Nos. 17-64

IN THE
Supreme Court of the United States

THE GEO GROUP, INC.,
Petitioner,

v.

DETENTION WATCH NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS,
Respondents.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a private intervenor have independent standing to appeal a district court order directing government parties in interest to disclose information pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552 *et seq.*, where the defendant agencies have elected not to appeal in accordance with their statutorily-conferred discretion to disclose government information to the public?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents Detention Watch Network ("DWN") and the Center for Constitutional Rights ("CCR") were appellees and cross-appellants below and plaintiffs in the district court. Petitioner The GEO Group ("GEO") was an appellant-intervenor and cross-appellee-intervenor below and a defendant-intervenor in the district court.

Corrections Corporation of America (a/k/a "CoreCivic") was an appellant-intervenor and cross-appellee-intervenor below and a defendant-intervenor in the district court, but did not petition for a writ of certiorari.

The U.S. Immigration and Customs Enforcement ("ICE") and U.S. Department of Homeland Security ("DHS") were defendants in the district court, but not parties to the appeal.

Respondents DWN and CCR have no parent corporations. No publicly-held company owns 10% or more of a corporation's stock, the disclosure of which is required under Rule 29.6.

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

United States Code

Rules and Regulations

Other Authorities

INTRODUCTION

Respondents are non-profit human rights organizations seeking the release of the terms and conditions of government contracts with private prison contractors for the operation of immigration detention facilities. Respondents challenged the Department of Homeland Security and Immigration and Customs Enforcement's withholding of information pursuant to applicable exemptions under the Freedom of Information Act ("FOIA"), and won in the district court. But post-judgment, Petitioner, one of the nation's two largest private prison contractors, intervened with the intention of appealing if the Government acceded to the district court's disclosure order. Although the Government declined to appeal, and notwithstanding that no appellate court has ever permitted a private intervenor, acting alone, to appeal a FOIA ruling ordering the Government to disclose information, Petitioner contends that its disagreement with the Government's exercise of discretion merits the Court's attention.

None of the considerations traditionally warranting certiorari are present. First, the Second Circuit's summary dismissal of Petitioner's appeal presents no conflict with the precedent established nearly forty years ago in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and has been undisturbed since. *Brown* holds that private parties may not seek to enjoin or limit disclosure of information under the FOIA because the FOIA is exclusively a disclosure statute that grants discretion to the Government to withhold information if and only if it can

demonstrate that such information falls within an applicable exemption. Petitioner cannot overcome the plain language of the FOIA and of *Brown*: there is no private right of action for third parties to limit release of information where the Government itself is prepared to disclose.

Second, the Second Circuit's decision is consistent with decades of Supreme Court precedent, beginning with *Diamond v. Charles*, 476 U.S. 54 (1986), requiring intervenors to establish independent standing under Article III where the party in interest has declined to appeal. While Government decisions may touch on private interests, that connection alone does not amount to an injury-in-fact under Article III. Because the purported harm Petitioner seeks to prevent here – public release of government contract terms – is not a cognizable legal injury under the FOIA or otherwise, and because the Government has declined to appeal, the Court cannot issue an order that would redress Petitioner's theoretical injury. In acceding to the district court's disclosure order, the Government extinguished its dispute with Respondents, and there is no case or controversy for the Court to adjudicate. With no party against whom to enforce a judgment, the questions Petitioner seeks to address are purely hypothetical and would produce nothing more than an advisory opinion. This fact alone compels denial of the petition.

Third, the Second Circuit's decision to dismiss Petitioner's appeal does not diverge from the decisions of any other circuit. Petitioner is unable to cite a single instance of a federal appellate court permitting private parties to unilaterally challenge a

district court's FOIA disclosure order. There is no circuit split requiring this Court's resolution because the precedent is so well-established: the FOIA is exclusively a disclosure statute, and where the Government has acceded to the lower court's order, private parties cannot show Article III standing to appeal.

Finally, Petitioner's attempt to appeal the district court's FOIA judgment in the Government's absence not only suffers from these fatal jurisdictional flaws, but also threatens grave violence to the FOIA and its overarching policy of prompt 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 should deny Petitioner's request to revisit an uncontroversial set of precedents that no circuit court has questioned.

STATEMENT OF THE CASE

The subject of this petition is a private prison contractor's attempt, as an intervenor, to appeal a disclosure order under the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.*, despite the fact that the federal defendant agencies, the only parties in interest, have not appealed and are therefore bound to disclose withheld information in the agencies' possession.

Respondents, two non-profit human rights organizations, filed their request under the FOIA in

November 2013. In July 2016, Respondents were granted summary judgment compelling the Government to disclose information it had withheld pursuant to two FOIA exemptions – a decision that the Government chose not to appeal. But a year after the Government decided to comply with the disclosure order, the contested information has not been released to the public. Petitioner, who intervened post-judgment in the district court, appealed independently, obtaining stays of disclosure pending the outcome. Now that the Second Circuit Court of Appeals, in a unanimous, summary order, has dismissed Petitioner's appeal for lack of standing, Petitioner seeks relief from this Court in lieu of the absent government agencies – the only parties in interest.

A. Factual Background

United States Immigration and Customs Enforcement ("ICE"), a component of the Department of Homeland Security ("DHS"), manages a system of immigration detention centers across the country, comprised of facilities owned and managed by ICE, local governmental entities, and private prison contractors. In addition, many government-owned facilities subcontract with private prison corporations to provide detention-related services. App.28a. Private contractors currently account for 62% of immigration detention beds. J.A. 229 ¶16.[1] The two largest private immigration detention

[1] This brief cites to the Joint Appendix ("J.A.") that was filed in the Second Circuit.

contractors are Petitioner The GEO Group ("GEO"), and CoreCivic, formerly known as Corrections Corporation of America ("CCA"), who together operate 72% of the private immigration detention beds. J.A. 229 ¶17.

