STATE OF RHODE ISLAND SUPERIOR COURT PROVIDENCE, SC.

IN RE: 38 STUDIOS GRAND JURY C.A. NO.: PM 2017-0701

# THE ATTORNEY GENERAL’S MEMORANDUM OF LAW IN SUPPORT OF HIS OBJECTION TO GOVERNOR RAIMONDO’S PETITION

**FOR RELEASE OF 38 STUDIOS GRAND JURY MATERIAL**

1. **INTRODUCTION**

Governor Gina M. Raimondo filed the instant Petition seeking protected grand jury records related to the criminal investigation into the issuance of bonds by the Rhode Island Commerce Corporation for the benefit of 38 Studios, LLC (“38 Studios”). That Grand Jury did not take a vote and no indictment was issued. The statutory limitations period has not yet run, and there are no related judicial proceedings pending in any Court.

The Governor asks this Honorable Court to order the release of “all Grand Jury Records, wherever located.” Governor Raimondo’s Petition at p. 3. The Rhode Island Department of At- torney General (the “Attorney General” or “State”) objects to the release of any grand jury mate- rials relating to the 38 Studios investigation, as the Governor has not articulated a legally cogniza- ble basis for this extraordinary request. The Governor argues that the “public interest in transpar- ency is immense.” (Petitioner’s Memo at 1.) The Governor’s “transparency” based argument is squarely at odds with the centuries of precedent protecting the grand jury and its process. The Governor’s Petition and public statements have done nothing but fuel misguided speculation about the grand jury process, undermine its integrity, and cast a negative light on the entire process.

The Governor provides no legal argument that her Petition is justified by any exception to Super. R. Crim. P. Rule 6(e) restricting the release of grand jury materials. In particular, there is no need shown for these materials because of another judicial proceeding, and the request is not

limited in any manner. Rather, this request is to make the entire grand jury proceeding public. This boundless request should be rejected.

Instead of relying on Rule 6(e), the Governor advocates for the adoption of a vague and unsubstantiated “special circumstances” exception that has not been recognized in Rhode Island, and fails to show the necessary particularized need for release of the records. It is understandable that the Governor does not appreciate the methods of the grand jury, as the Executive has no role in that process. In contrast, the Attorney General has been involved in every grand jury convened in this State since it was colonized. As the chief prosecutor for the State of Rhode Island, the Attorney General has the obligation to uphold the public interest in maintaining the sanctity of the grand jury and its integral role in the criminal justice system.

The position taken by the Governor is not only untenable but also sets the stage for a dan- gerous precedent that would undermine the effectiveness of the grand jury in the administration of justice. It is important to remember that the grand jury was created as a barrier between the Crown and its subjects, and to prevent the Crown’s misuse of the criminal justice system by bringing unjustified criminal charges. The grand jury must have the confidence that it can conduct its in- quiries as it has for centuries. Moreover, witnesses who are called to testify must have the assur- ance that they can testify candidly and truthfully without repercussion and that their testimony will not be revealed save for an indictment being returned, or in a very narrow set of circumstances not alleged here.1

1 In accord with Rule 6, grand jury witnesses are generally told the following by prosecutors – that their testimony is confidential and that no one can tell anyone what was said in the grand jury. The only person that can tell what was said in their testimony is the witness themselves. If no one is indicted, their testimony will forever be private. If someone is indicted, a recording of the testi- mony will be given to the defense attorney. Additionally, grand jurors themselves are sworn to secrecy.

The Governor’s request does not fit within any recognized exception to Rule 6(e), and this Court should decline the invitation to create a “transparency” exception. “[I]f courts granted dis- closure *whenever* the public had an interest in grand jury proceedings, Rule 6(e) would be eviscer- ated.” *In re Petition of Craig*, 131 F.3d 99, 104 (2d Cir. 1997) (citing *In re Petition of Craig*, 942 F.Supp. 881, 883 (S.D. NY 1996)) (emphasis in original). Without sufficient legal basis, the Gov- ernor threatens the confidence of the protections afforded the grand jury, the sanctity of the which must be maintained. In summary, the Governor’s Petition is without merit and must be denied.

# BACKGROUND OF THE 38 STUDIOS INVESTIGATION

The Rhode Island State Police (“RISP”), in conjunction with the Attorney General, inves- tigated the proposal to fund 38 Studios and the $75 million in bonds authorized by the Rhode Island Economic Development Corporation. A separate investigation was also conducted by the Federal Bureau of Investigation and the United States Attorney for the District of Rhode Island. The federal investigation revealed no violation of federal criminal laws. The Statewide Grand Jury presentation began in December, 2013 and ended in July, 2015.2

Procedurally, after the presentation of a case to a grand jury, the prosecutor normally pro- vides the grand jury with legal instructions and charges it to apply those instructions to the facts presented. The grand jury’s function is to determine if probable cause exists to believe that a crime was committed. In the event the prosecutor, as the legal advisor to the grand jury, determines that the evidence presented is insufficient he/she will not instruct the grand jury with any criminal charges to consider. In the 38 Studios case, based on the State investigation, it was determined by career prosecutors and certain members of the Criminal Division in July, 2015, that there was not

2 The Statewide Grand Jury sat for its initial six months and two six-month extensions.

enough evidence of a criminal charge to sustain giving instructions to the Statewide Grand Jury to consider.

In addition to the criminal investigation, a civil action based on the Rhode Island Economic Development Corporation’s actions to assist 38 Studios, LLC in obtaining financing was filed in the Superior Court in 2012. *See generally*, *Rhode Island Economic Development Corporation v. Wells Fargo Securities, LLC, et al.*, PB-2012-5616. The civil case was filed in November, 2012, in the Providence County Superior Court and concluded in February, 2017. At no point during the civil proceedings did any party request the grand jury materials. Once the civil case concluded, the Governor announced that State Police Colonel Ann Assumpico would release 38 Studios crim- inal-investigation materials in RISP’s possession. The RISP released materials relating to the criminal investigation in March, 2017.3 On February 12, 2017, the Governor filed the instant Petition seeking the release of grand jury materials to the public.

