No. SU-2017-301-A

RHODE ISLAND SUPREME COURT

IN RE 38 STUDIOS GRAND JURY

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, COMMON CAUSE RHODE ISLAND, THE NEW ENGLAND FIRST AMENDMENT COALITION, AND THE RHODE ISLAND PRESS ASSOCIATION

IN SUPPORT OF APPELLANT, GOVERNOR GINA RAIMONDO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

RHODE ISLAND CASES

RULES AND STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

American Civil Liberties Union of Rhode Island

Since 1959, the ACLU of Rhode Island ("ACLU") has worked to defend and preserve the individual rights and liberties guaranteed by the Constitution and laws of the United States. As the ACLU has long recognized, abuses of power are likely to occur if the government is allowed to operate in secrecy. Transparency is essential to protecting civil liberties, preventing abuses of power, and deterring corruption, and for that reason, the ACLU has been active in promoting the right to know in Rhode Island.

In that regard, the ACLU, through volunteer attorneys, has appeared in numerous cases in both the Rhode Island Superior Court and Supreme Court – as a party, as amicus curiae, and as counsel for third parties – in cases challenging state and municipal governments' refusal to release important governmental records. See, e.g., R.I. Affiliate ACLU v. Moran (R.I. Superior Court, PC No. 07-286) (2007) (access to a police department report regarding the fatal police shooting of a resident); The Rake v. Gorodetsky, 452 A.2d 1144 (R.I. 1983) (access to records of police misconduct); Direct Action for Rights and Equality v. Gannon, 713 A.2d 218 (R.I. 1998) (same); Providence Journal Company v. R.I. Housing and Mortgage Finance Company, (R.I. Superior Court, P.C. 85-1412) (1986) (access to certain publicly-financed mortgage records submitted to a grand jury (amicus); Providence Journal Co. v. Kane, 577 A.2d 661 (1990) (access to certain personnel records of state employees)(amicus).

Common Cause Rhode Island

Common Cause Rhode Island is a nonpartisan organization whose mission is to promote representative democracy by ensuring open, ethical, accountable, effective government processes at local, state, and national levels by educating and mobilizing the citizens of Rhode Island.

Common Cause believes that accountability in the 38 Studios case will only come through full transparency. While acknowledging the important role grand jury secrecy plays in our justice system we believe the public interest in this case is paramount.

New England First Amendment Coalition

The New England First Amendment Coalition (NEFAC) is a regional non-profit organization advocating for First Amendment freedoms and the public's right to know about its government. The coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians and academics, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. The coalition regularly files amicus curiae briefs addressing matters concerning the First Amendment and government transparency. Most recently, NEFAC argued against a Rhode Island judge's order banning members of the public from contacting jurors in a completed criminal trial, against the sealing of New Hampshire probate records related to a high-profile criminal investigation, in favor of transparency in a First Circuit civil rights case, and in favor of disclosing the identities of jurors after a trial in a Massachusetts federal court.

The Rhode Island Press Association

The Rhode Island Press Association (RIPA) is a nonprofit organization which supports and promotes print journalism across the state, as well as the right of a free press and the First Amendment. Most Rhode Island print publications are part of RIPA, including, but not limited to, The Newport Daily News, The Woonsocket Call, The Valley Breeze, The Warwick Beacon, The Providence Business News, and the state's largest paper of record, The Providence Journal.

RIPA joins in calling for the release to the public of the full records relating to the 38 Studios case. This case has been covered by our members news organizations for close to seven

years. We believe that the public deserves to be told what decisions public officials made relating to this case and what happened to the public funds. It is the public's right to know and the right of the press to disseminate the information. While RIPA understands the importance of grand jury secrecy, we also believe in the necessity of disclosure of the details of this case which has had such profound implications on the financial resources of the state and its citizens.

STATEMENT OF THE CASE

This appeal addresses whether the people of Rhode Island are entitled to the full record regarding the 38 Studios debacle. The facts leading up to this case are detailed in the Superior Court opinions in this case, Slip Op. 1-2, and in Rhode Island Economic Development Corp. v. Wells Fargo Securities LLC, 2013 WL 4711306 at **2-37 (R.I.Super. Aug. 28, 2013). As the court in the latter case explained: "The basic plot is well-known: 38 Studios, LLC (38 Studios) was induced to move its business to the Ocean State in exchange for a massive financial accommodation; less than two years later, 38 Studios went bankrupt." *Id*. at *2.

The 38 Studios saga touches on all levels of Rhode Island government and involves actions by the Governor, the Economic Development Corporation (EDC), the General Assembly, and the Attorney General, among others. It began in March 2010 after then-Governor Donald Carcieri met former Boston Red Sox pitcher Curt Schilling at a fundraiser and directed the EDC to do whatever was necessary to help Schilling move his video-game company 38 Studios to Rhode Island. *Id*. In June 2010, the General Assembly enacted a law authorizing the EDC to issue bonds up to $125 million for a "Jobs Creation Guaranty Program." *Id.* Days later, the EDC proposed to use the majority of those funds to issue a $75 million bond to 38 Studios, one of the largest bonds ever issued by the EDC. *Id.* The EDC issued the bond, despite the fact that 38

Studios lacked any significant experience, had never earned a profit, and worked in an industry with extreme volatility. Id. Within two years, 38 Studios went bankrupt, which put over 150 employees out of work and left Rhode Island taxpayers with an estimated $88 million loss in principal and interest. *Id.*

The 38 Studios bankruptcy has had massive and longlasting repercussions for the people and government of this state. It threatened the state's credit rating and resulted in a lawsuit brought by the Securities and Exchange Commission. It spawned civil litigation that resulted in a $61 million settlement. The General Assembly has enacted numerous statutes to address the fallout, including legislation to make continued payments on 38 Studio's debts and to authorize release of all investigatory records into 38 Studios. See Gen. Laws § 38-2-16.

