STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

IN RE: 38 STUDIOS GRAND JURY

C.A. NO.: PM 2017-0701

MEMORANDUM OF THE AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND AS AMICUS CURIAE IN SUPPORT OF GOVERNOR GINA M. RAIMONDO'S PETITION FOR THE RELEASE OF 38 STUDIOS GRAND JURY RECORDS

This Court should grant the petition filed by the Governor for the release of the 38 Studios grand jury records because the people of Rhode Island have a right to know how state officials decided to invest $75 million in taxpayer funds. Although grand jury records are ordinarily protected from disclosure, the principle of grand jury secrecy is not absolute. It can be overcome in exceptional circumstances like those presented here. Unlike a typical grand jury investigation involving allegations of private crime by private individuals, the investigation of 38 Studios addressed a matter of public policy of extraordinary importance that involved the decision by the state to invest $75 million in public funds. In a well-functioning democracy, the people have a need to know how the state decides to spend public funds, and this need vastly outweighs any minimal interests in secrecy present here.

Interest of the 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).

As the Supreme Court has long recognized, "An informed public is the most potent of all restraints upon misgovernment." Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936). That bedrock principle is at stake in this matter: in order to prevent abuses of power the people of Rhode Island are entitled to know how decisions are made over the use of their tax funds involving potential criminal misconduct.

I. This Court Has Discretion to Order the Release of the 38 Studios Grand Jury Records

Rule 6(e) of the Superior Court Rules of Criminal Procedure codifies the traditional rule of grand jury secrecy, and the Rhode Island Supreme Court has held that under the Rule "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).

It is well-settled that in deciding whether to order the release of grand jury records, this court should balance the public interest in disclosure against the interests of grand jury secrecy. See 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"); Petition of Jessup, 136 A.2d 207, 217 (Sup. Ct. Del. 1957) (a court may order the release of grand jury materials upon a showing "that the public interest in disclosure of the proceeding overrides the public interest in maintaining the secrecy of the Grand Jury proceeding"); Aiani v. Donovan, 98 A.D.3d 972 (N.Y. S.Ct., App. Div. 2012) (applying "[a] discretionary balancing of the public interest in disclosure against the public interest in secrecy of the grand jury").

This Court has considerable discretion in deciding whether to release grand jury information. See Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 228 (1979) ("Generally we leave it to the considered discretion of the district court to determine the proper response to requests for disclosure under Rule 6(e)."). As the U.S. Supreme Court has explained, the standard for determining whether a movant has established need sufficient to outweigh the public interest in grand-jury secrecy is "a highly flexible one, adaptable to different circumstances and sensitive to the fact that the requirements of secrecy are greater in some situations than others." United States v. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983).

In his submission to this court, the Attorney General challenges these well-settled standards. He argues that the court may order disclosure only if it falls within one of the "narrow exceptions" contained in Rule 6(e). See Attorney General Mem. at 11-16. Yet courts have uniformly held that the exceptions listed in Rule 6(e) are not exclusive and courts retain inherent power to order disclosure for other reasons. Reviewing these cases, the Seventh Circuit recently declared: "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 v. United States, 837 F.3d 753, 767 (7th Cir. 2016); see also In re Petition of Craig, 131 F.3d 99, 101-103 (2d Cir. 1997). In *Carlson*, the government made the same argument that the Attorney General makes here, that Rule 6(e) establishes an exclusive list of circumstances for disclosing grand jury records, and the Seventh Circuit explained that the argument went against the "great weight of authority": "the government stands alone: no court has accepted its position." Carlson, 837 F. 3d at 765.

In arguing that this Court can only order the release of grand jury records based on the limited exceptions listed in Rule 6(e), the Attorney General argues that the court should not recognize an exception to grand jury secrecy for "exceptional circumstances." Attorney General Mem. at 15-16. Yet every court that has considered the question has recognized that grand jury records can be disclosed for exceptional circumstances. See, e.g., U.S. v. Aisenberg, 358 F.3d 1327, 1347 (11th Cir. 2004); In re Petition of Craig, 131 F.3d 99, 107 (2d Cir. 1997). The Attorney General cannot identify a single case that has done what he asks this court to do: to declare that the court lacks power to disclose grand jury records even when exceptional

circumstances would justify doing so. The reason he can cite no such case is simple—no court has ever done so.

