

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

HASSAN M. AHMAD,

Plaintiff-Appellee,

v.

UNIVERSITY OF MICHIGAN,

Defendant-Appellant.

Supreme Court Case No. 160012

Court of Appeals Case No. 341299

Court of Claims Case No. 17-000170-MZ

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**AMICUS BRIEF OF ASSOCIATION OF RESEARCH LIBRARIES, ASSOCIATION OF  
COLLEGE AND RESEARCH LIBRARIES, AMERICAN HISTORICAL  
ASSOCIATION, AMERICAN COUNCIL OF LEARNED SOCIETIES, UNIVERSITY OF  
CALIFORNIA LIBRARIES, UNIVERSITY OF ILLINOIS LIBRARY, AND  
UNIVERSITY OF IOWA LIBRARIES, IN SUPPORT OF DEFENDANT-APPELLANT**

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**STATEMENT OF THE QUESTION PRESENTED<sup>1</sup>**

Whether the documents sought by the plaintiff are within the definition of “public record” in § 2(i) of the Freedom of Information Act (“FOIA”), MCL 15.232(i)?

- Plaintiff-Appellee answers: Yes
- Defendant-Appellant answers: No
- Amici answer: No
- The Court of Claims answered: No
- The Court of Appeals answered: Yes
- This Court should answer: No

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<sup>1</sup> Counsel for a party did not author this brief, in whole or in part, and did not make a monetary contribution intended to fund the preparation or submission of this brief.

## INTERESTS OF AMICI

The Association of Research Libraries (“ARL”) is a non-profit association of 124 research libraries and archives representing research intensive institutions in North America. ARL’s members include large university libraries, public libraries, U.S. government and national libraries. Founded in 1932, ARL is a forum for the exchange of ideas and a catalyst for collective action to create, share, and sustain our global knowledge. ARL advocates on research libraries’ behalf, convenes its research and higher education partners, shares intelligence on current issues, and develops the next generation of diverse library leaders. ARL programs and services promote equitable access to, and effective use of, recorded knowledge in support of teaching and research.

The Association of College & Research Libraries (“ACRL”) is the higher education association for academic libraries and library workers. Representing nearly 10,000 individuals and libraries, ACRL (a division of the American Library Association) develops programs, products, and services to help those working in academic and research libraries learn, innovate, and lead within the academic community. Founded in 1940, ACRL is committed to advancing learning, transforming scholarship, and creating diverse and inclusive communities.

The American Historical Association (“AHA”) is a nonprofit membership organization founded in 1884 and incorporated by Congress in 1889 for the promotion of historical studies. The AHA is a trusted voice that advocates for history education, works to sustain and enhance the professional work of historians, and promotes the critical role of historical thinking in public life. As the largest organization of professional historians in the world, the AHA represents more than 11,500 members and serves historians representing every historical period and geographical area in a wide variety of professions. The AHA’s journal, the *American Historical Review*, is the most widely read and cited professional historical journal in the world.

The American Council of Learned Societies (“ACLS”) is a nonprofit federation of 75 scholarly organizations formed in 1919. As the preeminent representative of American scholarship in the humanities and related social sciences, ACLS holds a core belief that knowledge is a public good. As such, ACLS strives to promote the circulation of humanistic knowledge throughout society. In addition to stewarding and representing its member organizations, ACLS employs its \$140 million endowment and \$35 million annual operating budget to support scholarship in the humanities and social sciences and to advocate for the key role of these fields of study in the world.

The University of California (“UC”) Libraries comprise one of the largest academic library systems in the world. It includes libraries from 10 campuses and the California Digital Library, manages more than 40 million print volumes in over 100 libraries, and provides access to millions of electronic items such as e-books and e-journals. The UC libraries provide information resources and services to UC faculty, students, and staff in direct support of the University of California’s teaching, learning, research, patient care, and public service goals.

