withhold the redacted contract terms, not the rights or claims of the Contractors. Article III standing requires an injury-in-fact that is "concrete and particularized," as well as "actual or imminent." *Lujan*, 504 U.S. at 560-61; *Hollingsworth*, 133 S. Ct. at 2662 ("[A] litigant must seek relief for an injury that affects him in a personal and individual way [and] . . . must possess a direct stake in the outcome of the case.") (internal citations and quotation marks omitted). Here, Intervenor-Appellants have no "direct stake" in the outcome of this appeal because the FOIA judgment they challenge only prohibits the Government from withholding its contract terms; the district court's order does not order the Contractors "to do or refrain from doing anything." *See Hollingsworth*, 133 S. Ct. at 2662; *Lujan*, 504 U.S. at 563 ("[T]he party seeking review must be of himself the injured.") (citations omitted).

Indeed, the absence of Intervenor-Appellants' injury is clear from the nature and purpose of FOIA, which exclusively governs the government's disclosure obligations to the public and the exemptions that permit the government to keep limited information secret. *See* 5 U.S.C. § 552(b) (setting forth FOIA's nine categories of exempt information); *Bloomberg*, 601 F.3d at 147 (noting FOIA's "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language") (internal citations omitted)).

Although the Government may withhold information when FOIA exemptions apply, the statute provides no basis for third parties like the Contractors to enjoin the government from disclosing information. *See* 5 U.S.C. § 552(b); *Chrysler*, 441 U.S. at 293.

In fact, in *Chrysler Corp. v. Brown*, the Supreme Court made clear that there is no private right of action under FOIA to prevent a government agency from disclosing information. 441 U.S. at 292. In that case, the Chrysler Corporation, a contractor with the Department of Defense, sought to enjoin the release of affirmative action plans and equal employment opportunity reports, claiming they were "confidential" pursuant to FOIA Exemption 4. *Id.* at 285-86, 291. The Court rejected Chrysler's attempt to bar disclosure, finding it contrary to FOIA's "language, logic" and "history." *Id.* at 291-92. The Court concluded that while FOIA's exemptions, and "Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and non-governmental entities" who submit information to the government, "the congressional concern was the *agency*'s need or preference for confidentiality." *Id*. at 291-93 (emphasis in original).

As the numerous courts that have followed *Chrysler* have necessarily recognized, FOIA "protects the submitters' interests in confidentiality only to the extent that this interest is endorsed by the agency collecting the information." *Id.* at 293; *see*, *e.g., Acumenics Research & Techn. v. Dep't of Justice*, 843 F.2d 800, 804

(4th Cir. 1988) ("[A] private party seeking to block an agency's disclosure of information under FOIA has no private right of action[.]"); *In re Providence Journal Co.*, 820 F.2d 1342, 1349 (1st Cir. 1986) ("FOIA does not authorize an injunction against disclosure."); *NOW v. Soc. Sec. Admin. of Dep't of Health and Human Servs.*, 736 F.2d 727, 744-45 (D.C. Cir. 1984) ("[T]he FOIA right of action extends only to those who request disclosure."); *Stoianoff v. Comm'r of Motor Vehicles*, 107 F. Supp. 2d 439, 444 (S.D.NY. 2000) ("[T]here is no private right of action to enjoin disclosure under FOIA."). This well-settled law makes clear that the Contractors have no "direct stake" in the outcome of a now-resolved FOIA dispute, where the Government no longer contests disclosure. Just as the Contractors could not sue to block an agency's disclosure through FOIA under *Chrysler*, they may not usurp the Government's FOIA authority and appeal a FOIA judgment in place of the Government to achieve that result.[4]

Furthermore, Intervenor-Appellants' "mere interest" in keeping its contracts with the government secret "is not enough to meet the Article III injury-in-fact

[4] The only mechanism available to third parties to challenge government information disclosures is the Administrative Procedure Act ("APA"). *Chrysler*, 441 U.S. at 317–18 (recognizing party's standing to bring a non-disclosure suit under section 10(a) of the APA). Here, the Contractors have not filed suit under the APA to challenge the Government's decision to disclose pursuant to the district court's order. Even if they had, they would be unable to overcome the "arbitrary and capricious" standard applicable to such claims. *See, e.g.*, *F.D.I.C. & Ernst*, 677 F.2d 230 (2d Cir. 1982) (an agency's decision to disclose "could not be arbitrary, because the district court had already reviewed the issue of disclosure").

requirement." *See Lujan*, 504 U.S. at 563 (a party claiming an injury must be "directly affected, apart from their special interest in the subject") (internal quotations omitted); *Tachiona*, 386 F.3d at 211 (for Article III injury, party must "have sustained a 'legal injury, actual or threatened,' as a result of the judgment"). Here, the district court's FOIA decision and order determines only the Government's obligations. The Contractors' view that the government transparency ordered by the district court is adverse to their interests is not equivalent to Article III standing; because the Contractors have no rights under FOIA to compel government secrecy, they have no direct stake in this matter and no "concrete and particularized" injury required for standing to appeal. *See Hollingsworth*, 133 S. Ct. at 2662; *Lujan*, 504 U.S. at 560. This Court therefore lacks jurisdiction and the appeal must be dismissed.

