

**STATE OF RHODE ISLAND  
PROVIDENCE, SC.**

**SUPERIOR COURT**

In Re: 38 Studios Grand Jury

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**MEMORANDUM OF LAW IN SUPPORT OF GOVERNOR GINA M. RAIMONDO'S  
PETITION FOR THE RELEASE OF 38 STUDIOS GRAND JURY MATERIALS**

Governor Gina M. Raimondo respectfully requests this Court order the public disclosure of all material from the 38 Studios grand jury investigation so that the public can access this information. While the general rule of grand jury secrecy is an important principle of our justice system, 38 Studios is the rare case that requires an exception to that rule. The public interest in transparency is immense. Rhode Islanders should have full disclosure about this disastrous deal. At the same time, the interest in grand jury secrecy appears to be minimal. The conclusion of the grand jury investigation has significantly reduced, if not eliminated, any continuing need for secrecy. In the extraordinary circumstances of 38 Studios, the case for disclosure outweighs the case for secrecy. This Court should permit the release of all the grand jury material from the 38 Studios investigation so that our State can finally move past this unfortunate episode in our history.

**I. FACTS AND TRAVEL**

**A. The Immense Public Interest In 38 Studios And Its Failure**

In June 2010, the General Assembly enacted the Job Creation Guaranty Program. The program authorized the Rhode Island Economic Development Corporation ("EDC") to issue up to \$125 million of bonds or other obligations to provide financing for "companies growing their employment in Rhode Island." Pub. L. 2010, ch. 26, § 1. One month later, in July 2010, the

EDC Board of Directors authorized \$75 million in bonds under this program for the benefit of 38 Studios. *R.I. Econ. Dev. Corp. v. Wells Fargo Sec., LLC*, No. PB-12-5616, 2013 R.I. Super. LEXIS 165, at \*5 (R.I. Super. Ct. Aug. 28, 2013). The bonds were meant to get 38 Studios to move to Rhode Island and to finance the company's expansion. *See id.*

The EDC issued \$75 million in bonds in November 2010, and 38 Studios received the proceeds from the bond sale over the course of the next year. *Id.* at \*16. Then, in May 2012, 38 Studios defaulted on an interest payment. *Id.* at \*19. By June of that year, the company had closed its doors and filed for bankruptcy. *Id.* 38 Studios' bankruptcy meant the company could not repay the bonds, leaving Rhode Island taxpayers facing the prospect of repaying them.

In response, the State has taken measures to prevent another disaster like this from happening again. The General Assembly reorganized the State's economic development agency. *See* 2013 R.I. Pub. Laws ch. 243, § 3. Governor Raimondo proposed, and the General Assembly adopted, new economic development tools with safeguards that reflect best practices and designed to protect the State.

The State has also taken steps to hold people accountable for the 38 Studios deal. The EDC, now known as the Rhode Island Commerce Corporation, sued former EDC officials, major financial institutions, and other advisors who failed Rhode Islanders by letting this transaction happen. That lawsuit recovered \$61 million in gross settlements, nearly 70% of the amount owed on the bonds.

There has been a prolonged and profound public interest in understanding the 38 Studios debacle and who is responsible. Reporters have created detailed timelines of events, *see, e.g., Timeline: The rise and fall of 38 Studios in Rhode Island*, Providence Journal, (June 8, 2012) <http://www.providencejournal.com/article/20140522/Business/305229863>; fact-checked the

statements of those involved, *see, e.g.*, Mark Reynolds, *Despite his protests from afar, Costantino played key role in 38 Studios courtship*, Politifact (Oct. 18, 2015), <http://www.politifact.com/rhode-island/statements/2015/oct/18/steven-costantino/despite-his-protests-afar-costantino-played-key-ro/>; and closely followed the litigation arising from these events and the information that litigation has uncovered, *see, e.g.*, Ian Donnis, Elisabeth Harrison & Scott MacKay, *EDC Board Told Legislature Knew About And Vetted 38 Studios*, Rhode Island Public Radio (Sept. 14, 2015), <http://ripr.org/post/edc-board-told-legislature-knew-about-and-vetted-38-studios>. Even four years after the company closed its doors, 38 Studios still makes front-page local news.