The 38 Studios debacle has left Rhode Island taxpayers dumbfounded and with myriad unanswered questions about their government: How could this have happened? Who was responsible? Did public officials violate the public trust? How can we make sure it doesn't happen again?

Rhode Islanders hoped that the grand jury would provide answers. Convened in December 2013 to investigate possible criminal wrongdoing in the 38 Studios deal, the grand jury sat for a total of eighteen months. In connection with the grand jury's investigation, 146 individuals were interviewed, including all but one member of the 2010 General Assembly. Yet the grand jury issued no indictments. Instead, in July 2016, the Attorney General issued a press release that simply announced that "there were no provable criminal violations of the Rhode Island General Laws in connection with the funding of 38 Studios, the disbursement of funds to 38 Studios, [or] by 38 Studios vendors." Attorney General, Press Release, Results of the Criminal Investigation of 38 Studios, LLC (Investigation Results) at 8 (July 29, 2016).

The events surrounding the state funding and investigation of 38 Studios remain a matter of intense public interest. Responding to public demands, the Governor and the General Assembly have recognized the right of the public to the release of all pertinent materials regarding 38 Studios. The Attorney General—who as a member of the General Assembly in 2010 voted to authorize the bond program used by 38 Studios and who directed the state investigation—is the only state official who continues to try to block the release of the records of that investigation. This Court must now determine whether that attempt should succeed.

SUMMARY OF ARGUMENT

What is at stake in this case is nothing less than the fundamental right of the people to know about the operations of their government. The right of the public to be fully informed is a foundational principle upon which this nation was established. As James Madison wrote: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." Letter to W.T. Barry, Aug. 4, 1822, in 9 Writings of James Madison 103 (G. Hunt ed. 1910). To effectuate that principle, our nation's founders adopted the First Amendment, which not only protects the right to "uninhibited, robust, and wide-open" public debate but also "the antecedent assumption that valuable public debate . . . must be informed." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980). As the Supreme Court has long recognized, the people's right to know about the operations of their government is absolutely crucial to a functioning democracy: "An informed public is the most potent of all restraints upon misgovernment." Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

Against the public's right to know, the Court must weigh the interests in grand jury secrecy. Rule 6(e) of the Rhode Island Rules of Criminal Procedure recognizes that the public's right to know does not ordinarily extend to the inner workings of the grand jury. The grand jury conducts its work in secret for a variety of important reasons, including the interests in ensuring that grand jurors have freedom to deliberate, in encouraging the free and untrammeled disclosure of relevant information, and in protecting from public disclosure innocent targets who are exonerated by the investigation. State v. Carillo, 307 A.2d 773, 776 n.4 (R.I. 1973). Although grand jury secrecy serves important interests, this Court has recognized that "the secrecy extended to grand jury proceedings is not absolute." In re Doe, 717 A.2d 1129, 1134 (R.I. 1998). When called upon to disclose grand jury records, courts must balance the need for disclosure against the need for continued secrecy. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 223 (1979) ("[D]isclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure.").

In the ordinary grand jury investigation, the need for secrecy trumps the public's right to know. See In re Sealed Case, 199 F.3d 522, 526 (D.C. Cir. 2000) ("[G]rand jury proceedings and related matters operate under a strong presumption of secrecy."). But 38 Studios is not an ordinary case. The 38 Studio debacle has cast a cloud over the legitimacy of Rhode Island government unlike any other recent event. It involves allegations of malfeasance at every level of state government, from the Governor who proposed to woo 38 Studios to the state, to the General Assembly that authorized the issuance of the 38 Studios bond, to the EDC that issued an unprecedented $75 million bond without performing routine financial investigations, to the Attorney General who investigated the deal and reported no wrongdoing. Given the profound

implications of the 38 Studios saga, Rhode Islanders are entitled to know what led to the debacle and whether it was properly investigated. Without knowing what went wrong, they may not be able prevent further mistakes.

While the interest in public disclosure in this case is exceptionally strong, the need to maintain grand jury secrecy is significantly diminished. The grand jury investigation has been completed. As the Supreme Court has repeatedly stated, the interests in secrecy recede significantly after a grand jury is disbanded. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) ("[A]fter the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it."). Furthermore, the risk of public embarrassment to innocent parties is small. The players in the 38 Studios saga are well known, most have talked to the press, and the depositions they gave in civil litigation have been made public. Disclosure therefore is unlikely to lead to public scrutiny of individuals who have not already been subjected to it. To the extent that any legitimate issues of privacy support continued secrecy, those issues can be addressed on a case-by-case and document-by-document basis upon remand to the Superior Court. Accordingly, the only remaining interest favoring continued grand jury secrecy is the generic interest that disclosure may affect the willingness of witnesses from coming forward in future cases. Given the overwhelming public need to know about 38 Studios, a generic interest in grand jury secrecy, standing alone, is insufficient. The concern that disclosure may harm future grand juries is present whenever disclosure is sought, but that concern is best addressed by limiting disclosure to truly exceptional cases, not by denying disclosure when it's warranted.