# HISTORY OF THE GRAND JURY

The institution of the grand jury proceeding in secret traces back at least to the seventeenth century. *See Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 218 (1979). One of the early cases from 1681 England, *Shaftesbury’s Trial*, 8 How. St. Tr. 769, demonstrates the necessity of grand jury secrecy. When a pro-Protestant grand jury in London refused to indict Catholic King Charles II’s enemy, Lord Shaftesbury, the grand jury thereafter became an institu- tion “capable of being a real safeguard for the liberties of the subject.” Sara Sun Beale *et al*., Grand Jury Practice, 1-10 (2d ed. 2016) (*citing* Lester B. Orfield, *Criminal Procedure from Arrest to Appeal,* 141 (1947) (*quoting* Letter from Professor William S. Holdsworth (July 23, 1933))).

3 [http://risp.ri.gov/38studios/,](http://risp.ri.gov/38studios/) last viewed on April 4, 2017.

Prior to the grand jury proceedings in that case, a juror voiced his concerns that a public examina- tion of the inquiry would open the jurors up to outside pressures affecting their impartiality, could cause suspects to flee, and incite witness intimidation. *See Shaftesbury’s Trial*, 8 How. St. Tr. at 772.

The ancient and rich history of the grand jury reveals that the secrecy of its proceedings is crucial to its role as an independent truth-seeking body to the administration of justice. To carry out its responsibility, the grand jury “enjoys extraordinary inquisitorial and investigative powers, and its proper functioning depends significantly upon the concept of secrecy in its proceedings.” *Matter of Allegations of Misconduct in the City of Elizabeth,* 233 N.J.Super. 426, 431, 558 A.2d 1387, 1389 (App. Div. 1989). The justice system’s bedrock principle of confidential and undis- closed grand jury proceedings far outweighs any need for alleged transparency in the disclosure of grand jury materials. *Id.* at 1392.

The same justifications for the secrecy of grand jury proceedings given in 1681 have reso- nated through the centuries to the views expressed by the courts today. The grand jury process was brought from England to the colonies in America. In Rhode Island, the first grand jury was impaneled in 1640. *See* Mark Kadish*, Behind the Locked Door of An American Grand Jury: Its Secrecy, and its Process*, 24 Fl. St. L. Rev. 1 (1996) (*citing* Younger, *The People’s Panel: The Grand Jury in the United States*, 1634-1941, at 6 (1963)). In 1791, the Fifth Amendment was adopted as part of the federal Bill of Rights, with its Grand Jury Clause insuring that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury… .” U.S. CONST. amend. V. The Grand Jury Clause protects the people against arbitrary and overzealous government action by protecting “against hasty, mali- cious and oppressive prosecution.” *Wood v. Georgia*, 370 U.S. 375, 390 (1962). Rhode Island

adopted this tenet in the State’s Constitution where the Grand Jury Clause is found in Article 1, Section 7.4

The Supreme Court of the United States has taught that grand jury secrecy is “indispen- sable,” consistently recognizing its importance and warning of the consequences of piercing its veil. *U.S. v. Johnson*, 319 U.S. 504, 513 (1943). Dating back to the early 20th Century, courts have adjudicated motions for access to grand jury materials and, in reaching their decisions, have balanced the need for secrecy against the need for disclosure. In 1917, the District Court for the District of Rhode Island addressed the issue of widespread public disclosure of grand jury pro- ceedings in *United States v. Providence Tribune Co.*, 241 F. 524 (D. R.I. 1917). The district court held the newspaper in contempt for printing an article revealing information about a grand jury proceeding. *Id.* The published article disclosed the identity of witnesses and the fact that there was an ongoing grand jury investigation. *Id.* at 528. Disclosure of those limited facts was enough for the court to find that there had been an obstruction of justice. *Id.* Quoting the United States Supreme Court, the District Court held that the grand juries “are not appointed for the prosecutor or for the court; they are appointed for the government and for the people… .” *Id.* at 526 (*quoting Hale v. Henkel,* 201 U.S. 43, 61 (1906)).

The *Providence Tribune* decision listed several reasons supporting grand jury secrecy as “essential” to its process, that include: 1) to prevent the destruction of evidence; 2) to prevent the disappearance or tampering of witnesses; 3) to protect the grand jury witnesses and encourage full disclosure of knowledge without outside pressure; and 4) to protect the grand jury itself as an independent representative of the public for finding truth. *Providence Tribune*, 241 F. at 526. The

4 “[N]o person shall be held to answer for any offense which is punishable by death or by impris- onment for life unless on presentment or indictment by a grand jury.”

district court found these interests weighed in favor of maintaining secrecy for the fair administra- tion of justice. *Id.* The principles and aims of the justice system have not changed; it still requires the maintenance of grand jury secrecy for the same reasons enumerated by the district court one hundred years ago.

By the 1930’s, courts throughout the United States were upholding grand jury proceedings and similarly recognizing the policies underlying its well-established tradition as expressed in *Providence Tribune*; *see U.S. v. Amazon Indus. Chemical Corp.,* 55 F.2d 254, 261 (D. Md. 1931). In 1946, the common law tradition of grand jury secrecy was codified in the federal system through Rule 6(e) of the Federal Rules of Criminal Procedure. In Rhode Island, the Superior Court Rules of Criminal Procedure became effective in 1972 and included Rule 6(e), which is substantially similar to its federal counterpart.