Governor Raimondo has sought public access to the detailed information uncovered in the 38 Studios civil lawsuit. The lawsuit produced thousands of pages of evidence and testimony about how the 38 Studios deal came about and about how the company failed. This included the depositions of more than 60 people, including former Governors Donald Carcieri and Lincoln Chafee; former Speakers of the House Gordon Fox and William Murphy; former House Finance Chair Steven Costantino; long-time Gordon Fox associate Michael Corso; five former officials of the EDC, including former Executive Director Keith Stokes and Deputy Director J. Michael Saul; two senior officials from Governor Carcieri's staff; the Chief Executive Officer, Chief Financial Officer, and lead director of 38 Studios; and more. *See* Ted Nesi, *Here's a list of who got deposed in the 38 Studios lawsuit*, WPRI.com (Sep. 24, 2015), <http://wpri.com/blog/2015/09/24/heres-a-list-of-who-got-deposed-in-the-38-studios-lawsuit/>. This deposition testimony was not originally public information. Nor were thousands of pages produced during discovery about the inner workings of the 38 Studios deal. In her capacity as Chair of the Commerce Corporation, Governor Raimondo successfully petitioned the Court to unseal records from the

civil case. See Pl.'s Mot. for Order Unsealing Papers (Apr. 27, 2015), *R.I. Econ. Dev. Corp.*, 2013 R.I. Super. LEXIS 165.

The Court permitted release of the deposition transcripts and tens of thousands of pages of documents about the inner workings of the 38 Studios deal. According to the *Providence Journal*, these efforts released a “cascade” of information that “reveal[ed] the secret beginnings of the 38 Studios deal.” Paul Grimaldi, *Documents reveal secret beginnings of the 38 Studios deal*, *Providence Journal*, (Sep. 25, 2015) <http://www.providencejournal.com/article/20150924/NEWS/150929566>.

## **B. The Grand Jury Investigation**

While information uncovered in the civil litigation has been made public, much about the grand jury investigation into 38 Studios remains secret. According to a press release on the grand jury activities on July 29, 2016, and other statements issued by the Attorney General's office and the State Police, at least this much is known:

First, the investigation is closed. Indeed, the grand jury investigating 38 Studios “end[ed] in July, 2015.” Rhode Island Office of Attorney General & Rhode Island State Police, *Results of the Criminal Investigation of 38 Studios, LLC*, at 7 (July 29, 2016) (hereinafter, “*Investigation Results*”), available at <https://lintvwpr.files.wordpress.com/2016/07/38-studios-release-0729164.pdf>. The *Investigation Results* marked the “conclusion of this criminal investigation” and had the aim of “resolving the issue of whether criminal conduct occurred.” *Id.* at 8. And on Friday, February 3, 2017, the Attorney General's office confirmed that the investigation into 38 Studios is closed. See Ian Donnis, *38 Studios Investigation Closed; Different Explanations Offered*, *Rhode Island Public Radio* (Feb. 3, 2017), <http://ripr.org/post/38-studios-investigation-closed-different-explanations-offered>.

Second, the results of the investigation apparently did not warrant a criminal prosecution. Specifically, the *Investigation Results* stated that the inquiry produced “no evidence” of criminality in connection with the General Assembly’s “passage of the ‘Job Creation Guaranty Program.’” *Id.* at 2. It also stated that, based on the evidence reviewed, 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, and by 38 Studios to vendors.” *Id.* at 8.

Third, the investigation sought information from many people who have been publicly associated with the 38 Studios debacle. The *Investigation Results* disclose that Governor Carcieri, executives of 38 Studios, former EDC staff, members of the then EDC board of directors, and every member of the 2010 General Assembly (save one in federal prison) were interviewed or contacted by investigators. *See id.* at 7-8.

Fourth, the laws of grand jury secrecy prevent divulging much of the information generated in the investigation. Indeed, nearly one-quarter of the *Investigation Results* explain how the rules of grand jury secrecy would prevent information uncovered from the investigation from becoming public. *See id.* at 4-6, 8.