Courts have repeatedly held that in exceptional circumstances involving cases with truly historic circumstances, the public interest in transparency can outweigh the need for grand jury secrecy. Such cases arise rarely, but when they do arise courts have found that disclosure of

grand jury materials was warranted for cases of exceptional public importance, such as the investigation of Watergate, In re Petition of Kutler, 800 F.Supp.2d 42 (D.D.C. 2011); the independent counsel's investigation into President Clinton, In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton, --F.Supp.3d--, 2018 WL 1801173 (D.D.C. Apr. 16, 2018); and investigations of Jimmy Hoffa, In re Tabac, 2009 WL 5213717 (M.D.Tenn. Apr. 14, 2009); Julius and Ethel Rosenberg, In re Petition of Nat'l Sec. Archive, No. 08–civ–6599, Summary Order at 1–2 (S.D.N.Y. Aug. 26, 2008); and Alger Hiss, In re Petition of Am. Historical Ass'n, 49 F.Supp.2d 274 (S.D.N.Y. 1999). These cases reflect a consensus that "in some situations historical or public interest alone could justify the release of grand jury information." In re Craig, 131 F.3d 99, 105 (2d Cir. 1997).

To be sure, the 38 Studios case may not have the national implications of these cases, but within Rhode Island, 38 Studios may well be comparable to Watergate.

* * *

The decision whether to order disclosure of grand jury materials is committed to the discretion of the Superior Court. Douglas Oil, 441 U.S. at 223. This Court should reverse the Superior Court's denial of the request to release 38 Studios grand jury records for three independent reasons:

1. The Superior Court erred in ruling that the "plain language" of Rule 6(e) forecloses the court's power to order disclosure outside the exceptions to grand jury secrecy identified in that Rule. Slip Op. at 14. The Superior Court's interpretation of Rule 6(e) is a pure legal question that this Court should review *de novo*. As every other court that has examined the issue has correctly ruled, Rule 6(e) identifies a *non-exhaustive* list of circumstances justifying disclosure, and trial courts retain inherent authority to order disclosure under exceptional

circumstances outside those listed in Rule 6(e). See Carlson v. United States, 837 F.3d 753, 765 (7th Cir. 2016) (collecting cases recognizing courts' inherent power to order disclosure outside Rule 6(e) and declaring that "no court has accepted" the government's argument that Rule 6(e) creates an exclusive list of exceptions).

2. The Superior Court erred in ruling that, even if an exception for exceptional circumstances outside Rule 6(e) were recognized, that exception requires the petitioner to demonstrate a "particularized need" for the requested records, and Governor Raimondo has not shown such a need. Slip Op. at 15-17. That ruling too represents a conclusion of law that this Court should review *de novo*. The particularized need standard applies to requests for disclosure under the exceptions listed in Rule 6(e); it does not apply when a party seeks disclosure based on exceptional circumstances outside Rule 6(e). Addressing the public interest in knowing about significant historical events like Watergate or the Independent Counsel's investigation of President Clinton, courts have granted such requests when made by the news media, authors, and historians, who seek solely to vindicate the public interest in being informed about significant events. Governor Raimondo stands on the same footing as the petitioners in those cases. In any event, if a need for the information is required, Governor Raimondo has demonstrated such a need by asserting the right of the public to a full accounting of 38 Studios.

3. After the Superior Court's ruling, the Rhode Island General Assembly enacted a statute, the 38 Studios Transparency Act, which requires the release of 38 Studios records. Gen. Laws § 38-2-16. That Act provides: "Notwithstanding any other provision of this chapter or state law, any investigatory records generated or obtained by the Rhode Island state police or the Rhode Island attorney general in conducting an investigation surrounding the funding of 38 Studios, LLC by the Rhode Island economic development corporation shall be made available to

the public." At a minimum, the 38 Studios Transparency Act demonstrates that Rhode Island law now acknowledges that the 38 Studios debacle is an exceptional circumstance that justifies an exception from the ordinary rules regarding government secrecy. In addition, it is possible that the Transparency Act covers materials sought in this case, as the grand jury records at issue here would appear to constitute "investigatory records" that were "generated or obtained" by the Attorney General "in conducting an investigation surrounding the funding of 38 Studios." Moreover, the General Assembly apparently believed that the Act would cover grand jury records because the Act specifically exempts any covered disclosure from § 12-11.1-5.1, the provision of Rhode Island law that makes it a crime to disclose grand jury records. To the extent that any grand jury records regarding 38 Studios are in the possession of the Attorney General's Office, they might be subject to the 38 Studios Transparency Act. Accordingly, even if this Court were to agree with the conclusions of the Superior Court, it should remand the case to determine whether the Transparency Act nonetheless requires disclosure.

I. RHODE ISLAND COURTS HAVE AUTHORITY TO ORDER DISCLOSURE OF GRAND JURY RECORDS UNDER EXCEPTIONAL CIRCUMSTANCES

This case addresses whether Rhode Island courts have authority to order disclosure of grand jury records when exceptional circumstances require it. The Superior Court ruled that it lacked power to order disclosure no matter how strongly the public interest requires disclosure. It ruled: "Under a plain reading of Rule 6(e)(3)(C), grand jury disclosure may not be had unless such a request falls within the enumerated exceptions to Rhode Island's Rules of Criminal Procedure." Slip Op. at 6. That conclusion has been rejected by every court that has examined the question. They have rejected that argument for good and well-supported reasons: it is inconsistent with the plain text of Rule 6(e) and the longstanding inherent judicial power to order disclosure when justice so requires.