In 1958, the Supreme Court first addressed the civil use of grand jury materials in view of Federal Rule 6(e) in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958). *Procter & Gamble Co.* was a civil suit instituted by the government. A previous grand jury investigation did not result in an indictment or a true bill. The only question before the Supreme Court was whether a private defendant could gain access to grand jury transcripts under Federal Rule of Civil Proce- dure 34. The answer was no. The Supreme Court held that to break the “indispensable secrecy of grand jury proceedings” required a showing of “compelling necessity” and this necessity “must be shown with particularity.” *Procter & Gamble*, 356 U.S. at 682 (*quoting United States v. Johnson*, 319 U.S. 503, 513 (1943)). After applying these criteria, the Supreme Court found that there was no showing of necessity with particularity, and held that Procter & Gamble would not be preju- diced by application of the ordinary civil discovery rules that might cause delay and substantial costs. *Id.*

The Supreme Court again applied this standard in *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211 (1979). The Court emphasized that the party seeking disclosure bears the burden of demonstrating need and “must show 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.” *Id.* at 222. The Court noted that—even in a case where grand jury activity has ceased— the interests in secrecy, though reduced, are not eliminated. *Id.* In its reasoning, the Court in- structed that the “possible effect upon the functioning of future grand juries” must be considered when disclosing grand jury material. *Id.*

In *United States v. Sells Engineering, Inc.*, the Supreme Court held that a Civil Division attorney in the United States Department of Justice was not entitled to automatic access to the grand jury materials even if used for his or her duties, including prosecuting or defending civil actions on behalf of the federal government. 463 U.S. 418, 431 (1983). The *Sells* Court held that the term “attorney for the government” was meant to refer only to prosecutors conducting criminal proceedings, and not Department of Justice attorneys with purely civil responsibilities. *5 Id.*

The *Sells* Court acknowledged the “extraordinary powers of investigation” granted to grand juries, and cautioned that the use of those powers ought to be limited to the accomplishment of the task. *Id.* at 434-435. Consequently, the Supreme Court held that government civil attorneys must obtain a court order for access to grand jury materials for civil use. The civil attorneys in that case,

5 The explicit language in Super. R. Crim. Pro. Rule 6(e)(3)(A)(i) is such that disclosure is per- mitted only to an attorney for the State “for use in the performance of such attorney’s duty” to enforce criminal law. That means that disclosure of grand jury materials is not permitted to the attorneys in the Civil Division of the Department of Attorney General, despite being in the same office, with the same titles. Only the Criminal Division attorneys and personnel are allowed ac- cess to grand jury materials, and only if it is in their duty to enforce criminal law.

like the Civil Division attorneys in the Department of Attorney General, can only acquire disclo- sure of grand jury materials by showing the court the same particularized compelling need as pri- vate litigants as set forth in *Procter & Gamble Co. Id.* at 444.

The Court’s opinion in *Sells* focused on the essential and legitimate reasons for grand jury secrecy. *Sells*, 463 U.S. at 444. The Court recognized the policy reasons for granting government attorneys access to grand jury materials in criminal cases, and the dangers of allowing the auto- matic disclosure of grand jury materials to non-criminal government attorneys. *Id.* The *Sells* Court warned that allowing the disclosure to government agencies would circumvent the usual discovery methods and “would grant to the Government a virtual *ex parte* form of discovery... .” *Id.* at 434. The Court also noted the negative effect disclosure could have on future grand juries, writing that “[i]f a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum.” *Id.* at 432.

As history has shown, secrecy in grand jury proceedings is fundamental to the administration of justice. For sound legal reasoning developed over centuries, the breadth of grand jury secrecy is great and the exceptions to pierce the veil of the grand jury are exceedingly narrow.

# RHODE ISLAND SUPERIOR COURT RULE OF CRIMINAL PROCEDURE 6(e)

It is beyond dispute that the rule of secrecy governs grand jury proceedings in Rhode Is- land. Rhode Island Superior Court Rule of Criminal Procedure 6(e).6 Our grand jury serves the

6 Rule 6(e)(2) General Rules of Secrecy. A grand juror, an interpreter, a stenographer, an opera- tor 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 mat- ters occurring before the grand jury, except as otherwise provided for in these rules … .

dual purpose of first determining whether probable cause exists to believe a crime has been com- mitted and whether the person under investigation committed the crime, and second, to protect citizens against unfounded allegations. *See In re Sgt. Cornel Young, Jr. Grand Jury*, 755 A.2d 842, 845 (R.I. 2000); *In re John Doe Grand Jury Proceedings*, 717 A.2d 1129, 1134 (R.I. 1998) (*quoting United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983)). The gate-keeping function performed by the grand jury “underlies the long-established policy that maintains the secrecy of the grand jury proceedings.” *Sells*, 463 U.S. at 424 (internal citation omitted).

The long-standing tradition of secrecy codified in Rule 6(e) is not absolute. *State v. Ca- rillo*, 307 A.2d 773 (1973). Limited exceptions to the general rule of secrecy allow for the dis- closure of grand jury materials under certain circumstances.7 Rule 6(e)(3)(C)(i) specifically pro- vides for the disclosure “when so directed by a court preliminarily to or in connection with a judi- cial proceeding.” When reviewing a request for disclosure, the court must consider not only the need for and the character of the materials sought, but also the traditional and fundamental policy considerations underlying grand jury secrecy. *See In re Young*, 755 A.2d at 846; *In re Doe*, 717 A.2d at 1134. These policy considerations include: (1) preventing the escape of those whose in- dictment may be contemplated; (2) ensuring the grand jurors the utmost freedom in their deliber- ations and preventing the target or defendant from importuning them; (3) preventing the suborna- tion of perjury and other witness tampering; (4) encouraging the free and untrammeled disclosure

7 Rule 6(e)(3)(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made – (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 occur- ring before the grand jury; (iii) when the disclosure is made by an attorney for the State to an- other 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 appro- priate official of the federal government for the purpose of enforcing such law.

of relevant information; and (5) protecting the innocent target or defendant exonerated by the in- vestigation from public disclosure or the fact that he or she was under investigation. *In re Young*, 755 A.2d at 846; *In re Doe*, 717 A.2d at 1134.

Disclosure is appropriate only when the moving party can establish a particularized need for the materials. *State v. Ouimette*, 110 R.I. 747, 298 A.2d 124 (R.I. 1972). The particularized need test is met if the party seeking grand jury materials shows 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 ma- terial so needed.” *In re Young*, 755 A.2d at 847 (*quoting Douglas Oil Company*, 441 U.S. at 222). The burden rests on the moving party and disclosure is appropriate only in those cases where the need for disclosure outweighs the public interest in secrecy. *Id*.

# ARGUMENT

* 1. **The Governor’s Petition Does Not Fit Within Any Rule 6(e) Exception**

As an initial matter, the Governor provides no argument that her Petition meets the strict requirements of Super. R. Crim. Pro. Rule 6(e) or the narrow exceptions therein. Although the interests of the citizens in how their government works is not inconsequential, the meager and legally insufficient arguments offered by the Governor cannot be allowed to alter the grand jury process in Rhode Island.