The University of Illinois Urbana-Champaign Library is one of the largest public academic libraries in the country and holds one of the preeminent research collections in the world, encompassing more than 14 million volumes. The library is committed to maintaining the strongest collections and service programs possible, and to engaging in research, development, and scholarly practice—all of which support the university's missions of educational opportunity, research, and public engagement.

The University of Iowa Libraries is a network of seven research libraries on the UI campus. Its mission is to serve and collaborate with faculty, staff, students, and the public to advance teaching, learning, research, creative work, and clinical care. The UI Libraries holds

extensive special collections and archives. It operates a full-service preservation and conservation lab, provides specialized support for digital scholarship, and serves as a regional office for the Network of the National Library of Medicine

In sum, amici represent archives and the researchers who use them.<sup>2</sup> They operate in a delicate ecosystem. The mission of any archives is to make material available to researchers. The researchers, for their part, need access to these materials in order to perform their research. Both the archives and the researchers rely on donors to provide the original materials, but the donors are often concerned about full immediate disclosure of the information in their records. Access restrictions for a defined period enable this ecosystem to stay in balance. Without honored access restrictions, many donors would withhold, censor, abandon, and even destroy papers, which would irreparably harm the research enterprise.

The Court of Appeals' decision, if affirmed by this Court, would disrupt this ecosystem. Donors would reasonably fear that courts in other states might similarly treat private papers donated to state-run archives as public records. The flow of records into state-run archives would slow as the archives could no longer guarantee to donors that they could protect the sensitive information contained in these records. Moreover, with respect to already donated materials, archives would have to breach contractual obligations to maintain privacy and confidentiality, and archivists would have to violate their ethical duty to respect donor requests. This Court should reverse.

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<sup>2</sup> Archives collect primary source materials such as an individual's notes and letters or an entity's records. Libraries, in contrast, mainly collect published materials such as books and magazines. However, a research library may incorporate an archival unit. Further confusing matters, most of the holdings of the University of Michigan's Bentley Historical Library are archival in nature, although it does collect published materials concerning the state of Michigan and the University of Michigan.

## INTRODUCTION

Dr. John Tanton, a private citizen, donated his personal papers to the University of Michigan's Bentley Historical Library. The Court of Appeals found that all of Tanton's papers were public records subject to disclosure under FOIA, even though the University agreed to, and complied with, Tanton's stipulation that the University not permit access to some of the papers until 2035. The Court of Appeals reasoned that because the University of Michigan is a public university, and because Bentley Historical Library's official purpose included collecting records in order to make them available to students, the University's collection of Tanton's papers was in furtherance of an official purpose, thereby converting the papers into public records subject to FOIA.

Appellant the University of Michigan's brief thoroughly explains how the Court of Appeals' erroneous interpretation of the term "public record" strays from both the plain language of the statute and precedent, including decisions of this Court. Rather than repeating these points, this brief will explore the adverse impact that affirmance could have on archival and research activities across the nation.

For over 100 years, archives in the United States have received donations of papers and other materials, subject to agreements to restrict access to some of those materials for a set time to protect the privacy of the donors or third parties referenced in those materials. While archivists, consistent with their mission, would typically prefer to make these materials publicly available as soon as possible, they understand that they need to agree to these access restrictions in order to secure the materials in the first place; materials which will eventually be made available for review. There is, and has been, widespread recognition in the field that without access restrictions, there is a serious risk that donors, rather than donating sensitive but important documents to archives, will destroy them, so that they are forever lost to researchers.

Affirmance of the Court of Appeals' decision threatens this longstanding practice of state-run libraries or archives accepting donations of papers under access restrictions. Other states have freedom of information provisions similar to Michigan's. If this Court treats personal papers donated to the University of Michigan' Bentley Historical Library as public records simply by virtue of their being stored there, other donors with sensitive papers would not donate them to any state run library or archives in Michigan, and would reasonably fear that courts in other states might follow this Court's lead and therefore hesitate to donate them elsewhere as well, running the significant risk of these items ultimately being lost or damaged. The materials most susceptible to destruction would be those of local or regional, as opposed to national, interest.