Rhode Island's Rule 6(e) of the Superior Court Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy. It is modeled after Rule 6(e) of the Federal Rules of Criminal Procedure, which employs nearly identical language. Rule 6(e) provides a fundamental protection to the work of the grand jury and thereby protects the criminal process. As the U.S. Supreme Court has explained, "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." U.S. v. Sells Engineering, Inc., 463 U.S. 418, 425 (1983). Notwithstanding the importance of grand jury secrecy, it is not an inflexible command. As this Court has recognized, "the secrecy extended to grand jury proceedings is not absolute." In re Doe, 717 A.2d 1129, 1134 (R.I. 1998); see also State v. Carillo, 307 A.2d 773, 776 (R.I. 1973) ("[T]he 'secrecy' of the grand jury minutes [is] no longer sacrosanct."). That judgment is fully consistent with the rulings of numerous state and federal courts, which have held that "There is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers." Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 582 (D.C. Cir. 1987).

Although Rule 6(e)(3) establishes certain exceptions by which a court may order disclosure of grand jury materials, every court that has examined the question has concluded that the exceptions listed in the Rule are not exhaustive. Rule 6(e) provides that grand jury records "may" be disclosed to government attorneys and certain government officials in the performance of their official duties, and "may also" be disclosed in connection with other judicial proceedings, other grand jury proceedings, and when such records could provide a criminal defendant a ground to seek to dismiss an indictment. In identifying certain circumstances when a court "may" order disclosure, the plain language of Rule 6(e) does not suggest, let alone declare, that courts are powerless to order disclosure in all other circumstances. Instead, "the courts of

appeals that have squarely ruled on this issue have found that courts have the inherent authority to disclose grand jury information in circumstances not addressed by Rule 6(e), albeit in limited circumstances." 1 Charles A. Ian Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice & Procedure Criminal § 106 (4th ed. 2008).

In Carlson v. United States, 837 F.3d 753, 764 (7th Cir. 2016), the United States Court of Appeals for the Seventh Circuit rejected the argument, identical to the one adopted below, that the exceptions in Rule 6(e) are exhaustive:

> It is far more reasonable to read Rule 6(e)(2)(B) as specifying, "unless these rules provide otherwise," which persons are bound to keep grand-jury materials secret, and then to read Rule 6(e)(3)(E) as telling the court to whom it "may" authorize disclosure, without indicating anywhere that the list is exclusive. There is nothing odd or counterintuitive in having one rule for disclosures that may not occur without court supervision, and a different rule for disclosures specifically ordered by the court.
>
> Nor can we find language elsewhere in the rule supporting the government's exclusivity theory.
>
> The few hints that we find in the text of Rule 6(e) all indicate that the list in subpart (3)(E) is not exclusive. The presence of limiting language elsewhere in Rule 6(e), in (2)(B), indicates that its absence in (3)(E) is intentional. Fed. R. Crim. P. 6(e)(2)(B). A rule of nonexclusivity does not mean that Rule 6(e)(3)(E) is pointless: it would be entirely reasonable for the rulemakers to furnish a list that contains frequently invoked reasons to disclose grand-jury materials, so that the court knows that no special hesitation is necessary in those circumstances.

See also In re Petition of Craig, 131 F.3d 99, 101-103 (2d Cir. 1997) (same); In re Biaggi, 478 F.2d 489 (2d Cir. 1973) (same); In re Hastings, 735 F.2d 1261, 1268 (11th Cir. 1984) (same); Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974) (en banc)) (same).

Exhaustively reviewing all reported cases that have examined judicial power to grant disclosure of grand jury records outside the exceptions listed in Rule 6(e), the Seventh Circuit stated "we consider the decisions of our sister circuits. There, too, the government stands alone: no court has accepted its position. . . . And the government acknowledged at oral argument that no district court has bought its theory either." Carlson v. United States, 837 F.3d at 765. In its submission to the Superior Court, the Attorney General, like the government in *Carlson*, was unable to identify a single case that has done what it asked the court to do: to declare that courts lack power to disclose grand jury records even when compelled by exceptional circumstances. The reason the Attorney General could cite to no such case is simple—no court has ever done so.

The conclusion that disclosure may be ordered outside the exceptions listed in Rule 6(e) finds support in the longstanding recognition that the judiciary has inherent power to supervise grand juries and control the release of grand jury materials. As the Seventh Circuit explained:

> The district courts retain certain inherent powers . . . One such power relates to their supervision of the disclosure of grand-jury materials. We join with our sister circuits in holding that Rule 6(e)(3)(E) does not displace that inherent power. It merely identifies a permissive list of situations where that power can be used.

Carlson, 837 F.3d at 767; see also In re Petition to Inspect and Copy Grand Jury Materials (Hastings), 735 F.2d 1261, 1268 (11th Cir. 1984) (declaring that the conclusion "that it had inherent power beyond the literal wording of Rule 6(e) is amply supported"); In re Petition of Kutler, 800 F.Supp.2d 42, 47 (D.D.C. 2011) (concluding that a "special circumstances exception is well grounded in courts' inherent supervisory authority to order the release of grand jury materials"); In re Application to Unseal Dockets Related to Independent Counsel's 1998

Investigation of President Clinton, —F.Supp.3d—, 2018 WL 1801173 (D.D.C. Apr. 26, 2018) ("[I]n recognizing that Rule 6(e)(3)(E) is permissive, not exhaustive, numerous courts have held that district courts have inherent authority to disclose grand jury records in circumstances that are not enumerated in Rule 6(e)(3)(E).") (collecting cases).