The Superior Court’s analysis to determine if it should exercise its discretion and allow for release of materials under a Rule 6(e) exception is two pronged; the court must find that: (1) the request fits into an exception; and (2) release is appropriate after the “particularized needs” analy- sis is conducted. *See In re: Ryan O’Loughlin Grand Jury*, R.I. Super., Oct. 15, 2012 (Gibney, P.J.) at 6 (*citing United States v. Baggot*, 463 U.S. 476, 480 (1984) (noting that a court will not release

grand jury records unless the party seeking disclosure can demonstrate that the requirements of

*both* Rule 6(e)(3)(C)(i) and the three parts of the “particularized need” test have been met)).

Superior Court Rule of Criminal Procedure 6(e)(3) sets forth very limited exceptions to breach grand jury secrecy. Most, if not all, cases where the Superior Court has been asked to exercise its discretion and release grand jury records have been linked to another judicial proceed- ing. Rule 6(e)(3)(C)(i) allows disclosure of “… matters occurring before the grand jury … when so directed by a court preliminarily to or in conjunction with a judicial proceeding.” Disclosure pursuant to Rule 6(e)(3)(C)(i) is permitted only if the *primary* purpose of such disclosure is to assist a petitioner in the preparation for, or conduct of, a judicial proceeding. *See Baggot*, 463 U.S. at 480. *See also In re: Ryan O’Loughlin Grand Jury*, R.I. Super., Oct. 15, 2012 (Gibney, P.J.) at 12 (setting forth that if primary purpose of disclosure is not to assist preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted).

This Court has had the occasion to interpret the “preliminarily to … a judicial proceeding” portion of subsection Rule 6(e)(3)(C)(i) in a case where petitioner filed a petition for grand jury records to determine whether to file a wrongful death case. This Honorable Court found that the disclosure request was premature and not permitted under (C)(i). *See In re: Ryan O’Loughlin Grand Jury*, R.I. Super., Oct. 15, 2012 (Gibney, P.J.) at 13. Rule 6(e)(3)(C)(i) does not allow for a grand jury record to be used as a fact-finding tool to determine liability for a potential civil suit. *See United States v. Young*, 494 F.Supp. 57, 60-61 (E.D. Tex. 1980) (medical licensing board not entitled to release of grand jury transcripts concerning doctor “preliminarily to” judicial proceed- ing, when the licensing board sought the transcripts for investigative purposes preparatory to pos- sible suspension of doctor’s license, and any judicial appeal of board’s decision was up to the doctor). Rule 6(e)(3)(C)(i) affirmatively limits the availability of court-ordered disclosure of grand

jury materials, thereby reflecting a judgment that not every beneficial purpose justifies the release of grand jury materials. *See Baggot*, 463 U.S. at 480.

The Governor’s Petition is bereft of any claim that the grand jury materials will aid or assist in litigation—neither a pending matter nor one where filing is contemplated or anticipated—that would warrant release of the grand jury materials under Rule 6(e)(3)(C)(i). Additionally, there is not one exception enumerated in Rule 6(e)(3) that supports the Governor’s Petition for release of the material.

Despite the lack of argument in response to the strictures of Rule 6(e), the Governor places reliance on the *Cornel Young* and the *Station Fire* cases to support the release of the grand jury material. *See generally*, Petitioner’s Memo at p. 6. The Governor’s reliance is misplaced. Both *Cornel Young* and the *Station Fire* involved the Superior Court invoking its discretion after deter- mining that petitioners had satisfied the Rule 6(e) threshold. In both cases, the court found the Rule 6(e) requirement of “… preliminary to or in connection with a judicial proceeding” had been met. In *Cornel Young*, the Superior Court found there was anticipated litigation because the Estate of Cornel Young Jr. sent notice of a civil lawsuit to the City of Providence. *In re Young,* 755 A.2d at 846. And in the *Station Fire* case, a civil lawsuit had been filed in federal district court. *In re: Station Fire Grand Jury,* R.I. Super., Dec. 21, 2006, No. PM 2006-5611 (Rodgers, P.J.).

In *Cornel Young*, a Providence County Grand Jury returned a no true bill regarding poten- tial criminal charges by two police officers after they fatally shot off-duty officer Police Sergeant Cornel Young, Jr. *See In re Young*, 755 A.2d at 845. The City of Providence, joined by the Estate of Cornel Young, Jr. petitioned the Superior Court for release of the grand jury minutes. *Id.* The two officers consented to release of the grand jury proceeding, waiving any right to secrecy of the grand jury proceedings. *Id.* Arguments of public mistrust, community strife, extensive media

coverage, and public unrest were unpersuasive for the court to allow for public disclosure. *Id.* at 845-8. The Superior Court properly determined that the public interest would best be served by limiting the release of grand jury materials only to the parties. *Id.* at 848. The court further ordered the parties to not otherwise disseminate, publish or release the materials. *Id.* Any violation could subject the violator to penalty for contempt. *Id.*

The *Station Fire* case is also very distinguishable from the case at bar. There, a historically tragic fire occurred, killing one hundred people and injuring two hundred more. *In re: Station Fire Grand Jury,* R.I. Super., Dec. 21, 2006, No. PM 2006-5611 (Rodgers, P.J.). Three individuals were indicted by the grand jury on charges of involuntary manslaughter. *Id.* The Attorney Gen- eral, on behalf of the State, filed a Petition in Superior Court seeking the release of grand jury testimony, reasoning that the materials were necessary for the civil litigation where the State was a defendant; that the three criminal defendants, also defendants in the civil case, already had pos- session of the grand jury materials through discovery in the criminal case; and that significant costs to the approximately 500 plaintiffs and defendants in the civil case could be saved by disclosure. *See* State’s Memorandum of Law in Support of Petition for Disclosure of Grand Jury Testimony, PM 2006-5611 (attached).