### **C. The Instant Petition**

Superior Court Rule of Criminal Procedure 6(e)(2) sets forth a general rule of grand jury secrecy that prohibits the disclosure of information that would “tend to reveal some secret aspect of the grand jury’s investigation.” *Heikkinen v. Kilmartin*, 2014 R.I. Super. LEXIS 159, at \*8 (R.I. Super. Ct. 2014).<sup>1</sup> Governor Raimondo brings the instant petition seeking a court order

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<sup>1</sup> Rule 6(e)(2) states: “General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the State, or any person to whom disclosure is made under paragraph (e)(3)(A)(ii) shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. A knowing violation of Rule 6 may be punished as a contempt of court.”

authorizing the disclosure of all material—transcripts, recordings, exhibits, and all other documents—from the 38 Studios grand jury investigation that is covered by Rule 6(e)(2).

## **II. THE COURT SHOULD ORDER DISCLOSURE OF THE 38 STUDIOS GRAND JURY MATERIAL**

### **A. The Superior Court Has The Discretion To Order The Release Of Grand Jury Material In Exceptional Circumstances**

Although there is a traditional rule of secrecy for matters occurring before a grand jury, this secrecy is “not absolute.” *In re John Doe Grand Jury Proceedings*, 717 A.2d 1129, 1134 (R.I. 1998). “There is no *per se* rule against disclosure of any and all information which has reached the grand jury chambers.” *Id.* (quotation marks omitted). Rather, granting access to grand jury materials is a matter within the Superior Court’s discretion. *See In Re Station Fire Grand Jury*, PM No. 2006-5611, at 3 (R.I. Super. Ct. filed Dec. 21, 2006).

In exercising its discretion, the Superior Court looks to (i) “the effect such disclosure would have on policies underlying grand jury secrecy,” and (ii) “the need for and the character of the material sought.” *In re Doe*, 717 A.2d at 1134. “[T]he petitioner’s burden of demonstrating a particularized need is not a heavy one.” *In re Young Jr. Grand Jury*, 755 A.2d 842, 847 (R.I. 2000). “[A]s the conditions justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.” *Id.*

Although the need for grand jury material typically coincides with one of the grounds in Superior Court Rule of Criminal Procedure 6(e),<sup>2</sup> these grounds need not be exclusive. As

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<sup>2</sup> Rule 6(e)(3)(C) permits disclosure “(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; (iii) when the disclosure is made by an attorney for the State to another grand jury; or (iv) when permitted by a court at the request of an attorney for the State, upon a showing that such matters may disclose a violation of federal criminal law, to an appropriate official of the federal government for the purpose of enforcing such law.”

federal courts have recognized, the release of grand jury materials is appropriate in “exceptional circumstances” that are not provided for in the rules of criminal procedure.<sup>3</sup> *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1269 (11th Cir. 1984); *see e.g., In re Petition of Craig*, 131 F.3d 99, 103 (2d Cir. 1997) (disclosure of grand jury material may be warranted in special circumstances beyond those listed in federal Rule 6(e)); *Carlson v. United States*, 109 F. Supp. 3d 1025, 1034 (N.D. Ill. 2015) (“Court has inherent authority to order disclosure of grand jury transcripts in special circumstances” not listed in federal Rule 6(e).), *aff’d* 837 F.3d 753 (7th Cir. 2016). This power to permit disclosure in exceptional cases derives from the Court’s “inherent supervisory authority” over the grand jury. *In re Petition of Kutler*, 800 F. Supp. 2d 42, 43 (D.D.C. 2011).

Courts have found exceptional circumstances in cases where (A) the subject of the grand jury investigation was of significant public interest or historical interest and (B) disclosure would further important governmental transparency values. *See Id.* at 48 (“[I]t is ‘entirely conceivable that in some situations historical or public interest alone could justify the release of grand jury information.’” (quoting *In re Craig*, 131 F.3d at 105)); *see also In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d at 1269, 1275 (lower court “correctly considered the important ‘public interest in the integrity and independence of the judiciary’ in deciding to grant disclosure” of records of alleged judicial misconduct because the judge’s conduct was “a matter of great societal importance”). In these cases, courts authorized disclosure of grand jury material after engaging in a case-specific analysis and determining that enhancing the public understanding of significant events and the activities of public officials outweighed the interests