As *Carlson* explains in great detail, "[t]he inherent supervisory power of the court over the grand jury is well established." 837 F.3d at 762. That principle fully applies in Rhode Island, in which, as this Court has recognized, "the grand jury envisioned by our Constitution is a common-law grand jury." State v. Russell, 950 A.2d 418, 429 (R.I. 2008). The court's supervisory power over the grand jury arises because the grand jury has long been understood to be "a part of the judicial process." Id. a 762 (quoting Levine v. United States, 362 U.S. 610, 617 (1960) (the grand jury is "an arm of the court")). Today, as at common law, the "matters over which the court exercises supervisory authority [over the grand jury] range from the mundane to the weighty." Carlson, 837 F.3d at 762.

Prior to the adoption of the Rules of Criminal Procedure, it was well-recognized that courts had inherent power to order the release of grand jury matters, notwithstanding the principle of grand jury secrecy. As the U.S. Supreme Court declared in 1940, the decision to release grand jury materials "rests in the sound discretion of the [trial] court" and "disclosure is wholly proper where the ends of justice require it." United States v. Socony–Vacuum Oil Co., 310 U.S. 150, 233-234 (1940). As this history demonstrates, the courts' power to order disclosure of grand jury materials derives from its inherent power to supervise grand juries; Rule 6(e) merely declares that longstanding authority. As the Supreme Court explained more than fifty years ago:

> [T]he federal trial courts as well as the Courts of Appeals have been nearly unanimous in regarding disclosure as committed to the discretion of the trial

> judge. Our cases announce the same principle, and Rule 6(e) is but declaratory of it.

Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959). The Advisory Committee's note on Rule 6(e) confirms that Rule 6(e) simply expresses the longstanding authority of the courts to order disclosure when warranted and was not intended to limit that power: "This rule continues the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure ...." Notes of Advisory Committee on Rules, following Fed.R.Crim.P. 6.

II. THE 38 STUDIOS CASE PRESENTS AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING DISCLOSURE

In determining whether exceptional circumstances justify disclosure of the 38 Studios grand jury records, the Superior Court should have applied the balancing test articulated long ago by the U.S. Supreme Court: "disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy, and that the burden of demonstrating this balance rests upon the private party seeking disclosure." Douglas Oil Co., 441 U.S. at 223. In other words, the court should have "appl[ied] a balancing test to determine whether exceptional circumstances are present, weighing carefully the factors favoring continued secrecy and the factors favoring public access." In re Pitch, 275 F.Supp.3d 1373 (M.D. Ga. 2017); see also In re Petition of Kutler, 800 F.Supp.2d 42 (D.D.C. 2011) (declaring that the court will "balance any special circumstances justifying disclosure against the need to maintain grand jury secrecy"). That balance overwhelmingly favors disclosure.

In this case, an application of that balancing test is straightforward. There is an overwhelming public interest in disclosure of the 38 Studios grand jury records. It is an exceptional case involving failures at every level of state government. In contrast, the need for

continued grand jury secrecy is significantly diminished in light of the end of the grand jury's investigation, the passage of time, and the fact that participants in the 38 Studios saga are well known. Any interests in privacy could be addressed on a case-by-case basis. Disclosure of the 38 Studios grand jury records falls squarely within a large body of precedent authorizing disclosure in similarly exceptional circumstances.

Instead of conducting this straightforward balancing test, the Superior Court mistakenly ruled that no disclosure could be ordered because the Governor has no particularized need for the information and because the public interest in disclosure was insufficient as a matter of law to overcome the generic need for grand jury secrecy.

A. Overwhelming Public Interest Supports Disclosure of the 38 Studios Grand Jury Records

The grand jury investigation into 38 Studios presents the rare circumstance in which an overwhelming public interest in transparency outweighs the usual interests in grand jury secrecy. Unlike the vast majority of grand jury investigations, the 38 Studios saga involves a quintessential matter of public policy touching on all levels of Rhode Island government and involving actions by the Governor, the General Assembly, the EDC, the General Assembly, and the Attorney General. As is well-known, the story of 38 Studios involves then-Governor Carcieri's decision to woo 38 Studios to move to Rhode Island, the General Assembly's decision to authorize $125 million in bonds for a jobs program, the EDC's decision to provide 38 Studios with a $75 million bond, and the bankruptcy of 38 Studios that left Rhode Island taxpayers holding the bag. It also involves the investigation into 38 Studios by the Attorney General, which resulted in no indictments.

38 Studios has left a cloud hanging over Rhode Island government. Although 38 Studios has had profound effects on the state, no public accounting has occurred. No official report

detailing what happened and what went wrong has been issued. In short, 38 Studios is a matter of intense public interest. The public has a right to know how Rhode Island officials made the crucial decisions to spend $75 million of the public's money on 38 Studios. Rhode Islanders are also entitled to know whether the state conducted a thorough investigation into 38 Studios.