In determining that a compelling particularized need had been demonstrated by the parties seeking disclosure, the Superior Court found the following factors significant: unequal access to grand jury materials by the parties in the civil case; the stay of discovery ordered by the federal court and potential costs; and the greater reliability of the grand jury testimony since almost four years had passed and there was a risk of faded memories and lost and available witnesses since the incident occurred. *In re: Station Fire Grand Jury,* R.I. Super., Dec. 21, 2006, No. PM 2006-5611 (Rodgers, P.J.) at 6. Significant to the court’s analysis were: 1) a list of grand jury witnesses was

publicly released as part of the criminal case; and 2) the defendants in the criminal case had been given the grand jury materials as part of the discovery process in the criminal case. *Id.* at 10-11. The court also determined that based on the number of parties in the civil case, it would be difficult to restrict the materials to the parties only and a strong likelihood existed that further dissemination would occur, thus further finding that public disclosure was appropriate. *Id.* at 12. The Superior Court emphasized that it was granting the relief “in light of the extraordinary circumstances of this case—the complexity and difficulty of the pending litigation, the resolution of all policy concerns supporting secrecy, and the immense public interest in the case.” *Id.* at 13.

Furthermore, both *Cornel Young* and the *Station Fire* cases can be distinguished from the instant case because in *Cornel Young* and *Station Fire*, the cases were investigated fully, both grand juries considered charges and voted accordingly. Here, although the investigation has been closed, the grand jury was not instructed on potential criminal charges and the possibility remains that the investigation could be re-opened, as the statute of limitations has not expired on any po- tential charges.

With the instant Petition, the Governor has not demonstrated that her request for disclosure falls within or meets any of the Rule 6(e) requirements or exceptions or that there is any particu- larized need present. Thus, the inquiry should end and her Petition be denied. The only other avenue to obtain release of grand jury materials, however, is through an “exceptional circum- stance” exception, a court created exception based upon a showing of “particularized need.” This exception has been used in only a small number of cases, and never in Rhode Island. The Governor is asking this Honorable Court to depart from the well-settled analysis in Rhode Island by invoking the “exceptional circumstances” as the *sole* basis to release grand jury materials. Such a result would erode the confidence of the grand jury process, impede its ability to seek justice, and effect

all future grand jury requests for disclosure. Therefore, this Honorable Court should decline to create this exception as the Governor has failed to meet the Rule 6(e) requirement and demonstrate that her request fits within an exception to grand jury secrecy.

# The Governor Fails to Meet the Exceptional Circumstance Exception

* + 1. **Exceptional Circumstances History**

In 1973, the *New York Times* ran an article claiming that Mario Biaggi, a candidate for mayor of New York City, refused to answer at least 30 questions before a federal grand jury. *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973). Biaggi sought disclosure of the grand jury material, a request that was joined by the United States Attorney. *Id.* In addressing the request for disclosure, the District Court for the Southern District of New York was mindful that the rule of secrecy “was designed for the protection of the witnesses who appear” but found that Biaggi waived that pro- tection by seeking complete disclosure. *Id.* at 493 (*citing In re Grand Jury Proceeding*, 4 F.Supp. 283, 284-285 (E.D. Pa. 1933)). The court found that the request did not fall within an exception to Rule 6(e), but allowed the disclosure based on “… the exercise of a sound discretion under the special circumstances” of the case. 478 F.2d at 494.

In 1984, the Eleventh Circuit in *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984) (hereinafter “*Hastings*”), had the opportunity to consider a “special circumstances” exception where a request for release of grand jury materials was made pursuant to Rule 6(e). In that case, Judge Hastings was indicted for soliciting a bribe in exchange for a judicial decision and another individual, William Borders, was indicted for offering the bribe. *Id.* Both individuals were tried separately—Judge Hastings was acquitted and Mr. Borders was con- victed. *Id.* Subsequently, the Judicial Investigating Committee filed a petition with the court seeking access to the grand jury records to assist in investigating a complaint that Judge Hastings

violated the Code of Judicial Conduct. *Id.* Judge Hastings objected to release, arguing that the Committee’s investigation is not “preliminarily to or in conjunction with a judicial proceeding,” as required by Rule 6(e)(3)(C)(i). *Id.* Thus, the *Hastings* Court undertook an analysis of the phrase “preliminarily to or in conjunction with a judicial proceeding,” as required by Rule 6(e)(3)(C)(i). The court agreed that this request did not fit within this or any of the exceptions, but stated that the proceeding that these records were sought was “closely analogous” to the situation for which Rule 6(e)(3)(C)(i) was created. *In re Petition to Inspect and Copy*, 735 F.2d at 1268. The Court further found that it was appropriate to exercise its inherent authority because special circumstances ex- isted in the judicial investigation since the Committee was acting pursuant to express statutory authority and the Committee is required by statute to conduct and maintain its proceedings in con- fidence. *Id.* at 1264, 1269. Importantly, the court in *Hastings*, recognizing the need to minimize any secrecy breach, imposed several restrictions, including: the time and conditions of access; that only a limited number of individuals were allowed access; specifying where the records would be kept; permitting access for only 90 days; and that all information was to be kept in strict confi- dence. *Id.* at 1265.

In the absence of an explicit Rule 6(e) exception to allow for the release of the grand jury records, the *Hastings* court found “special circumstances” existed for release because the Judicial Investigating Committee was like a judicial proceeding, there existed a Congressional mandate to investigate judicial misconduct, Judge Hastings was indicted and tried, and release of the records was extremely restricted.

The Second Circuit had another opportunity to address the release of grand jury material in *In re Petition of Craig*, 131 F.3d 99 (2d Cir. 1997). Petitioner there, Bruce Craig, was a doctoral candidate at American University who sought release of grand jury material from 1948 to support

his dissertation on Harry Dexter White, a former Assistant Secretary of the Treasury who was accused of having been a communist spy. *Id*. In 1948, White appeared before a special grand jury, although he was not indicted. *Id*. A few months later White died, just days after appearing in front of the House Un–American Activities Committee, where he emphatically and publicly denounced the allegations against him. The Circuit Court affirmed the denial of Craig’s petition for release of the grand jury material. Citing *In re Biaggi*, 478 F.2d at 494, the Second Circuit reasoned that although there are certain “special circumstances” in which release of grand jury records may be appropriate, those circumstances were not met there.