Nearly four years ago, in November 2013, Respondents Detention Watch Network ("DWN") and the Center for Constitutional Rights ("CCR") (together "Respondents") filed a FOIA request with ICE and DHS. As non-profit advocacy and legal groups combatting mass incarceration and detention, Respondents sought to inform public debate about the financial incentives underlying the immigration detention contracting regime and contractors' influence on immigration detention policy. J.A. 20-25 ¶¶ 2, 11-13, 16-17; J.A. 45-52. The request sought release of information regarding ICE's controversial implementation of its detention bed mandate or quota, the annual Congressional appropriations provision that conditioned over $5 billion in funding for ICE on the maintenance of 34,000 detention beds per day. J.A. 20-21 ¶¶ 2, 4-5. Among other records, DWN and CCR sought ICE's "Executed Agreements Related to Detention Facilities or Detention Beds," including executed contracts, renewals and agreements with both local government contractors and private prison corporations. J.A. 47. Of particular interest were the terms in executed government contracts that offered "guaranteed minimum" payments to detention contractors regardless of whether beds were filled. J.A. 47-48.

DWN and CCR filed a complaint in the federal district court for the Southern District of New York on January 30, 2014, to compel the federal agencies,

ICE and DHS, to search for and produce documents. J.A. 20. 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 pages per month. J.A. 173.

ICE began producing documents to Plaintiffs on a monthly basis, including its detention contracts with both local governments and private contractors. But ICE withheld critical terms of these contracts pursuant to FOIA Exemption 4, which allows the Government to protect "trade secrets and commercial or financial information obtained from a person" that is "privileged or confidential." 5 U.S.C. § 552(b)(4). Specifically, ICE withheld the amount the Government agreed to pay contractors for guaranteed minimums, which are reflected in the unit prices and per diem bed-day rates, including those that vary with detainee population (sometimes referred to as "tiered pricing"). J.A. 228 ¶¶8, 11-12. Pursuant to Exemption 4, ICE also withheld staffing plans – documents indicating the number of detention staff that contractors employ to carry out their obligations as a condition of their contracts with the Government. J.A. 228 ¶ 9; App. 18a.

The Government eventually conceded that unit pricing had been erroneously redacted in detention contracts with local and county governments, and re-produced public contracts with unredacted terms. J.A. 231 ¶25; App. 19a. But with regard to identical information in contracts and agreements with private contractors, ICE sought input from private contractors pursuant to 6 C.F.R. § 5.8, a DHS regulation requiring DHS and its

components to provide "prompt written notice" to "any person or entity from whom the Department obtains business information" that a FOIA requester seeks such information, and providing contractors with the opportunity to "object to disclosure." 6 C.F.R. § 5.8(d), (f). After receiving the contractors' input, ICE determined that it would continue to withhold the contract terms pursuant to Exemption 4. J.A. 175, 232 ¶ 28; App. 19a.

B. Proceedings in the District Court

Respondents DWN and CCR moved for summary judgment on November 17, 2015, to challenge the Government's invocation of Exemption 4 to withhold the terms and conditions of its contracts and agreements with private contractors. J.A. 222, 224. Respondents asserted that terms and conditions of executed government contracts 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. J.A. 333, App. 24a-25a. Respondents further argued that such information is not "confidential" under Exemption 4 because release of such information would not cause the contractors substantial competitive harm, given the lack of a competitive market for detention contracts. J.A. 229-231 ¶¶ 15-22; App. 28a.

The Government cross-moved for summary judgment, adding for the first time the argument that staffing plans may be withheld under FOIA Exemption 7(e), which allows federal agencies to withhold information compiled by law enforcement if

it "would disclose techniques and procedures for law enforcement investigations or prosecutions." 552 U.S.C. §7(e). J.A. 314. In support of its arguments defending both exemptions, the Government filed declarations from ICE and DHS officials, J.A. 351, 384, 454, as well as numerous private contractors, including Petitioner, contending that the contract terms should be kept secret. J.A. 395, 404, 414, 459, 468.

On July 14, 2016, the district court granted Respondents' 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." App. 17a. The district court rejected the Government's claim that the terms and conditions of executed government contracts with private contractors was information "obtained from a person" under Exemption 4. Applying the Second Circuit's decision in *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.,* 601 F. 3d 143, 147 (2nd Cir. 2010), the district 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." App. 26a (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." App. 26a. 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." App. 28a. 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." App. 34a. Accordingly, the district court ordered that "the information must be produced." App. 17a.

From the time Respondents filed their FOIA request in November 2013 and their complaint in the district court in January 2014, and despite ICE's direct notification to Petitioner about the lawsuit in March 2015, Petitioner made no attempt to intervene to protect any of its asserted interests. It was not until two weeks *post*-judgment, that Petitioner, followed shortly thereafter by CCA, moved to enter the lawsuit as a defendant-intervenor. App. 7a. Respondents objected on grounds that allowing GEO and CCA to intervene after a final judgment was untimely and prejudicial, and that the private contractors' interest was adequately represented through its extensive participation in the Government's opposition to Plaintiffs' motion. App. 10a-11a.

On September 1, 2016, the court granted GEO and CCA's motions to intervene as of right under Federal Rule of Civil Procedure 24(a) "for the sole purpose of appealing the Court's July 14, 2016 Opinion and Order." App. 15a. The district court reasoned that the "[d]isposition of this action may

impede [the Contractors'] abilities to protect their interest in preventing disclosure," App. 13a, but did not evaluate whether the intervenors would have appellate standing to protect such interest if the Government did not appeal.