Additionally, affirmance could force archives to breach their existing contractual obligations to restrict access to literally millions of documents in their possession that had been contractually agreed not to be available to the public for a certain period of time. This would not only subject the archives to financial liability, it would also force their staffs to violate their ethical duties.

For all of the reasons set forth below, and in the University of Michigan's brief, this Court should reverse, and reinstate the decision of the Court of Claims.<sup>3</sup>

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<sup>3</sup> Amici do not include a Statement of Facts, but rely on the Statement of Facts set forth in Appellant's brief.

## ARGUMENT

### I. **AFFIRMANCE OF THE COURT OF APPEALS WOULD INTERFERE WITH THE PRESERVATION OF MATERIALS OF LOCAL AND REGIONAL IMPORTANCE.**

Over the past century, donors of papers to archives have routinely imposed access restrictions in their deeds of gift in order to delay disclosure of information that could be harmful to them, their families, and their colleagues. Such information is typically sensitive because it is so current, and includes such diverse material as valuable trade secrets, unpublished novels, and letters revealing intimate relationships with still-living individuals, to give but a few examples. Archives have no choice but to agree to these restrictions, for if they do not, donors may instead destroy these sensitive documents in order to prevent their immediate public release. If this Court affirms the Court of Appeals, it will undermine the effectiveness of such restrictions, forcing future donors to purge their records before providing them to archives, or worse yet, not provide them to archives at all. The impact would be particularly dire with respect to materials of local and regional importance, or regarding highly specialized topics, which may not be of interest to federal or private archives.

#### A. **Archivists Respect Access Controls In Deeds of Gift In Order to Preserve Sensitive Papers.**

Institutions that collected manuscripts in the nineteenth century did not confront donor-imposed access restrictions. That is because, consistent with the interests of historians at that time, they collected only documents from the colonial and revolutionary periods, meaning, most of the authors and subjects of those manuscripts were long-deceased. Raymond Geselbracht, *The Origins of Restrictions on Access to Personal Papers at the Library of Congress and the National Archives*, 49 *Am Archivist* 142, 144 (1986). For example, when the Manuscripts Division of the Library of Congress was established in 1897, virtually all of its holdings related

to the colonial and revolutionary periods, over one hundred years earlier. In the subsequent decade, the period covered by the Division's holdings were "creeping forward to include the first half of the nineteenth century." *Id.* at 144-45.

In the 1920's and 30's, historians' interest in more recent events grew, as well as the understanding of the value of private papers to research. In 1965, the chief of the Library of Congress Manuscripts Division wrote that personal papers "can, and often do, speak without guile, and often with candor: statesmen, with hair, let it down; the bald and balding come clean with their intimates; ladies exchange gossip; warriors, forgetful of the old spirit, criticize one another; lovers protest their passions; and out of frankness unsuppressed comes truth and understanding." David Mearns, *The Answers: A Fog-Laden Panorama of LC's Collections*, 90 *Libr J* 1836 (1965). This led to the collection of more contemporary personal papers, and consequently, donor concerns about privacy. Thus, the Massachusetts Historical Society "accessioned its first collection with donor-specified restrictions in the 1920s." *The Origins of Restrictions*, 49 *Am Archivist*, p. 145.

The interest in contemporary history and culture accelerated dramatically after World War II, and with it came a demand for more recent manuscripts. This, in turn, led to donors demanding that access to sensitive papers be restricted for a specified period. Archivists had no choice but to agree to these restrictions if they wanted to obtain these papers and prevent their destruction and loss to history.