*Craig* offered the following non-exhaustive list of factors that a trial court may consider when confronted with these highly discretionary and fact-sensitive “special circumstances” mo- tions: (i) the identity of the party seeking disclosure; (ii) whether the defendant to the grand jury proceeding or the government opposes the disclosure; (iii) why disclosure is being sought in the particular case; (iv) what specific information is being sought for disclosure; (v) how long ago the grand jury proceedings took place; (vi) the current status of the principals of the grand jury pro- ceedings and that of their families; (vii) the extent to which the desired material—either permissi- bly or impermissibly—has been previously made public; (viii) whether witnesses to the grand jury proceedings who might be affected by disclosure are still alive; and (ix) the additional need for maintaining secrecy in the particular case in question. *In re Petition of Craig*, 131 F.3d at 106.

# The Petition Cannot Satisfy The “Craig” Factors Nor Has The Governor Shown A “Particularized Need”

Since the Governor is relying on an “exceptional circumstance” exception, she must demonstrate to this Court that her stated reason, public interest, is an “exceptional circumstance” and she also has a greater showing of “particularized need” because her request is outside of Rule 6(e). *See In re American Historical Association*, 49 F. Supp.2d 274, 287 (1999) (*citing In re Craig*,

131 F.3d at 106 n. 10) (if a petitioner’s request does not fit within one of enumerated exceptions in Rule 6(e)(3)(C), and instead relies on a “special circumstances” exception, a greater showing of a “particularized need” must be made)). Applying this analysis and the *Craig* factors to this case requires a finding that there are no “special circumstances” which would justify the breach of the grand jury process.

# Application of the *Craig* factors mandates non-disclosure

When the nine *Craig* factors listed *supra* are analyzed, the outcome weighs heavily in favor of preserving the grand jury process and against release. The Governor, although seeking disclo- sure for “the public interest,” was not a witness in or involved in the grand jury, compared to a case discussed below where a witness requested his own testimony be released. Also, a court should be very concerned about releasing materials in a case such as this, where no one was in- dicted. *See In re Craig*, 131 F.3d at 106 (a trial judge should be extremely hesitant to grant release of grand jury material where the request is by a third-party stranger and it is over the objection of the defendant). The public’s right to full disclosure and the public's interest in transparency does not outweigh witnesses’ right to secrecy. *Id.* at 105.

Additionally, there is no defendant in the 38 Studios investigation to oppose the release; however, the Attorney General does oppose the disclosure. The career prosecutor presenting this matter to the grand jury determined there was not enough evidence to provide the grand jurors a charge. It is equally significant that the identity of the witnesses that testified have never been disclosed publicly and are not known because nothing relating to the grand jury proceeding has been released. If a witness in a grand jury is not seeking release of grand jury records, then the records should remain sealed, even if the public claims to have interest in the grand jury proceed- ings. *See In re Biaggi*, 478 F.2d at 492-493.

In addition, the Governor states she is seeking disclosure because Rhode Islanders should have full disclosure about the 38 Studios deal and the public has an interest in transparency. Peti- tioner’s Memo. at 1. This rationale has been found insufficient by itself to pierce the Rule 6(e) veil of secrecy around the grand jury, as the Second Circuit affirming the lower court, declared, “... if courts granted disclosure *whenever* the public had an interest in grand jury proceedings, Rule 6(e) would be eviscerated.” (Emphasis added). The Court in *Craig* recognized,

“Thus, the district court's comment that public interest, without more, cannot per- mit disclosure must be read simply as the commonplace observation that the ‘spe- cial circumstances’ test cannot be satisfied by a blanket assertion that the public has an interest in the information contained in the grand jury transcripts. Indeed, by concluding that ‘the “public interest” exception urged by Petitioner [that any garden-variety public interest compels disclosure if it outweighs the need for se- crecy in the particular grand jury proceeding in question] would swallow the gen- eral rule of secrecy.’”

131 F.3d at 105.

Also, the Governor does not and cannot identify specific information from the grand jury because she does not know who testified or what was presented to the grand jury as part of this case; the Governor is not the Constitutional officer charged with this responsibility. Instead, the Governor casts a wide net and seeks the release of all grand jury records, wherever located. *See* Petition at 3. Similar to the Governor’s request, the Federal District Court for the District of Co- lumbia was presented with a petition for release of grand jury testimony and materials related to the grand jury investigating Watergate and President Nixon in *In re Shepard*, 800 F. Supp.2d 37 (D.C. 2011). In *Shepard*, the district court denied the petition for release and stated that the petition encompassed all testimony and materials associated with every witness before three grand juries. *Id*. at 40. The court, in distinguishing the single grand jury witness request made in the *Kutler* case, *In re Petition of Kutler*, 800 F. Supp.2d 42 (D.D.C. 2011), relied upon by the Governor, stated that “the special circumstances exception is not intended for indiscriminate application.” *In*

*re Shepard*, 800 F. Supp.2d at 40. Noting that the *In re Shepard* petition encompassed all testi- mony and materials associated with every witness before three grand juries, the court stated that “the sheer volume of material requested implicates a number of secrecy concerns” and those con- cerns, given the “wide-ranging request, are great indeed.” *Id.*

Also significant is the factor of when the grand jury took place or concluded. Unlike cases that disclosed material 30 years after the end of a grand jury proceeding, the grand jury investigat- ing the 38 Studios deal concluded in July of 2015, less than two years ago. The statute of limita- tions for the types of crimes that could be involved in the 38 Studios investigation would most likely be 10 years and that 10 years has not run yet. The freshness of this grand jury proceeding and the fact that this investigation of 38 Studios could be re-opened weighs against disclosure. Moreover, as this investigation is less than two years old, it is likely that the status of grand jury witnesses would be the same or similar to what it was when the case was being investigated. The Attorney General has no reason to believe that the grand jury witnesses are not alive. Any disclo- sure would directly and potentially significantly impact the grand jury witnesses. The temporal proximity to the grand jury in this case is yet another distinction with the cases relied upon by the Governor, where generally, many years had passed before a petition for disclosure was filed. Ad- ditionally, in the 38 Studios case, no grand jury material or information has been made public, either permissibly or impermissibly.