The Government did not appeal any part of the district court's order. GEO and CCA filed a notice of appeal of the district court's summary judgment order to the Second Circuit, J.A. 497, and Respondents filed a notice of cross-appeal to challenge the district court's grant of intervention. J.A. 500. Upon motion by GEO and CCA, the district court stayed the release of any of the contested information not already in the public domain. App. 3ra-4ra; 6ra-7ra.

C. Proceedings in the Second Circuit Court of Appeals

On November 29, 2016, Respondents moved to dismiss the contractors' appeal for lack of standing, arguing that without the Government as a party to the appeal, the Second Circuit had neither jurisdiction to bind the Government nor the power to direct the agencies to withhold information under the FOIA. On February 8, 2017, in a unanimous, summary decision, a three-judge motions panel dismissed Petitioner's appeal for lack of jurisdiction, stating that it had not "suffered an invasion of a legally protected interest" and therefore lacked standing to appeal. App. 2a. The panel therefore dismissed as moot Respondents' cross-appeal of the order granting intervention. App. 2a. Petitioner and its co-intervenor, now called CoreCivic, moved for reconsideration and rehearing *en banc*; those

motions were denied on April 11, 2017. App. 3a. Petitioner alone subsequently moved for a stay of the Second Circuit's mandate pending its petition for a writ of certiorari to this Court. The Court of Appeals granted the stay on July 17, 2017, shortly after the instant petition was filed. App. 1ra-2ra.

D. Corrections of Petitioner's Misstatements

1. Petitioner repeatedly and wrongly states that Respondents "sought business information that [private contractors] had provided to ICE." Pet. 7, 8 n.3, 14 (quoting J.A. 353 ¶11 (affidavit of ICE's Deputy Freedom of Information Act Officer Fernando Pineiro)). This statement is false; it is based not on Respondents' FOIA request but rather on an ICE official's recitation of the standard set forth in 6 C.F.R. § 5.8 and is thus conclusory rather than factual. As their request clearly sets forth, Respondents sought "Executed Agreements" between the Government and its detention contractors, J.A. 47. Petitioner's misrepresentation serves to imply, erroneously, that the district court ordered the disclosure of information equivalent to bids or raw data that are proprietary to the contractors. Pet. 7, 8 n.3, 15. But the withholding of any information "provided" by the contractors was never the subject of summary judgment litigation below. Rather, the district court ordered the disclosure of pricing terms in final, executed government contracts and information in government-generated staffing plans, that is, information created *by the government* as a result of executive decision-making. App. 26a. The terms of government contracts and staffing plans ordered

disclosed were thus not "provided" by the contractors; they did not exist before the Government agreed to these terms and plans. App. 25a (noting that "[d]eclarations in the record confirm that these rates were negotiated and agreed on by the Government, as one would expect in an arms-length transaction.")

2. Petitioner also claims that the Government has never repudiated its initial invocation of FOIA Exemptions (b)(4) or (b)(7)(e). For example, Petitioner states that "DHS/ICE has ***never*** withdrawn the exemptions," Pet. 24 (emphasis in original), and that "if the agency itself had made a decision to rescind its determination and release GEO's information, it could simply have turned over the information on its own." Pet. 17. The record controverts both claims. First, the Government abandoned any claim of statutory authority to withhold contract terms and conditions under Exemptions (b)(4) and (b)(7)(e) when it accepted the district court's order and chose not to appeal. That decision is *res judicata*; the government cannot resuscitate a claim to withhold this information under the FOIA now that its window to appeal has closed. Second, Petitioner wrongly states that "if the agency had made a decision to rescind its prior determination to release GEO's information, it could simply have turned over the information on its own." Pet. 17. This is untrue. The Government's choice not to appeal is a decision to cease withholding the information. It is the court-ordered stays requested by Petitioner – not any position of the Government's – that have prevented the agency from releasing

information to Respondents. App. 1ra-2ra; 3ra-4ra; 6ra-7ra.

REASONS FOR DENYING THE PETITION

I. The Circuit Court's Summary Dismissal of Intervenor's Appeal for Failure to Establish Standing Under the FOIA Is Dictated by *Brown* and Does Not Warrant Review.

The unanimous, one-paragraph decision by a three-judge motions panel of the Court of Appeals for the Second Circuit holding that Petitioner lacks standing because it has "not suffered an invasion of a legally protected interest," App. 2a, was a routine and correct application of *Chrysler Corp. v. Brown*, 441 U.S. 281, 292-93 (1979). As *Brown* explained, "'the FOIA by itself protects the submitters' interest in confidentiality *only* to the extent that this interest is endorsed by the agency collecting the information.'" App. 2a (quoting *Brown*, 441 U.S. 292-93 (emphasis added)). Thus, where the defendant government agencies have declined to appeal and thereby acceded to the district court's order, they have waived any objection to disclosure. But Petitioner contends that the Government endorses its interest in confidentiality even though the Government's actions contradict that claim. This is disingenuous. Petitioner alone seeks to stop the release of government information to the public. Its status as an independent, intervening third party is fatal to its petition because courts have no authority under the FOIA to enjoin disclosure, the remedy Petitioner seeks.

Petitioner's challenge to the Court of Appeals' uncontroversial holding mischaracterizes both *Brown* and the Government's position. In *Brown*, the Chrysler Corporation, a contractor with the Department of Defense ("DOD"), sought to enjoin DOD's release of Chrysler's affirmative action plans and equal employment opportunity reports, claiming they were "confidential" pursuant to FOIA Exemption 4. *Id.* at 286-88, 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 nongovernmental entities" who submit information to the government, *id.* at 291, "the congressional concern was with the *agency*'s need or preference for confidentiality." *Id.* at 292-93 (emphasis in original). *Brown* therefore held that FOIA does not grant a private right of action to parties seeking to block government disclosures and district courts lack jurisdiction to compel the withholding of government information.