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<sup>3</sup> Rhode Island’s Rule 6(e) is “analogous” to its federal rule equivalent. *Heikkinen v. Kilmartin*, 2014 R.I. Super. LEXIS 159, at \*7 (R.I. Super. Ct. 2014). “[T]his Court may properly look to a federal court interpretation of the analogous federal rule for guidance in applying our own state’s rule.” *Id.* (quotation marks omitted).

in grand jury secrecy. *See, e.g., In re Nat'l Sec. Archive*, 104 F. Supp. 3d 625, 629 (S.D.N.Y. 2015) (ordering disclosure of grand jury material from the Ethel and Julius Rosenberg investigation upon finding that “[t]he public interest is best satisfied by the proper responsive disclosure of information” rather than the continued secrecy to protect diminished expectations of privacy); *In re Kutler*, 800 F. Supp. 2d at 50 (ordering disclosure of Watergate grand jury information because “[t]he special circumstances presented here—namely, undisputed historical interest in the requested records—far outweigh the need to maintain the secrecy of the records”); *In re Am. Historical Ass’n*, 49 F. Supp. 2d 274, 297 (S.D.N.Y. 1999) (ordering disclosure of Alger Hiss grand jury information because “the substantial and particularized showing of their historical significance” outweighed “the minimal need to maintain secrecy of the grand jury transcripts”).

The case permitting public disclosure of material from the grand jury investigation of the Station Fire is consistent with this federal case law. The 2003 fire at The Station nightclub was a devastating tragedy that took the lives of 100 people and injured hundreds more. *In Re Station Fire Grand Jury*, PM No. 2006-5611 at 2. A grand jury investigated the fire and indicted three individuals responsible. *Id.* Because of the intense public interest in the case, Attorney General Patrick Lynch sought disclosure of grand jury material to the public at large. Attorney General Lynch explained:

The investigation of the Station Fire has resulted in public comment and interest on the scale of, perhaps, no other case or event in recent memory. The commentary has led to some criticism of grand jury process and public unrest and outcry. Release of the grand jury materials will provide insight to the public as to the scope and nature of the investigation. The State submits it would serve the



public interest if the public had access to information for its own determination of how and why this tragedy occurred.

Brief for Petitioner at 3-4, *In Re Station Fire Grand Jury*, PM No. 2006-5611.

The Superior Court authorized public disclosure of the Station Fire grand jury material “in light of the extraordinary circumstances” of the case. *In Re Station Fire Grand Jury*, PM No. 2006-5611 at 13. In reaching this decision, the Court followed the pattern developed in the federal cases set forth above. It determined that the need for grand jury secrecy was minimal and outweighed by the “immense public interest in th[e] case.” *Id.*

To be sure, the *Station Fire* Court also relied on the fact that it was authorizing disclosure to civil litigants in permitting a broader disclosure to the public. Nonetheless, the decision illustrates the balancing test a court should apply when considering a request for public disclosure of grand jury material: such requests are “best managed through the cautious discretion of the Superior Court as it monitors and protects the grand jury, hearing all claims of interest in disclosure on a case-by-case basis and weighing these against the policies supporting grand jury secrecy.” *Id.* at 13-14.

This Court should undertake this same balancing test in considering this petition for disclosure of the 38 Studios grand jury materials. For the reasons set forth below, that balance weighs in favor of transparency.

**B. Exceptional Circumstances Justify The Release Of The 38 Studios Grand Jury Records**

The 38 Studios saga presents the rare exceptional circumstances that warrant piercing the traditional veil of grand jury secrecy.

First, the failure of 38 Studios is, unfortunately, a seminal event in recent Rhode Island history. It has cost taxpayers tens of millions of dollars. It has brought threats to the State’s

credit rating. *See* Ted Nesi, *S&P threatens RI with downgrade over 38 Studios bonds*, WPRI.com (May 12, 2014) <http://wpri.com/2014/05/12/sp-negative-watch-for-ri-bonds-due-to-38-studios/>. It spawned a massive civil litigation resulting in \$61 million of settlements. It spawned a second civil suit in the form of a Securities and Exchange Commission complaint against a state agency and Wells Fargo, one of the nation's largest banks. *See* Complaint at 1, *SEC v. Rhode Island Commerce Corporation, et al*, 1:16CV00107 (D.R.I. Mar. 3, 2016), ECF No. 1. It prompted a criminal probe that reportedly touched the *entire* membership of the 2010 General Assembly (save one former member serving a federal prison sentence). *Investigation Results* at 8. Any one of these impacts would signify an important event. The fact that these impacts—and more—flow from one series of events illustrates just how truly exceptional the 38 Studios saga is in recent Rhode Island history.