2. This Court cannot redress the Contractors' purported injury because under FOIA it cannot enjoin the release of government documents.

The Contractors also cannot establish standing because the Court has no power to redress their purported injury. *See Schulz*, 44 F.3d at 52 (to establish standing an injury-in-fact must be "likely to be redressed by the relief requested"). First, redress is not possible because, as set forth in Part I, the absence of the Government in this appeal means that it is beyond the reach of the Court, which cannot bind a party not before it. *See Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d

221, 229 (2d Cir. 2012) (claimed injury not redressable where harm alleged was due to banks that were not parties before the Court).

Second, this Court is powerless under FOIA to direct the remedy the Contractors seek: an order enjoining release of the contract terms. FOIA vests jurisdiction in the district courts only to "enjoin the agency *from withholding* agency records and *to order the production* of any agency records improperly withheld from the complainant." *See* 5 U.S.C. § 552(a)(4)(B) (emphasis added). FOIA is "exclusively a disclosure statute" that does not give courts "the authority to bar disclosure." *Chrysler*, 441 U.S. at 292. Indeed, government agencies have complete discretion to determine whether to disclose information otherwise protected by an applicable FOIA exemption.

Thus, even if this Court reversed the lower court's decision, the Government could still disclose the information. *See Chrysler*, 441 U.S. at 293 (FOIA protects information "to the extent . . . endorsed by the agency"). The Contractors' claimed injury is therefore not redressable because it depends "'on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Lujan*, 504 U.S. at 562 (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). This Court is thus powerless to direct the remedy the Contractors seek.

III. PERMITTING CORPORATE ENTITIES TO DICTATE THE SCOPE OF GOVERNMENT SECRECY WOULD UNDERMINE THE FOIA.

Allowing private contractors to appeal a district court's FOIA judgment in the Government's absence not only suffers from fatal jurisdictional flaws, it would do grave violence to FOIA and its overarching mandate of public disclosure. As the Supreme Court recognized in *Chrysler,* FOIA and its legislative history make clear that private entities were never intended to have veto power over government decisions to release information to the public. *Chrysler*, 411 U.S. at 291-93.

Congress deliberately did not create a private cause of action to mandate secrecy under FOIA. *See* 5 U.S.C. § 552; *see Chrysler*, 441 U.S. at 291-92; SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 2 (July 4, 1966), *available at* http://www.llsdc.org/assets/sourcebook/foia-lh.pdf (FOIA's exemptions "were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information."). Thus, private entities like the Contractors, and even the courts, have no grounds under FOIA to second-guess government decisions that favor transparency. To allow private entities to override the government's decisions in this instance "would amount to condoning a collateral attack on the democratic process . . . erod[ing] the legitimacy of decisions made by the democratically-elected representatives of the people." *See Floyd*, 770 F.3d at 1060 (noting this Court's

"serious reservations" about a public sector union litigating an appeal abandoned by the City's "duly elected representatives").

Lacking a private right of action to compel government secrecy, the Contractors appeal as if they are, in fact, the Government. Irrespective of their influence over the government's detention policy—the very subject this FOIA request seeks to expose—the Contractors cannot stand in the shoes of the Government, assert FOIA exemptions available only to the Government, and interfere with the balance Congress sought to strike between the public and their elected representatives regarding the transparency appropriate in our democracy. In the end, Article III protects against corporations' inappropriate role in FOIA implicated by this appeal. *See Steel Co.*, 523 U.S. at 101 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of the separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

CONCLUSION

For all of these reasons, this Court lacks jurisdiction and the Intervenor-Appellants lack standing, and Plaintiff-Appellees respectfully request that the appeal be dismissed.

Dated: November 29, 2016

Respectfully submitted,

*/s/*Jennifer B. Condon
JENNIFER B. CONDON
STEPHANIE D. ASHLEY
(Student Attorney)
IMAN SAAD
(Student Attorney)
Center for Social Justice
Seton Hall Law School
833 McCarter Highway
Newark, New Jersey 07102
(973) 642-8700
Jenny-Brooke.Condon@shu.edu

GHITA SCHWARZ
BAHER AZMY
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Tel.: (212) 614-6445
Fax: (212) 614-6422
gschwarz@ccrjustice.org
bazmy@ccrjustice.org

Counsel for Plaintiff-Appellees