In the face of this clear holding that third parties cannot enjoin the government from disclosing information under the FOIA, Petitioner argues that the decision below "conflicts with *Brown*." Pet. 12. Petitioner claims first that *Brown* is limited to instances in which plaintiffs seek to enjoin agency disclosures, rather than those where, as here, an intervenor seeks to stop disclosure by stepping into the shoes of a government defendant that determines to release information rather than pursue a FOIA withholding on appeal. Pet. 16. Petitioner claims

next that *Brown* does not foreclose Petitioner's appeal because, unlike in that case, Petitioner's "interest in confidentiality" is actually "endorsed" by the defendant agencies despite their failure to appeal. Pet. 14-17. Petitioner is wrong on both counts.

First, nothing in *Brown* limits the Court's interpretation of the statute or its legislative history to so-called "reverse-FOIA" cases in which a private entity seeks an injunction against the government under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*., a statute not at issue here. Indeed, *Brown*'s recognition that Congress did not intend "to limit an agency's discretion to disclose information," *id.* at 294, has equal force here. Just as *Brown* forecloses third parties from enjoining the release of government documents, so too does it prevent a private contractor from usurping the Government's statutorily-conferred authority by appealing a FOIA judgment in place of the Government to achieve that same result.[2]

Petitioner attempts to evade this settled principle by stating that it does not seek to enjoin disclosure, but merely wants a ruling that would

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[2] The lone case GEO cites in support of its position, *Gulf & Western Industries, Inc., v. United States*, 615 F.2d 527 (D.C. Cir. 1979) only proves Respondent's point. There, the Government itself, not a private intervenor, appealed a disclosure order under the FOIA; the FOIA makes clear that the Government, as the defendant, had a legally protected interest in withholding pursuant to FOIA's exemptions. Petitioner, in contrast, has no "legally protected interest" in the appeal of a FOIA judgment accepted by the Government. *Lujan*, 504 U.S. at 560.

permit the defendant agencies to withhold the disputed information should they choose to do so. *See* Pet. 16. ("GEO has not argued that DHS/ICE is 'required' to redact the information; GEO is injured by the judgment that holds that DHS/ICE ***cannot*** do so") (emphasis in original). But this distinction does not solve Petitioner's standing problem. The mere speculative *possibility* of relief is insufficient to demonstrate a redressable injury. *See Lujan*, 504 U.S. at 562 (finding no standing where redress of injury depended upon "actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict") (citation omitted); *Clapper v. Amnesty Intern. USA*, 133 S.Ct. 1138, 1150 (2013) (noting the Court's "reluct[ance] to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment").

Here, redress is not only speculative, but foreclosed. By choosing not to appeal, the Government has abandoned its opportunity to withhold the documents under the FOIA. Principles of *res judicata* preclude the Government from reversing its position and reviving claims to exemptions that the district court held do not protect the information from disclosure. *See Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (noting the "res judicata consequences of a final, unappealed judgment on the merits"); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950) (United States' failure to "avail itself of the remedy it had to preserve its rights" demonstrates "the need for [*res judicata*] in providing terminal points for the litigation.").

Without a legally enforceable judgment that could bind the government party in interest, a ruling on the merits would be an impermissible advisory opinion. *See Steel Co., v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (stating that "[h]ypothetical 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"). The Second Circuit thus correctly recognized that Petitioner does not have standing because Petitioner suffered no "invasion of a legally protected interest." App. 2a. Contrary to Petitioner's argument, the Second Circuit's holding is clearly a "proper application of *Brown*." Pet. 13.

Second, Petitioner's argument that the defendant agencies "endorse" the private contractor's "interest in confidentiality" Pet. 16-17, is not only pure speculation, but also contradicted by the record. The Government's actions demonstrate as a matter of law that the Government no longer "endorses" GEO's claim for FOIA protection because the Government did not appeal; its failure to appeal requires it to disclose the withheld information.

Notwithstanding these uncontestable facts, Petitioner speculates that the defendant agencies still wish to conceal the information because the decision not to appeal was "made by the Solicitor General – not by the agency itself," and "could have" been made "over the agencies' objections." Pet. 16. This self-serving conjecture has no place in the assessment of standing. *See Lujan*, 504 U.S. at 566 ("Standing is not an ingenious academic exercise in the conceivable[.]") (internal quotation omitted). Courts do not look behind the explicit positions taken

by parties and attempt to guess hidden hopes that contradict those positions. Parties' actions before the court are the ones that count, because they form the only basis for the court to rule.

Moreover, contrary to Petitioner's remarkable claims, the fact that the information at issue was not yet released to the FOIA Requesters following the district court's order in no way suggests that the defendant agencies have resuscitated their claimed FOIA exemptions. Pet. 17 (arguing the agencies have not "rescinded" or "altered" their prior positions). Rather, the delay in release is purely Petitioner's doing. As is routine in FOIA cases, the district court, and then the circuit court, granted the motions of Petitioner and another private contractor to stay the release of information pending appeals. App. 1ra-2ra, 4ra-5ra; 6ra-7ra. The Government's compliance with court-ordered stays – sought by Petitioner itself – cannot be read as an endorsement of Petitioner's position or a reflection of the Government's wishes.

For all of these reasons, Petitioner is wrong that this Court's decision dismissing its appeal for lack of standing "conflicts with *Brown*." Pet. 14. Petitioner provides no examples of courts permitting intervenors to appeal a FOIA disclosure order with which the government agrees to comply, and the standing principles articulated in *Brown* have inspired no legal debate or controversy in the nearly forty years since it was decided. The Court of Appeals thus properly applied *Brown*, which forecloses Petitioner's standing to appeal.

II. The Circuit Court Properly Rejected Petitioner's Conflation of an Intervenor's

Interest with Article III Standing, and Its Uncontroversial Ruling Does Not Warrant Review.