Second, 38 Studios is the subject of immense and prolonged public interest. The number of local news stories are too numerous to count, and still increasing. These events have generated significant national news coverage as well. 38 Studios has also been the subject of continued legislative inquiry and debate. The General Assembly has held numerous hearings on the subject. *See* Bill Rappleye, *Lawmakers want to subpoena Schilling during 38 Studios hearings*, Turnto10.com (Oct. 27, 2015), <http://turnto10.com/i-team/38-studios/house-panel-to-open-hearings-into-38-studios>. It enacted an overhaul of the EDC. *See* Pub. L. 2013, ch. 243. And, in 2016, nearly four years after 38 Studios shut its doors, the General Assembly was still debating whether to repay the 38 Studios bonds. *See* Katherine Gregg, *Rep. MacBeth says R.I. should stop paying 38 Studios bondholders in wake of SEC charges*, Providence Journal (Mar. 8, 2016), <http://www.providencejournal.com/news/20160308/rep-macbeth-says-ri-should-stop-paying-38-studios-bondholders-in-wake-of-sec-charges>.

Third, there is a great need for transparency in this case. The 38 Studios debacle undermined the public's confidence in State government. While tens of thousands of pages of relevant information from the civil litigation has been made public, this disclosure has not satisfied the public's desire to understand how its government failed them in this case. Disclosure of the grand jury materials would address the injuries to the public trust that have not yet fully healed even more than four years after 38 Studios shut its doors. *See Carlson*, 109 F. Supp. 3d at 1037 (observing that disclosure of grand jury transcripts of the government's investigation of a newspaper would "build confidence in our government by affirming that it is open, in all respects, to scrutiny by the people" (quotation marks omitted)).

The failure of 38 Studios is not the equivalent of the devastating Station Fire. But Attorney General Lynch's reasons for public disclosure of grand jury material in the Station Fire case apply here: the 38 Studios debacle has resulted "in public comment and interest on the scale of, perhaps, no other case or event in recent memory" and that commentary has produced "public unrest and outcry." Brief for Petitioner at 3-4, *In Re Station Fire Grand Jury*, PM No. 2006-5611. "[I]t would serve the public interest if the public had access to information for its own determination of how and why [the failed investment in 38 Studios] occurred." *Id.* at 4.

**C. The Exceptional Circumstances Justifying Disclosure Outweigh The Need For Grand Jury Secrecy**

The immense interest in the 38 Studios grand jury material outweighs what appears to be a minimal interest in maintaining grand jury secrecy in this case.

The Rhode Island Supreme Court has identified five policies to be weighed when evaluating the possible disclosure of grand jury material:

- (1) preventing the escape of those whose indictment may be contemplated,

- (2) ensuring the grand jurors the utmost freedom in their deliberations and preventing a defendant or target of an investigation from importuning them,
- (3) preventing the subornation of perjury and other witness tampering,
- (4) encouraging the free and untrammelled disclosure of relevant information, and
- (5) protecting the innocent defendant or target exonerated by the investigation from public disclosure of the fact that he or she was under investigation.

*In re Doe*, 717 A.2d at 1134. On balance, these policies weigh in favor of disclosure.

In this case, the 38 Studios grand jury's conclusion without returning an indictment "essentially dissolve[s]" these reasons for secrecy. *In re Young Grand Jury*, 755 A.2d at 846. There is no apparent concern about the escape of those whose indictment may be contemplated because there are no such persons. There is no apparent need to preserve the freedom of the grand jury's deliberations, guard against witness tampering, or preserve the free flow of information to the grand jury because the 38 Studios grand jury reportedly disbanded eighteen months ago, in July 2015, and the case is closed. See *Investigation Results* at 8. Finally, there is no apparent need to protect innocent defendants or exonerated targets in a case where there was no indictment and, according to the *Investigation Results*, insufficient evidence to "even offer[] a criminal charge for grand jury consideration." *Id.*