In case the extraordinary nature of the 38 Studios case were not already apparent from the well-known facts, the Court may defer to the General Assembly, which has already determined that the public interest in transparency regarding 38 Studios justifies a departure from the ordinary rules of secrecy. In September 2017, responding to overwhelming public demand for transparency into the 38 Studios investigation, the legislature enacted the 38 Studios Transparency Act, which directs the release of 38 Studios investigatory records. That Act provides: "Notwithstanding any other provision of this chapter or state law, any investigatory records generated or obtained by the Rhode Island state police or the Rhode Island attorney general in conducting an investigation surrounding the funding of 38 Studios, LLC by the Rhode Island economic development corporation shall be made available to the public." Gen. Laws § 38-2-16.

In enacting the 38 Studios Transparency Act, the General Assembly expressed its recognition that 38 Studios is an exceptional circumstance in which the public's need to know outweighs the interests in secrecy. As a result of the Act, records regarding 38 Studios obtained or generated by the police and the Attorney General, including email, notes, and correspondence, have all been released, notwithstanding legal protections for those documents. As discussed more fully in Part III, infra, the Transparency Act by its terms may apply to 38 Studios grand jury records in the possession of the Attorney General's Office, because they are "investigatory records . . . obtained by . . the Rhode Island attorney general in conducting an investigation

surrounding the funding of 38 Studios." Regardless, by enacting and signing into law the Transparency Act, the General Assembly and the Governor have made it clear that the public interest in transparency in this exceptional case outweighs the needs for secrecy. This Court should defer to that judgment.

The Superior Court never weighed the strength of the public interest favoring disclosure. Instead, the Court avoided assessing the public's interest by holding that the Governor was required to demonstrate a particularized need for the materials. Slip Op. at 20. The court further noted that no Rhode Island case has ordered disclosure based on historic or public interest alone. Yet caselaw interpreting rules identical to Rhode Island's has uniformly held that in exceptional cases, like the 38 Studios case, public interest alone may be sufficient.

In his submission to the Superior Court, the Attorney General likewise argued that the public interest in the 38 Studios matter is insufficient to justify disclosure. In particular, the Attorney General argued that "... if courts granted disclosure *whenever* the public had an interest in grand jury proceedings, Rule 6(e) would be eviscerated." That argument fundamentally misses the point. No one argues that grand jury records should be disclosed *whenever* the public has an interest in those proceedings. Indeed, the public may have some interest in transparency in every grand jury investigation, but that interest hardly justifies piercing grand jury secrecy. Instead, what is at issue here is whether the public interest in *the 38 Studios investigation* is sufficient to overcome the ordinary principle of grand jury secrecy. While Rhode Islanders do not have a right to know what is said in every grand jury investigation, they do have a right to know how Governor Carcieri, the General Assembly, and the EDC decided to invest $75 million in taxpayer funds in 38 Studios, and they have a right to know whether the Attorney General adequately

investigated those decisions. This investigation presents a truly exceptional circumstance that justifies disclosure.

B. Particularized Need Is Not Required Under Exceptional Circumstances Involving a Sufficiently Strong Public Interest in Disclosure

The Superior Court erroneously held that grand jury materials can be disclosed only if Governor Raimondo demonstrates a "particularized need" for the documents. This Court, consistent with many others, has ruled that particularized need must be shown when a party seeks grand jury records under one of the 6(e) exceptions. See In re Young, 755 A.2d 842, 847 (R.I. 2000) ("The standard for determining when the traditional secrecy of the grand jury may be broken, warranting the disclosure *pursuant to Rule 6(e)*, is that the parties must make a particularized showing that '… the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.'") (emphasis added) (quoting Douglas Oil Co., 441 U.S. at 222). As the U.S. Supreme Court has made clear, the particularized need standard applies to "[p]arties seeking grand jury transcripts under Rule 6(e)." Douglas Oil, 441 U.S. at 222.

In contrast, courts have uniformly held that the public interest in transparency alone can justify disclosure in a narrow category of exceptional cases involving truly historic circumstances like 38 Studios. Such cases arise rarely, but when they do courts have held that the disclosure is warranted based on the public's right to know. Courts have found exceptional circumstances in cases involving the investigation of Watergate, In re Petition of Kutler, 800 F.Supp.2d 42 (D.D.C. 2011); the independent counsel's investigation into President Clinton, In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton, --F.Supp.3d--, 2018 WL 1801173 (D.D.C. Apr. 16, 2018); the investigation

into the disappearance of Jimmy Hoffa, In re Tabac, 2009 WL 5213717, at *2 (M.D.Tenn. Apr. 14, 2009); the investigation of Julius and Ethel Rosenberg, In re Petition of Nat'l Sec. Archive, No. 08–civ–6599, Summary Order at 1–2 (S.D.N.Y. Aug. 26, 2008); and the investigation of Alger Hiss, In re Petition of Am. Historical Ass'n, 49 F.Supp.2d 274 (S.D.N.Y. 1999).

These cases reflect a consensus "that in some situations historical or public interest alone could justify the release of grand jury information." Craig, 131 F.3d at 105. For instance, the court addressing the release of Watergate grand jury records explained why the public had a right to see those records:

> [T]he requested records are of great historical importance. . . .
> Watergate's significance in American history cannot be overstated. . . .
> The disclosure of President Nixon's grand jury testimony would likely enhance the existing historical record, foster further scholarly discussion, and improve the public's understanding of a significant historical event.