Petitioner concedes, as it must, that "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 Art[icle] III [standing]." *Diamond v. Charles*. 476 U.S. 54, 68. *See* Pet. 13. In the thirty years since *Diamond* was decided, this Court has reaffirmed this principle several times, most recently last term. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1648 (2017) (holding that an intervenor pursuing relief "not requested by a [party]" must satisfy the requirements of Article III standing); *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2663 (2013) (dismissing intervenors' attempt to litigate in the place of a state government for lack of standing where they were "[w]ithout a judicially cognizable interest of their own"); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 63 (1997) (stating that an intervenor may not "step into the shoes of the original party" in that party's absence "unless the intervenor independently 'fulfills the requirements of Article III'") (quoting *Diamond*, 476 U.S. at 68).

But having acknowledged its obligation to demonstrate standing, Petitioner fails to fulfill it. Instead, Petitioner conflates its statutory interest as an intervenor with the independent constitutional requirements of Article III: "GEO's standing should have been clear. GEO was permitted to intervene as

of right in the district court for the express purpose of appealing a judgment." Pet. Br. 13.[3] Petitioner is wrong that the district court's ruling permitting intervention in and of itself conferred standing. Not only did the district court never examine the question of standing, *see* App. 5a-15a, it *could not* have properly found that GEO had appellate standing if the Government chose not to appeal. Under Article III, Petitioner must have an injury in fact that is "concrete," "particularized," and "imminent," and it must be likely that this injury could be "redressed by a favorable judicial decision." *Town of Chester*, 137 S. Ct. at 1650 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)); *Lujan*, 504 U.S. at 560-61. As the Court of Appeals correctly held, Petitioner failed to show either injury or redressability, and its holding does not warrant review.

A. Interest as an Intervenor Is Not Equivalent to Article III Injury.

Petitioner's purported *interest* in preventing the disclosure of information is inadequate to establish the *injury* required by Article III. "Article III requires more than a desire to vindicate value interests. It requires an 'injury in fact' that distinguishes 'a person with a direct stake in the outcome of a litigation . . . from a person with a mere interest in the problem.'" *Diamond v. Charles*, 476

[3] Respondents' appeal of the district court's grant of intervention was dismissed as moot when the Court of Appeals dismissed Petitioner's appeal for lack of standing. App. 2a.

U.S. 54, 66-67 (1986) (quoting *United States v. SCRAP*, 412 U.S.669, 687 n.14 (1973)).

Petitioner has no direct stake in the outcome because it lacks a legally protected interest under the FOIA, which protects the interests of private parties "*only* to the extent that this interest is endorsed" by the government. *Brown*, 441 U.S. at 292-93 (emphasis added). Petitioner seeks to avoid this binding holding by simply imagining that the government still secretly endorses its position, Pet. 12, even though the Government, by declining to appeal, formally abandoned any interest in confidentiality. *See* Part I *supra* at 13, 17. Moreover, even if the Government did secretly support the private contractor's interest in confidentiality, Pet. 13, this supposed alignment of interests would be insufficient to establish third-party standing. Because the Government is not a party before the Court, it cannot be ordered "to do or refrain from doing anything." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). *See also Diamond v. Charles*, 476 U.S. at 68.[4] There is thus no case or controversy for the Court to adjudicate.

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[4] Indeed, in *Diamond*, the absent party-in-interest, the State of Illinois, which had declined to appeal, proffered in a "letter of interest" to the Court that its position regarding the constitutionality of the Illinois Abortion law was identical to its position before the lower courts and "essentially coterminous" with the position of the Intervenor on appeal. 476 U.S. at 61. The Court nevertheless held that the intervenor had no standing, reasoning that even if the "State's general interest may be adverse to the interests of appellees, its failure to invoke our jurisdiction leaves the Court without a 'case' or 'controversy' between appellees and the State of Illinois." *Id.* at 63-64.

"A litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Hollingsworth*, 133 S.Ct. at 2663 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). But as in other recent appeals brought by intervenors in the absence of a party in interest, "[w]ithout a judicially cognizable interest of [its] own," Petitioner attempts "to invoke that of someone else." *Id.* This it cannot do. "[A] statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S.Ct. 1377, 1388 (2014) (quoting *Allen v. Wright,* 468 U.S. 737, 751 (1984)). Congress has never provided third parties with a private right of action to stop or limit disclosure under the FOIA. 5 U.S.C. §552(b); *Brown*, 441 U.S. at 293. In the absence of any Congressional authority to vindicate its interests or any other cognizable injury-in-fact, Petitioner's purported injury does not "actually exist" and cannot meet the requirements of Article III. *Spokeo*, 136 S. Ct. at 1548.

B. This Court Cannot Order Relief that Would Redress Petitioner's Purported Injury.

Petitioner's purported injury is not redressable because the relief GEO seeks, a judicial order directing or permitting the Government to withhold information, cannot be issued in this case. First, the Government, the party who must be bound in order to effect the relief Petitioner seeks, is not a party to the case. Second, the Government, by waiving its right to appeal, abandoned any claim it had to

withhold the documents under Exemptions 4 and 7(e) of the FOIA. That decision is irreversible; the Government *cannot* now withhold documents pursuant to Exemptions 4 and 7(e) because it has not pursued its right to do so.[5] Third, the FOIA is "exclusively a disclosure statute" that does not give courts "the authority to bar disclosure." *Brown*, 441 U.S. at 292. Thus, the Government would have "broad and legitimate discretion" to release information to the public, even if the district court's decision were somehow reversed on the merits. *Lujan*, 504 U.S. at 562. The Government's unfettered discretion to release any information in its possession forecloses redress for Petitioner here, because "the courts cannot presume either to control or to predict" such future choices. *Id.* (internal citations omitted).[6]

Thus, as in *Lujan*, where this Court rejected a theory of redressability premised upon speculation about the post-judgment actions of non-parties, redressability is an "obvious problem" here. *Lujan*,

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[5] Petitioner barely makes mention of the district court's ruling that the Government cannot withhold staffing plans pursuant to Exemption 7(e). It provides no argument at all that it has standing to litigate the confidentiality of information pursuant to an exemption exclusive to law enforcement "investigations and techniques." 5 U.S.C. § 552(b)(7)(e) should be deemed waived.