None of the nine *Craig* factors weigh in favor of disclosure, thus demonstrating that the Governor’s public interest argument is untenable and cannot support the Petition’s request to release the grand jury materials under the unconventional “exceptional circumstances” theory. Notwithstanding the clear demonstration that nondisclosure is appropriate, the State will nonetheless go through the “particularized need” which can similarly not be satisfied.

# The Governor fails to show any “particularized need” for the Grand Jury Materials

When determining if a petitioner has met the three part “particularized need” requirements the Court must analyze if the party seeking grand jury materials has shown that “the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclo- sure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.” *In re: Ryan O’Loughlin Grand Jury*, R.I. Super., Oct. 15, 2012 (Gibney, P.J.) at 7 (*quoting Douglas Oil Company*, 441 U.S. at 222).

As mentioned above, there is no other judicial proceeding, pending or anticipated, therefore there is no need to disclose material to avoid possible injustice in other proceedings. Second, to assess whether the need for disclosure is greater than the need for continued secrecy, this Court should consider the need for and character of the materials sought and the five traditional policy considerations of grand jury secrecy. These policy considerations also weigh against disclosure. The same or similar concerns as have been previously discussed all apply here again and counsel against disclosure, such as non-expired statute of limitations, the identity of grand jury witnesses that testified are unknown, no indictment was issued, and the grand jury concluded only two years ago. The identity of the grand jury witnesses and the content of their testimony should not be disclosed. They were told their testimony and indeed, their identity, would remain secret unless and until an indictment was returned. Releasing grand jury materials now, which includes names of witnesses, would alter the established grand jury process by eroding the confidence of a witness to be candid and truthful to the grand jury without concern for repercussion. The grand jury as a public institution serving the community might suffer if those testifying today knew that the se- crecy of their testimony would be lifted tomorrow. *United States v. Procter & Gamble Co.*, 356

U.S. at 682. The Court went on to say, “the interests in grand jury secrecy, although reduced, are

not eliminated merely because the grand jury has ended its activities.” *Id.* These protections have existed for centuries and should not be cast aside because of speculation and curiosity and without a showing of the particularized need.

Moreover, a request for grand jury materials should be structured to cover only material so needed. The Governor is requesting *all* grand jury materials. A broad disclosure request seeking all grand jury materials is never the proper method to obtain such materials*. See Lucas v. Turner*, 725 F.2d 1095, 1106 (7th Cir. 1984). *See also In re: Ryan O’Loughlin Grand Jury*, R.I. Super., Oct. 15, 2012 (Gibney, P.J.) at 22 (discrete portions of grand jury transcripts may be disclosed by the court only when the petitioner crafts a particularized request) (citations omitted). A petitioner must exhaust other means of securing the relevant information before being granted access to grand jury materials. *See In re Petition to Inspect and Copy Grand Jury Materials,* 735 F.2d at 1273 (11th Cir. 1984). If the Governor is seeking further information or more answers she can form her own inquiry. The Governor has not exhausted all avenues and fails in this regard as well.

The Governor failed to support her burden to demonstrate that the “exceptional circum- stance” and the “particularized need” have been met and her Petition must be denied.

# The Cases Relied Upon By The Governor Do Not Support The Extraordinary Request For Disclosure

The cases cited by the Governor in support of her “exceptional circumstances” argument are quite distinguishable and do not support the release of grand jury materials. The Governor’s reliance on cases involving significant events is misplaced. Indeed, those cases arose at least thirty-six (36) years after the grand jury proceedings at issue, and in one case up to seventy (70) years after the proceedings. That is not this case here.

In the *Petition of Kutler* case, Kutler, an historian, and several historical associations, peti- tioned the court in 2010 for release of the transcript of President Richard Nixon’s grand jury testi- mony from June 23 and June 24, 1975. *In re Petition of Kutler*, 800 F.Supp.2d 42 (D. D.C. 2011). The petitioners asked the court to apply the “special circumstances” test as articulated by the Sec- ond Circuit in the *In re Craig* case. *Id.* The court recognized there may be special circumstances outside the boundaries of Rule 6(e)(3) where release may be appropriate. *Id.* at 44 (quotations omitted). The *Kutler* court went on to find that the Second Circuit’s special circumstances excep- tion is well grounded in the court’s inherent supervisory authority to order the release of grand jury materials. *Id.* at 47. However, the court noted that the exception applies only in exceptional circumstances that require a nuanced and fact-intensive assessment to determine if disclosure is justified. *Id.* The *Kutler* court, using the *Craig* factors, found that the factors favored release: only a narrow range of records related to a single grand jury witness was requested; the records sought were of great historical importance; the records were sought by major historical groups and Nixon and Watergate scholars; the grand jury had concluded thirty-six years prior; and Richard Nixon had passed away. *Id.* at 48-50. None of the reasons for allowing disclosure in *Kutler* are present here.

As previously discussed, *In re Craig* fails to assist the Governor’s position. After going through the factors enumerated above, that court denied the petition, stating, in part, that where a third-party stranger seeks the release of information over the objection of the defendant who was never indicted by the grand jury, the judge should be extremely hesitant to grant the release of the material. *Craig*, 131 F.3d 99 at 106. Additionally, the request was for only one person’s testi-

mony, who had died, and it was made 48 years after the grand jury concluded. *Id.* at 101. Ulti- mately, the court affirmed the district court’s denial of the request as the grounds were not “suffi- ciently exceptional.” *Id.* at 100. That request was denied even though it was extremely narrow.

*In re American Historical Association* is no more helpful to the Governor’s argument. In that case, a group of historical associations asked for public disclosure of grand jury transcripts relating to the espionage case of Alger Hiss. *In re American Historical Association*, 49 F.Supp.2d 274 (S.D. N.Y. 1999). He was alleged to have been involved in Soviet spy activity. *Id.* Two grand juries heard the case from 1947 to 1950. *Id.* at 277. Hiss was indicted by the grand jury and ultimately convicted of perjury. *Id.* In the 1950’s, Hiss wrote a book about the case and the grand jury proceedings. *Id.* at 294. The court determined that Petitioners met their burden to justify release of a limited number of grand jury transcript pages. Unlike the instant mater, Hiss was indicted and convicted, the request was made 50 years after the grand jury ended, Hiss wrote a book about the grand jury process, and the court granted release of only portions of the grand jury testimony.