The Attorney General further challenges well-settled law by arguing that this court can order the release of grand jury records only if the Governor can demonstrate a "particularized need" for the records. Attorney General Mem. at 15. To be sure, many cases have held that parties seeking grand jury materials for use in another proceeding must make a strong showing of a particularized need for the information. See, e.g., U.S. v. Sells Engineering, Inc., 463 U.S. 418, 422 (1983). Those cases do not address the posture of this case, in which disclosure of grand jury records is sought based on the public interest in information that the public has a right to know. *Carlson* again demonstrates that courts have rejected the government's argument on this point. In that case, a coalition of historians and journalists sought access to grand jury records regarding a World War II-era espionage investigation. The court ruled that the petitioners were not required to demonstrate a particular need for the records. 837 F.3d at 759. Instead, the fact that one of the petitioners "is a member of the public is sufficient for him to assert his 'general right to inspect and copy ... judicial records.'" Id.

As cases like *Carlson* involving the release of material of historical importance demonstrate, disclosure can be ordered upon a sufficient showing (1) that the public has a strong interest in obtaining the information and (2) that disclosure will not undermine grand jury secrecy. The Attorney General is absolutely correct in asserting that grand jury records should only rarely be disclosed and only upon a showing of exceptional circumstances. As the next section demonstrates, however, the 38 Studios investigation is the rare case when disclosure is warranted.

II. The Public Interest Strongly Favors Disclosure of the 38 Studios Grand Jury Records

The strongest protections against government corruption and abuse of power do not come from laws or government institutions but instead come from a well-informed electorate that maintains an ever-vigilant watch over government. The need to keep the public informed about what its government is doing is at the heart of representative democracy. 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).

The people of Rhode Island have a right to know about the decisions that led to the 38 Studios debacle. Unless they know how these decisions were made, the people of Rhode Island cannot take corrective action to prevent similar decisions in the future.

Because it addresses a matter of extraordinary public interest, the investigation of 38 Studios presents an exceptional circumstance that justifies a departure from the normal rule of grand jury secrecy. While most grand jury investigations involve allegations of private crime by private figures, the 38 Studios investigation addresses an issue of public policy and the loss of substantial amounts of public funds. In July 2010, the Economic Development Corporation authorized the issuance of $75 million in bonds for 38 Studios, but within two years 38 Studios declared bankruptcy, leaving Rhode Island taxpayers to pay a significant portion of the bonds. Innumerable questions have arisen about the role of General Assembly leaders, the then-Governor, and other public officials in this decision-making process. Because it is their money at stake, the people of Rhode Island have a fundamental right to know how the decisions involving 38 Studios were made.

The grand jury investigation of 38 Studios addresses a quintessentially public matter. As the Governor's Memorandum submitted in this matter explains, the investigation conducted for the grand jury investigation contacted or interviewed Governor Carcieri, former EDC staff, members of the board of directors of the EDC, and almost every member of the 2010 General Assembly. Governor's Mem. at 5. Rhode Island taxpayers have a right to know how these officials explained the decision to spend $75 million of their tax money on 38 Studios.

Courts have frequently ordered the release of grand jury records that involve issues of public policy for which the public has a right to know. For instance, in In re Petition of Kutler, 800 F.Supp.2d 42, 48 (D.D.C. 2011), the United States District Court for the District of Columbia ordered the release of President Richard Nixon's testimony before the Watergate grand jury. The court ruled that "the 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." Similarly, courts have ordered the release of grand jury materials relating to investigations of Jimmy Hoffa, In re Tabac, No. 3:08–mc–0243, 2009 WL 5213717, at *2 (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). In all of these cases, the courts concluded that the usual rule of grand jury secrecy should give way to the public interest in understanding matters of public policy.

The principle that the public has a right to know about important matters of public policy led a Rhode Island court to order the release of the grand jury records relating to the 2003 Station

nightclub fire. In re Station Fire Grand Jury, PM No. 2006-5611. The public interest in disclosure regarding 38 Studios is at least as strong because it involves decisions by state officials to use public funds. In order for the public to understand what happened and to prevent a recurrence of the 38 Studios debacle, details regarding the 38 Studios matter should not remain shrouded in secrecy.