[6] Indeed, the record demonstrates that the Government has released identical information in the past. J.A. 475, 479. These past releases call into question Petitioner's assumptions about what the Government would do in the unlikely event that Petitioner establishes standing and wins reversal. In any case, because it has abandoned its appeal, the Government is now foreclosed from withholding the contested information.

504 U.S. at 568, 571 (dismissing the likelihood of redress as "entirely conjectural"). Indeed, Petitioner's basis for standing is even weaker than in *Lujan*, because here, any speculation is actually foreclosed as matter of law. By waiving its right to appeal, the Government foreclosed the possibility that it might exercise its discretion to withhold information and is bound by court order to disclose the terms and conditions of its detention contracts. The Government's waiver is *res judicata*; it cannot change course now. *Federated Dep't Stores*, 452 U.S. at 401 (finding "no exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party") (internal citation omitted).

Faced with this unequivocal precedent, Petitioner chooses not to address redressability or the finality of the Government's decision not to appeal at all, arguing only that a reversal on the merits would remove "the only impediment to implementation of the agency's decision." Pet. 17. Not only is that untrue – the record shows the agency decided to accede to the district court's disclosure order – but, as this Court has held numerous times, this type of conjecture is entirely insufficient to establish standing. The Circuit Court's dismissal for lack of standing is correct and plainly in line with well-established precedent. It does not warrant review.

III. Petitioner Has Invented a Conflict Among the Circuits to Justify This Court's Review When in Reality No Circuit Court Has Permitted Intervenors

in FOIA Cases to Appeal in the Absence of the Defendant Federal Agency.

Petitioner is wrong that the Second Circuit's decision conflicts with similar Court of Appeals' decisions addressing intervenor standing. First, Petitioner's claim that "other circuit decisions hold that non-governmental parties have standing to appeal even when the government does not," Pet. 17, while true, is irrelevant, because each decision Petitioner cites also required the intervenors to establish independent standing – something Petitioner cannot do under the FOIA. *See* Part I *supra* at 13-18. Second, while numerous courts have recognized the rights of third parties to intervene in FOIA cases pursuant to Fed.R. Civ. P. 24, Pet. 17, no court has ever found standing for an intervenor to appeal a disclosure order on its own when the government agency has failed to do so. On the questions before the Court in this petition, the circuits are aligned. Yet Petitioner hopes to invent a split where there is none in an attempt to bait the Court into an unnecessary review of a straightforward procedural question. The Court should decline. There is no conflict here for it to resolve.

A. No Other Courts Have Found Independent Standing for Intervenors to Appeal in the Absence of the Government In a FOIA Case.

Petitioner badly misconstrues the Second Circuit's decision in this case. The court did not hold that intervenors can *never* establish independent standing in the absence of the government, only that

these intervenors fail to establish standing because, as private contractors attempting to shield information from disclosure under the FOIA, they have not "suffered an invasion of a legally protected interest." App. 2a. That holding is narrow, unassailable and in lockstep with decisions from Courts of Appeal around the country.

Courts allow intervenors to appeal in the absence of federal agencies only when, like plaintiffs, intervenors articulate a cognizable legal injury. *Diamond*, 476 U.S. at 68. All of the cases cited by Petitioner involved private rights of action expressly authorized by Congress to vindicate legally protected interests. Pet. 18-19. The intervenors in those cases established injury and redressability that allowed them to pursue their appeals in the absence of the government. By contrast – and this omission is telling – none of the cases Petitioner cites address standing under the FOIA. That is because the FOIA grants neither a private right of action to third parties nor authority to courts to order government agencies to withhold documents.

Petitioner cites three cases brought under the APA, which provides a right of action to vindicate interests protected by statute. In all three, the defendant-intervenors alleged injuries that brought them within the zone of interest protected by the APA and the regulation at issue. *See Didrickson v. U.S. Dep't of Interior*, 982 F.2d 1332, 1340-42 (9th Cir. 1992) (permitting environmental group to pursue an appeal to defend the regulation in the absence of the Government because the group had a private right of action under 5 U.S.C. § 702, and because its members, who fell within the zone of

interests protected by the Marine Mammal Protection Act, would suffer a "perceptible harm" absent enforcement); *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1109-10 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1180 (9th Cir. 2011) (permitting intervening environmental group to defend a Forest Service regulation after the government withdrew because the group "satisf[ied] the injury in fact requirement") (internal citation and quotations omitted); *Mausolf v. Babbitt*, 125 F.3d 661, 666-67 (8th Cir. 1997) (permitting intervening association of environmentalists to defend a government regulation in the absence of the government where the group had established ""concrete, imminent, and redressable injuries in fact, which are neither 'conjectural' nor 'hypothetical'"). In all of these APA cases, intervenors demonstrated both that they were independently within the zone of interest contemplated by the regulations they defended *and* that they would suffer concrete, particularized and imminent harm should those regulations be stricken. Their positions bear no resemblance to Petitioner's here.

The lone non-APA case cited by Petitioner is similarly unavailing. In *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428-30 (6th Cir. 2008), an out-of-state wine wholesalers association sued the state of Kentucky under 42 U.S.C. § 1983, alleging that state regulations discriminated against out-of-state producers. *Id.* at 426-27. An in-state wholesalers association intervened on the side of the defendant government, and, after the government chose not to

pursue an appeal, sought to appeal in their place. The Sixth Circuit found that the in-state wholesalers alleged "palpable economic injury that is sufficient to provide the basis for standing." *Id.* at 428. Brought under 42 U.S.C. § 1983, a statute whose sole purpose is to provide a private right of action to pursue discrimination claims, *Cherry Hill Vineyards* provides no support for Petitioner.