In re Petition of Kutler, 800 F.Supp.2d 42, 48 (D.D.C. 2011). To be sure, the 38 Studios case does not have the national implications of Watergate but within Rhode Island it has had a similarly dramatic import.

The petition for disclosure of the 38 Studios grand jury records should be granted for the same reasons that a federal court ordered release of the grand jury records of the 1998 independent counsel investigation into President Clinton. In that case, CNN sought the release of grand jury records of the Clinton investigation to carry out its journalistic mission of providing information to the public on important events. In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton, 2018 WL 1801173 at *3. CNN sought the release of the grand jury records to satisfy "the substantial public interest in learning more about what led to the impeachment proceedings against President Clinton and in better understanding past interactions between independent prosecutors and the Executive Branch." Id.

at *9. The Justice Department objected, asserting that Rule 6(e) does not allow disclosure of grand jury records based solely on "reasons of 'extreme public interest' or any other reason outside the reticulated exceptions to secrecy set forth in Rule 6(e)." Id. at *4. The district court disagreed, explaining, "as numerous courts have recognized, a district court retains an inherent authority to unseal and disclose grand jury material not otherwise falling within the enumerated exceptions to Rule 6(e)." Id. at *6. The court found that disclosure was warranted in light of the strong public interest in understanding the investigation into President Clinton. Id. at *9 (quoting *Craig).*

As these cases show, when a petition seeks grand jury records outside the Rule 6(e) exceptions, it is sufficient for a petitioner to show that exceptional circumstances call for disclosure. When CNN sought the release of the grand jury records from the Independent Counsel's investigation into President Clinton, it did not have any particularized need for the information. Rather, it sought the information solely to vindicate "the substantial public interest in learning more about what led to the impeachment proceedings against President Clinton." 2018 WL 1801173 at *4. Similarly, the court in In re Pitch, 275 F.Supp.3d 1373 (M.D. Ga. 2017), found that a historian had demonstrated exceptional circumstances to justify the release of grand jury records on a notorious lynching. Like CNN and the Governor in this case, the petitioner had no particularized need for the information other than to help inform the public about a historically important event. *Id*. at 1378-79 (stating that petitioner sought the records to "enhance the historical record, foster scholarly discussion and improve the public's understanding of this historical event"). In other cases, courts have granted petitions for disclosure submitted by historians and researchers, who sought to serve as a conduit for the public's interest in understanding major historical events.

As the highest elected official in the state, the Governor seeks to vindicate the public interest in obtaining full information on a most notorious and significant event in recent state history. With the enactment of the 38 Studios Transparency Act and other legislative actions, the General Assembly has agreed that 38 Studios was an extraordinarily significant in recent state history. The strong public interest in transparency in understanding what happened with 38 Studios justifies making an exception to the usual rules of grand jury secrecy. This Court should reverse the Superior's Court's judgment to the contrary.

C. The Interests in Continued Secrecy Are Minimal

As the discussion above shows, the public interest in disclosure is overwhelming. In contrast, the interests in maintaining secrecy are minimal. This is not a close case.

In the specific context of this case, it is apparent that the interests in secrecy are trivial. This Court has identified five purposes that grand jury secrecy is intended to serve:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

State v. Carillo, 307 A.2d 773, 776 n.4 (1973) (quoting United States v. Rose, 215 F.2d 617, 628-629 (3d Cir. 1954)). As the Superior Court recognized, the first three purposes are not implicated at all in this case. Slip Op. at 18. As for the latter two purposes—encouraging those

with information about crime to make free disclosure to the grand jury and protecting the innocent from unnecessary disclosure—those interests have only minimal application here and are outweighed by the strong public interest in disclosure.

As numerous courts have held, the interests served by grand jury secrecy diminish significantly after the grand jury's investigation has been completed, and those interests continue to decline over time. See Douglas Oil Co., 441 U.S. at 222; In re Craig, 131 F.3d at 107 ("[T]he passage of time erodes many of the justifications for continued secrecy."). In this case, the grand jury completed its investigation more than two years ago, and all civil litigation regarding 38 Studios has been resolved. Disclosure will not interfere with any ongoing criminal or civil investigation.

Neither the Attorney General nor the Superior Court identified any specific need for secrecy *in this case*, but instead they merely relied on the general interest in grand jury secrecy. They are right, of course, that grand jury secrecy serves very important interests. But the issue raised here is whether the 38 Studios investigation presents a special case justifying an exception to the ordinary principles of secrecy. It is no answer to point to the generic need for grand jury secrecy.

To be sure, any disclosure of grand jury records may discourage future witnesses, but this factor, standing alone, cannot justify nondisclosure when balanced against a compelling need for disclosure. For instance, in Frederick v. New York City, 2012 WL 4947806 (S.D.N.Y. 2012), the Court found that strong interests favored disclosure, while the only interest in continued secrecy was the concern that disclosure might discourage future witnesses. That interest alone should not stand in the way of disclosure because "[o]nly in the most abstract and minimal sense might a prospective grand juror who learns of a decision to unseal A.C.'s grand jury minutes be moved to

hide or shade testimony in a future criminal case." Id. at *13. Here, a generic interest in grand jury secrecy, standing alone, should not outweigh the overwhelming public interest in disclosure regarding 38 Studios. The concern that disclosure may harm future grand juries is present whenever disclosure is sought, but that concern is best addressed limiting disclosure to truly exceptional cases, not by denying disclosure when it's warranted.