In his submission to this Court, the Attorney General argues that the public interest in the 38 Studios matter is insufficient to justify disclosure. See Attorney General Mem. at 20. In particular, the Attorney General argues that "... if courts granted disclosure *whenever* the public had an interest in grand jury proceedings, Rule 6(e) would be eviscerated." Id. (quoting *Craig*, 131 F.3d at 105). That argument misses the fundamental point of this proceeding. No one is arguing that grand jury records should be disclosed *whenever* the public has an interest in those proceedings. Indeed, the public interest may be implicated in every grand jury investigation, but that 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 was said in every grand jury investigation, they do have a right to know how the state decided to invest $75 million in taxpayer funds in 38 Studios. This investigation presents a truly exceptional circumstance that justifies disclosure.

Although the Attorney General argues that the public interest is insufficient to justify disclosure now, he suggests that disclosure might be appropriate at some point in the far distant future after all of the witnesses have died. See Attorney General Mem. at 23-26. He thus attempts to distinguish cases that ordered disclosure of the grand jury investigations of President Nixon, Alger Hiss, and World War II espionage, by pointing out that the disclosures in those

cases occurred many years after the investigations. That argument, however, misunderstands the nature of the public interest in this case. Rhode Islanders need to understand today what went wrong with 38 Studios so that they can properly oversee state government, prevent future abuses, and avoid a recurrence of the mistakes that were recently made. It is not enough that our grandchildren may someday understand what happened. For representative democracy to work, Rhode Islanders need to know now what led public officials to make crucial decisions on how to spend the state's money.

III. Disclosure Would Not Undermine the Purposes of Grand Jury Secrecy

A strong public interest favors the disclosure of grand jury records here because the investigation addresses the state's decision to support 38 Studios with large amounts of public funds. In contrast, the purposes of grand jury secrecy are only minimally present here.

The U.S. Supreme Court has identified five purposes that grand jury secrecy is intended to serve:

> (1) [t]o 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 [the] 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; [and] (5) to protect [the] 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.

United States v. Procter & Gamble Co., 356 U.S. 677, 681–682 n.6 (1958). Of these five purposes, the first three are not implicated by this matter at all. 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 in grand jury secrecy diminish significantly after the grand jury's investigation has been completed and continue to decline over time. See Douglas Oil Co. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979); In re Petition of Craig, 131 F.3d 99, 107 (2d Cir. 1997) ("[T]he passage of time erodes many of the justifications for continued secrecy."). In this case, the grand jury completed its investigation 18 months ago. Disclosure will not interfere with any ongoing criminal or civil investigation. To be sure, any disclosure of grand jury records may discourage future witnesses, which is why such disclosures should be limited to exceptional circumstances like those present here.

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. As the Governor's Memorandum discusses, considerable material about 38 Studios has been released through civil litigation. Governor's Mem. at 13. 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 his submission to this court, the Attorney General identifies no specific harm that will result from disclosure of the 38 Studios records. Instead, he argues that, as a general matter,

disclosure will have a "chilling effect" on future grand jury witnesses called who may refuse to testify before future grand juries out of fear of disclosure. Attorney General Mem. at 28. That generic concern, of course, is present in every case in which grand jury records are disclosed. It does not address why the need for secrecy should outweigh the public interest in disclosure here. In any event, the interest in ensuring that future grand jury witnesses will cooperate with the grand jury process is precisely why grand jury records can be disclosed only under exceptional circumstances. A well-functioning grand jury system is protected by ensuring that grand jury secrecy is the rule, but it presents no basis for rejecting disclosure when truly exceptional circumstances arise, as they undoubtedly do with the 38 Studios investigation.

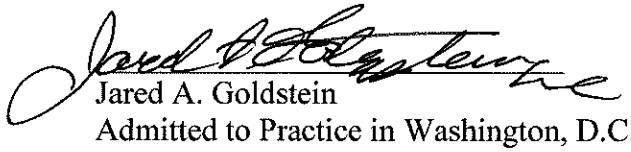
As a result, the interests in maintaining grand jury secrecy are minimal, if non-existent. In contrast, the public interest in disclosure is strong. This court should therefore grant the petition to release the grand jury materials.

CONCLUSION

For the reasons discussed above, this Court should grant the petition to release the 38 Studios Grand Jury records.

Respectfully submitted,

American Civil Liberties Union of Rhode Island
By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2017 I filed and served the within Memorandum via the electronic filing system and that it is available for viewing and downloading. A copy has been sent via ECF to all counsel of record:

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