In sum, in all these cases intervenors were permitted to pursue their appeals not because they had a right to intervene, but because, even after the defendant government entity had withdrawn or otherwise declined to appeal, intervenors demonstrated (1) a legally cognizable Article III injury and (2) the redressability of the injury pursuant to court order. But Petitioner has not cited, and Respondents cannot find, any FOIA case in any circuit in which an intervenor has been found to have independent standing to appeal in the absence of the Government. There is no conflict among the circuits for this Court to resolve.

B. The Second Circuit's Decision Did Not Rule on the Merits of Petitioner's Right to Intervene, and Did Not Create Any Conflict with Other Courts Regarding Intervention in FOIA Cases.

With no authority to support its novel claim that FOIA intervenors have standing to appeal even in the absence of the government agency, Petitioner recasts the Second Circuit's decision as a ruling about the propriety of intervention in FOIA cases in order to fabricate the appearance of a conflict with

other courts. Pet. 20 (stating that the decision "conflicts with cases in the D.C. Circuit in which private submitters of information were permitted to intervene in cases seeking production of that information"). But Petitioner's assertion is betrayed by the record. The Second Circuit's decision said nothing about whether Petitioner properly intervened. App. 1a-2a. In fact, the court expressly declined to address the issue, dismissing as moot Respondents' appeal of the district court's grant of intervention. *Id*. Because the Second Circuit's decision was silent on when intervention is appropriate in FOIA cases, there is no conflict that calls for this Court's review.

What the Second Circuit actually held, however, is consistent with circuits across the country: Petitioner's interest as an intervenor was not "legally protected" for purposes of establishing Article III standing. The decision is thus markedly different from the cases cited by Petitioner where intervenors on the side of the Government in FOIA cases demonstrated a sufficient "interest" for the purposes of Fed. R. Civ. P. 24. Indeed, in two of these cases, *Public Citizen* and *Judicial Watch*, the Government appealed and intervenors had no need to establish independent standing; the other three district court cases did not proceed to appeal at all. *See Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 900 (D.C. Cir. 1999) (Schering Corporation intervened on the side of the Federal Drug Administration ("FDA") where the agency appealed the district court's disclosure order); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 145 (D.C. Cir. 2006) (drug creator and manufacturer

intervened on the side of the FDA where the agency appealed the district court's disclosure order); *100Reporters LLC v. Dep't of Justice,* 307 F.R.D. 269, 275 (D.D.C. 2014) (evaluating "interest" as an intervenor at an early stage of the district court proceedings, not standing for the purposes of independent appeal); *Appleton v. FDA*, 310 F. Supp. 2d 194, 196 (D.D.C. 2004) (same); *Gov't Accountability Project v. FDA*, 181 F. Supp. 3d 94 (D.D.C. 2015) (same).

The Second Circuit's summary dismissal was limited to an uncontroversial holding that an intervenor appealing a disclosure order under the FOIA does not have standing to appeal in the absence of the government as a party in interest. Neither the D.C. Circuit Court of Appeals, nor any other, has ever taken any position that conflicts with the Second Circuit's holding. There is no circuit split for this Court to resolve.

IV. Petitioner's Dilatory Tactics Through Pursuit of this Meritless Appeal Undermine the Purpose of the FOIA and Must Be Rejected.

Granting the petition would gravely undermine the FOIA and its overarching mandate of public disclosure. As this Court recognized in *Brown*, the 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. *Brown*, 411 U.S. at 291-93. Congress intentionally did not create a private cause of action to mandate secrecy under the FOIA. *See* 5 U.S.C. § 552; *see Brown*, 441 U.S. at 291–92;

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE, FREEDOM OF INFORMATION ACT SOURCEBOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES 6 (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, and even the courts, have no grounds under the FOIA to second-guess statutorily-authorized government decisions that favor transparency.

Lacking a private right of action to compel government secrecy in service of its particular commercial interests, Petitioner presents itself to this Court as if it is the Government. Irrespective of its influence over federal detention policy – the very subject Respondents' FOIA request seeks to illuminate – Petitioner cannot stand in the shoes of the Government, assert FOIA exemptions statutorily 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. Article III reinforces this limitation on the judicial role. *See Steel Co.*, 523 U.S. at 101 ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.").

Finally, Petitioner's intervention in pursuit of a meritless appeal – commenced only post-judgment

and after the Government waived its right to appeal, but continuing all the way to this Court – ultimately serves a cynical aim. Benefitting from stays of the kind routinely obtained in FOIA appeals, Petitioner seeks to disrupt and delay the production of government contract terms and undermine Respondents' and the public's interest in this information.[7] Delay is antithetical to the "FOIA's goal of prompt disclosure of information." *Stonehill v. IRS*, 558 F.3d 534, 539 (D.C. Cir. 2009); *Judicial Watch, Inc. v. U.S. Dep't of Energy*, 319 F. Supp.2d 32, 35 (D.D.C. 2004) ("'[T]he interests of judicial finality and economy have special force in the FOIA context, because the statutory goals – efficient, *prompt*, and full disclosure of information – can be frustrated by agency actions that operate to delay the ultimate resolution of the disclosure request.'") (quoting *Senate of Puerto Rico ex rel. Judiciary Comm. v. Dep't of Justice*, 823 F.2d, 574, 580 (D.C. Cir. 1987) (internal citations and quotations omitted) (emphasis in original)).