To be sure, disclosing information from the grand jury may reveal that certain people were witnesses or otherwise involved in a criminal investigation. But many people have already been under the microscope for their involvement in the 38 Studios saga. Their deposition testimony, emails, and memos have been publicized and scrutinized to ascertain what they knew and when they knew it. See, e.g., Dan McGowan, *Email: EDC lawyer pushed family property for 38 Studios HQ*, WPRI.com (Sept. 28, 2015) <http://wpri.com/2015/09/28/email-edc-lawyer->

pushed-family-property-for-38-studios-hq/; Kathryn Gregg, *Wells Fargo told R.I. it didn't owe a payment on building notes; it did*, Providence Journal (Aug. 25, 2015), <http://www.providencejournal.com/article/20150825/NEWS/150829530>. While the extent to which this public scrutiny overlaps with the grand jury's investigation is not publicly known, it is worth noting that apparent subjects of interest to the grand jury, including the passage of Job Creation Guaranty Program, the funding of 38 Studios, and the disbursement of funds to 38 Studios, *see Investigation Results* at 2, 8, also were the subject of sustained inquiry in the civil case. Given the thousands of pages of discovery and deposition transcripts released in the civil case and the countless news reports dissecting events related to 38 Studios, the need to protect against implicating people in the 38 Studios debacle would appear to be minimal.

Finally, courts often consider the functioning of future grand juries and the concern of "institutional secrecy." *In re Young*, 755 A.2d at 847. Due to the unique circumstances of this case—the grand jury concluded 18 months ago, no criminal charges were filed, the Commerce Corporation's civil lawsuit has concluded, and immense public interest in this case remains—there is a decreased concern that release of these materials in this case will hamper future grand juries. Moreover, the Superior Court's role in scrutinizing future requests for disclosure safeguards the general policy of grand jury secrecy.

In evaluating the interest in secrecy, Governor Raimondo is mindful that the Attorney General's office has a special relationship to the grand jury process. And while she respectfully disagrees with the Attorney General's office's stated views on disclosure in this matter, she recognizes that, if necessary, this Court could seek the views of the Attorney General in order to supplement the record with any arguments it may make in favor of continued secrecy in this case. The Court could also instruct the Attorney General's office to provide notice to persons

whose privacy interests may be implicated by the release of the grand jury documents to afford them an opportunity to be heard as well.<sup>4</sup> *See In Re Station Fire*, PM No. 2006-5611 at 8 (explaining that Court ordered the Attorney General to provide notice of its petition for disclosure to all interested parties and file with the Court a list of those persons it noticed).

That said, it is important to note that the Attorney General's views are not dispositive. *See In re Young*, 755 A.2d at 843 (affirming lower court decision to disclose grand jury information over the objection of the Attorney General). The grand jury "is not under the control of the Attorney General." *Id.* Rather, it "is an arm of the Superior Court," and granting access to grand jury materials is a matter within the Superior Court's discretion. *Id.* In exercising that discretion, however, Governor Raimondo submits that vague or unsubstantiated pleas for secrecy should not defeat the exceptional public interest in disclosure in this case.

### **III. CONCLUSION**

Rhode Islanders deserve full transparency when it comes to 38 Studios. Although ample material has been made available to the public, questions remain and calls for disclosure

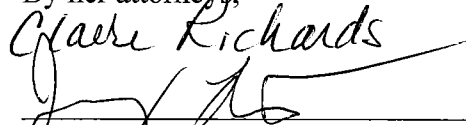
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<sup>4</sup> Information like social security numbers, account numbers, birth dates, home addresses, etc., can also be redacted from the records prior to public disclosure to protect privacy interests.

continue. For the reasons set forth above, Governor Raimondo seeks a court order releasing to the public at large all material from the 38 Studios grand jury investigation.

GINA M. RAIMONDO, in her capacity as  
Governor of the State of Rhode Island.

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### **CERTIFICATE OF SERVICE**

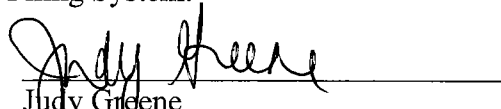
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