In 1942, a grand jury investigated whether *Chicago Tribune* staff violated the Espionage Act. *Carlson v. United States of America*, 109 F.Supp.3d 1025 (N.D. Ill. 2015) *aff’d*, 837 F.3d 753 (7th Cir. 2016). The grand jury declined to issue any indictments. *Id.* In 2014, the petitioners, an author and historical organizations, filed a petition seeking transcripts of grand jury testimony. *Id.* The Court, applying the *Craig* factors, found that release of the transcripts was warranted based on the following: the grand jury proceedings ended more than 72 years prior; most of the parties had died; no one other than the government had come forward to object; and a substantial amount of material from the investigation, including Department of Justice interviews with two grand jury witnesses, and an internal memorandum by a government attorney outlining the government’s

view of the case and why a prosecution shouldn’t be pursued, had already been released by the government. *Id.* at 1036-1037. Nonetheless, this case is distinguishable.

Similarly, in another case involving allegations of Russian espionage in the 1950’s, the District Court for the Southern District of New York, 58 years after the grand jury ended, released grand jury testimony of witnesses that were either deceased, consented to the release, or were presumed to be indifferent or incapacitated based on their failure to object. *In re Petition of Na- tional Security Archive*, 104 F.Supp.3d 625 (S.D. N.Y. 2015). Julius and Ethel Rosenberg were indicted for and convicted of conspiracy to commit espionage by passing information about the atomic bomb to Soviet agents. *Id.* at 626. They were executed in 1953. *Id.* In the same case, the court had the opportunity to decide a second petition regarding the release of testimony of David Greenglass, Ethel Rosenberg’s brother and alleged co-conspirator. The court granted the petition, as Greenglass had done an interview with a *New York Times* journalist and had publicly discussed his testimony over the years. *Id.* at 629. Again, the facts of this case are distinctly dissimilar.

Finally, as discussed above, the facts in *Hastings* are not analogous to the facts here, as there is no similar “judicial proceeding” to support the Governor’s Petition much less the other circumstances present in that case. Moreover, unlike *Hastings*, where the access to the released grand jury material was strictly limited to a finite group of individuals for a limited time, the Gov- ernor seeks the broadcasting of all grand jury material—transcripts, recordings, exhibits, and all other documents without regard for the use of such materials. *See* Petitioner’s Memo. at 6.

As demonstrated above, the cases relied upon by the Governor do not support her Petition and it must therefore be denied.

# The Governor’s Claim Of Public Interest Does Not Outweigh Grand Jury Process

In proceedings seeking the release of grand jury material, it is the charge of the Attorney General “…to be heard so that he may represent the public interest in secrecy including the State’s legitimate concern about the possible effect on the functioning of future grand juries of unduly liberal disclosure.” *See* Committee Notes for the 2002 Amendment of the Rhode Island Superior Court Rules of Criminal Procedure for Rule 6(e). The Attorney General is before this Honorable Court representing the public interest in preserving the integrity of judicial system. The grand jury must be protected as an independent representative of the public for finding truth and against un- warranted government action. The protection of Rule 6(e) and grand jury process should not be sacrificed for the arguments presented here.

As articulated above, the Governor’s argument that 38 Studios presents the “rare excep- tional circumstances” that warrant piercing the veil of the grand jury is unpersuasive. While rec- ognizing that this matter is significant, the importance of the grand jury and its process are monu- mental. A case from New Jersey is instructive. After a heated mayoral election in the City of Elizabeth involving a long sitting mayor, a grand jury investigation was commenced into the in- cumbent mayor, but did not result in an indictment. *Matter of Allegations of Misconduct in the City of Elizabeth,* 233 N.J.Super. 426, 558 A.2d 1387 (App. Div. 1989). When the grand jury proceeding ended, the prosecutor requested that the transcript be disclosed to the mayor, the City and the public “because of the unusual interest in this matter displayed by the media and because it involves a controversial political campaign …” and “fundamental fairness.” *Id.* at 1389, 1392.

The request for disclosure of the grand jury record in that case, as the request is here, was “for no purpose other than to inform the public.” *Id.* The court held that disclosure of the grand jury materials was not permitted just because the public may have an interest. The court reasoned

that there was a public interest and it was served by the grand jury acting only within its sphere of authority. The court further explained that “[f]or centuries the grand jury’s function ‘has been to indict or to present its work is limited to indictments and presentments.’ It has never been func- tioned as an agency for the gathering and distribution of information.” *Id.* (*citing In re Camden County Grand Jury,* 89 A.2d 416 (N.J. 1952)). Courts throughout time have been consistent in holding that requested grand jury evidence that may simply be helpful or that could be available through other means, does not pass the threshold test and should not be allowed to disrupt the grand jury process. *See Sells*, 463 U.S. at 431. The same reasoning recognized by these courts have echoed through time and apply here as well.

Finally, the release of these records and materials, without proper legal support or founda- tion, could have a chilling effect on the public interest of future grand juries and their critical role in the criminal justice system where potential witnesses refuse to cooperate or testify in fear that their testimony could be released. This is exactly what the Supreme Court of the United States said in the *Douglas Oil* case when it cautioned:

“[f]or in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the perfor- mance of its duties.”

441 U.S. at 222. For these reasons, the Attorney General objects to the release of the grand jury materials and records requested, and asks this Honorable Court to maintain the sanctity of the grand jury process.

# V. CONCLUSION

The Governor provides no argument to meet any of the narrow exceptions of Rule 6(e). Furthermore, the Governor has failed to establish that “exceptional circumstances” exist and that the “particularized need” for the release of the requested materials because of public interest out- weighs the weight of authority upholding the historic role of the grand jury in the administration of justice. The Governor’s Petition must be denied and dismissed.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2017 I filed and served the within Memoran- dum 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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