There is no substantial question that Petitioner lacks standing to appeal the district court's decision. The Government has made a legally-conclusive decision to forego an appeal of the district court's order, thereby exercising its statutorily-

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[7] This disruptive effect formed part of basis of Respondents' objection to the district court's grant of intervention. *See Roane v. Leonhart*, 741 F.3d 147, 151 (D.C. Cir. 2014) (noting that a factor for granting intervention is whether the potential intervenor would "unduly disrupt[] the litigation, to the unfair detriment of the existing parties"). Respondents' appeal to the Second Circuit was dismissed as moot. *See* App. 1a-2a.

conferred discretion to disclose documents under the FOIA. Further delay frustrates the Congressional purpose underlying FOIA. The Court should decline to review this petition.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2017

Appendix

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 17, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 16-3141(L),
16-3362(XAP), 16-4091(Con.)

Before: Barrington D. Parker,
Reena Raggi,
Christopher F. Droney,
Circuit Judges.

DETENTION WATCH NETWORK, CENTER FOR CONSTITUTIONAL RIGHTS, INC.,

Plaintiffs-Appellees-Cross-Appellants,

v.

CORRECTIONS CORPORATION OF AMERICA, THE GEO GROUP, INC.,

Intervenors-Appellants-Cross-Appellees.

ORDER

Appellant-Cross-Appellee The GEO Group, Inc., moves to stay the mandate pending the filing and disposition of a petition for writ of certiorari to the United States Supreme Court. Appellees-Cross-Appellants Detention Watch

Network and the Center for Constitutional Rights, Inc., oppose the motion.

IT IS HEREBY ORDERED that the motion is GRANTED. As The GEO Group, Inc., has already timely filed a petition for writ of certiorari, the stay will continue until the Supreme Court's final disposition.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

/s/

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED NOVEMBER 30, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 Civ. 583 (LGS)

DETENTION WATCH NETWORK, *et al.*,

Plaintiffs,

-against-

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants.

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS, on October 3, 2016, Intervenor-Defendants The GEO Group, Inc. filed a letter motion requesting clarification of the July 14, 2016 Opinion and Order to ensure appellate jurisdiction and stay production pending appeal.

WHEREAS, on October 20, 2016, Intervenor-Defendants' request to clarify that the July 14, 2016 Opinion and Order was a "turnover order" requiring

immediate disclosure of the materials at issue and temporarily stayed the production of documents pending a conference.

WHEREAS, a conference was held on November 29, 2016. For the reasons stated during the conference, it is hereby

ORDERED that disclosure of the documents ordered by the Opinion issued on July 14, 2016 Opinion and Order, clarified by the Order dated October 20, 2016, is STAYED IN PART pending the appeal, to the extent that the information has not already been made publicly available -- through TRAC website, through ICE's spreadsheet available for download at the URL made public in this action, or by any other disclosure.

The Clerk of Court is directed to close Docket No. 147.

SO ORDERED.

Dated: November 30, 2016
New York, New York

/s/
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED OCTOBER 20, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

14 Civ. 583 (LGS)

DETENTION WATCH NETWORK, *et al.*,

Plaintiffs,

-against-

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,

Defendants.

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS, on July 14, 2016, Plaintiffs' motion for partial summary judgment was granted and Defendants' cross-motion for partial summary judgment was denied;

WHEREAS, on September 1, 2016, the GEO Group, Inc. ("GEO") and the Corrections Corporation of America's ("CCA") request for leave to intervene were granted for the sole purpose of appealing the Court's July 14, 2016 Opinion and Order (the "Opinion");

Appendix C

WHEREAS, GEO filed a pre-motion letter on October 3, 2016, requesting that the Court enter a second order requiring Defendants to produce the documents at issue or clarify that the July 14 Order requires the immediate production of documents and stay the obligation pending the resolution of GEO's appeal;

WHEREAS, Plaintiffs filed a letter on October 10, 2016, stating that they do not oppose GEO and CCA's attempt to seek a clarifying order, but oppose the Intervenor-Defendants' request for a stay pending appeal;

WHEREAS, CCA filed a letter on October 18, 2016, in opposition to Plaintiffs' letter; it is hereby

ORDERED that Intervenor-Defendants' request to clarify the Opinion is GRANTED. The Opinion, which granted Plaintiffs' motion for partial summary judgment and denied Defendants' cross-motion for partial summary judgment, held that Freedom of Information Act ("FOIA") exemptions 4 and 7(E), 5 U.S.C. § 552(b)(4) and 5 U.S.C. § 552(b)(7)(E), are not properly asserted to withhold unit prices, bed-day rates and staffing plans in government contracts with private detention facility contractors and that the requested information "must be produced." The Opinion is a "turnover order" that requires immediate disclosure of the requested materials at issue. *See e.g., Ferguson v. FBI*, 957 F.2d 1059, 1063 (2d Cir. 1992). The Opinion was intended to require the Government to produce documents previously withheld pursuant to Exemptions 4 and 7(E) containing unit prices, bed-day rates and staffing plans. However, the Government's

obligation to produce the documents is temporarily **STAYED** pending the resolution of the pre-motion letters and request for a conference. It is further

ORDERED that Intervenor-Defendants' request for a pre-motion conference is **GRANTED**. The parties and Defendant-Intervenors shall appear for a conference on **November 15, 2016, at 11:20 a.m.**

SO ORDERED.

Dated: October 20, 2016
New York, New York

/s/
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX D — U.S.C.S. FED. RULES CIV. PROC. 24

Rule 24. Intervention

- (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
    - (1) is given an unconditional right to intervene by a federal statute; or
    - (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
- (b) Permissive Intervention.
    - (1) In General. On timely motion, the court may permit anyone to intervene who:
        - (A) is given a conditional right to intervene by a federal statute; or
        - (B) has a claim or defense that shares with the main action a common question of law or fact.
    - (2) By a Government Officer or Agency. On timely motion, the court may permit a federal

or state governmental officer or agency to intervene if a party's claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or
- (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

- (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

- (c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.