At the same time, this matter involves only a minimal interest in protecting the privacy of those who testified before the grand jury and those who may have been subjects of the investigation. A large amount of material about 38 Studios has been released through civil litigation, as well as through the 38 Studios Transparency Act. As a result, it is unlikely that the grand jury materials will implicate persons whose involvement with 38 Studios has not already been disclosed.

In the event that this Court believes that significant interests in grand jury secrecy remain, it should remand to the Superior Court to follow the process for determining disclosure on a document-by-document basis employed by the district court in the Clinton Independent Counsel case. That case could provide a model for the Superior Court to follow here. In that case, the district court gave the Department of Justice the opportunity to review the materials and propose specific documents or portions of documents to withhold to protect law enforcement and privacy concerns. See 2018 WL 1801173 at **3-5. Interested parties, including former President Clinton, were also given an opportunity to review the material, subject to confidentiality agreements, and to identify material that should not be disclosed. Id. The district court then examined the material and the various parties' requests for non-disclosure before determining which parts of the record should be released. *Id*.

III. IF THIS COURT AGREES WITH THE SUPERIOR COURT THAT NO EXCEPTION TO GRAND JURY SECRECY APPLIES, IT SHOULD REMAND

THE CASE TO WEIGH THE APPLICATION OF THE 38 STUDIOS TRANSPARENCY ACT

Even if this Court agrees with the Superior Court that no exception to grand jury secrecy applies here, it should remand this case for the Superior Court to determine in the first instance whether the 38 Studios Transparency Act applies to the materials sought here. As discussed above, in September 2017 the General Assembly responded to the overwhelming public demand for transparency into the 38 Studios investigation by enacting the 38 Studios Transparency Act, which directs the release of 38 Studios investigatory records. Gen. Laws § 38-2-16. The Act provides in full:

> Notwithstanding any other provision of this chapter or state law, any investigatory records generated or obtained by the Rhode Island state police or the Rhode Island attorney general in conducting an investigation surrounding the funding of 38 Studios, LLC by the Rhode Island economic development corporation shall be made available to the public; provided, however:
>
> (1) With respect to such records, birthdates, social security numbers, home addresses, financial account number(s) or similarly sensitive personally identifiable information, but not the names of the individuals themselves, shall be redacted from those records prior to any release. The provisions of § 12-11.1-5.1 shall not apply to information disclosed pursuant to this section.

P.L. 2017, ch. 304, § 1, eff. Sept. 27, 2017; P.L. 2017, ch. 310, § 1, eff. Sept. 27, 2017.

It appears that at least some of the materials sought by the Governor in this case may be covered by the terms of the Transparency Act. Under the plain terms of the Act, the grand jury records sought here constitute "investigatory records . . . surrounding the funding of 38 Studios." Those records were "generated" by the Attorney General, whose office directed the

investigation, called witnesses, and interviewed them. See State v. Russell, 950 A.2d 418, 429 (R.I. 2008) (describing the role of the Attorney General in the grand jury and stating that prosecutors working for the Attorney General "generally direct the investigation"). In addition to helping to "generate" the records sought here, the Attorney General may have "obtained" those records, as it is authorized to do under Rule 6(e)(3)(A)(i) of the Rules of Criminal Procedure.

It further appears that the General Assembly had grand jury records in mind in enacting the 38 Studios Transparency Act. Subsection 1 declares: "The provisions of § 12-11.1-5.1 shall not apply to information disclosed pursuant to this section." The referenced section identifies the law that makes it a crime to disclose grand jury records. As a result, the Act specifically establishes that disclosure of 38 Studios grand jury records would not violate the usual prohibition against disclosing grand jury records. If the Act does not require the disclosure of grand jury records, no purpose would be served by exempting disclosure under the Act from the criminal prohibition on disclosing grand jury records.

The principal legislative sponsor of the 38 Studios Transparency Act explained that the Act mandates the release of "all" investigatory records into 38 Studios. See, e.g., Representative Charlene Lima, http://www.rilin.state.ri.us/representatives/Lima/Pages/Biography.aspx ("During the 2017 legislative session, Representative Lima sponsored successful legislation that would allow for the release of ***all*** documents related to 38 Studios.") (emphasis added). Governor Raimondo, in contrast, apparently believed that the Act would not cover grand jury materials, though it is possible she was referring to a prior version of the bill, which specifically excluded grand jury materials. See Press Release, Raimondo Signs 38 Studios Transparency Legislation (Sept. 27, 2017), http://www.ri.gov/press/view/31531. Of course, as this Court has held,

evidence of the understanding of particular legislators or the Governor has no bearing on the interpretation of a statute. Such v. State, 950 A.2d 1150, 1158-1159 (R.I. 2008).

If this Court were to rule that 38 Studios does not constitute an exceptional circumstance justifying a departure from grand jury secrecy, it should remand the case to the Superior Court to determine whether disclosure is nonetheless required under the 38 Studios Transparency Act. In doing so, the court could consider whether the Act should be read to apply to grand jury records, including records that may be in the possession of the Attorney General.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's decision and remand with directions to release the 38 Studios grand jury records.

Dated: May ___ 2018
Providence, Rhode Island

Respectfully submitted,
For amici curiae American Civil Liberties Union of Rhode Island, Common Cause Rhode Island, The New England First Amendment Coalition, and the Rhode Island Press Association

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CERTIFICATION

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