In this post-War period, archivists such as Barbara Kaiser, director of the division of field services with the State Historical Society of Wisconsin, recognized that access restrictions were "an inevitable part of 20th-century collecting." Barbara Kaiser, *Problems With Donors of Contemporary Collections*, 32 *Am Archivist* 103, 105 (1969). Kaiser noted that "the

willingness of the collecting agency to restrict papers is frequently the only way to gain the consent of the donor to preserve materials at all, and in many cases it avoids a severe weeding of the collection by the donor.” *Id.* She went on:

From the donor’s standpoint, the need to restrict certain papers may very well be valid. Many contemporary collections do contain sensitive materials.... Confidential exchanges or candid comments about persons still living are a potential embarrassment to the donor and can disrupt relationships with friends and colleagues if released prematurely. But the passage of time will eliminate the sensitivity of much contemporary material, and often a temporary restriction will remove the donor’s objection to its preservation.

*Id.* At the same time, Kaiser noted that the restrictions do “present problems for the institution.... From the institution’s standpoint, there is the desire to make as many of its resources available for research as is possible.” *Id.*

A similar reluctant acceptance of the necessity of agreeing to donor restrictions on access, notwithstanding the temporary obstacles they place on research, is reflected in the more recent writings of many other archivists. *See, e.g.,* John C. Broderick, *Access to Manuscript Collections in the Library of Congress*, in *Access to the Papers of Recent Public Figures: The New Harmony Conference* (Alonzo L. Hamby and Edward Weldon ed., Organization of American Historians, 1977), p. 60 (the Library of Congress will “accede to restrictions proposed by donors of manuscript materials if such restrictions are reasonable and definite and if negotiations indicate that preservation of the materials requires their acceptance. In such negotiations, representatives of the Library exert whatever influence they have toward open access and/or the shortest possible interval of restriction”); Edward Kemp, *Manuscript Solicitation for Libraries, Special Collections, Museums, And Archives* (Libraries Unlimited, 1978), pp. 59-60 (“Philosophically, the librarian ought to refuse gifts with restrictions regarding use; practically, those limitations are probably temporary, protecting the donor or his family from some embarrassment for a specified period of years. If the librarian does not accept such a

restriction, the collection may well be destroyed as the donor broods upon the sensitive, personal nature of the files”); Henry Bartholomew Cox, *The Law and the Manuscripts Curator*, in *Management of Archives and Manuscript Collections for Librarians* (Richard H. Lytle ed., Society of American Archivists, 1980), pp. 72, 77 (“[T]he ideal is to open collections to researchers as soon as possible, and donors should be encouraged to do so. But many curators are forced to place unfortunate restrictions on documents in their custody in order to secure them to their institutions or, in extreme cases, to prevent the putative donor from destroying them”); Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 *Stan L Rev* 299, 330 n. 176 (1992) (“Archivists fear the smell of burnt letters. Their hesitation to advocate legally required liberal access policies reflects their belief that such policies may lead people to burn documents”); Joseph Sax, *Playing Darts with a Rembrandt: Public and Private Rights om Cultural Treasures* (Univ of Mich Press, 2001), p. 119 (archivists “fear that if they do not accede to the restrictions, invaluable material may be destroyed rather than made public”); Sara Hodson, *In Secret Kept, In Silence Sealed: Privacy in the Papers of Authors and Celebrities*, 67 *Am Archivist* 194, 205 (2004) (placing the papers in an archival repository with an agreement that they be sealed for an appropriate period of time is an “obvious alternative to either destroying sensitive papers or opening them freely to scholars. In such instances, the willingness of a library to accept papers that carry a reasonable restriction may ensure that significant but sensitive research materials can survive to be used by scholars in future years”); Judith Schwarz, *The Archivist’s Balancing Act: Helping Researchers While Protecting Individual Privacy*, in *Privacy & Confidentiality Perspectives: Archivists and Archival Records* 82 (Menzi Behrnd-Klodt & Peter Wosh eds., ALA Editions, 2009), p. 82 (“Archivists, historians, and other researchers have a strong mutual interest in opening the historical record for the fullest access to

information. At the same time, we share concerns over how to safeguard individual privacy against the danger that someone's private life can become public without his or her permission, acquiescence, or desire. Weighing issues of privacy while trying to meet the access and information needs of researchers is one of the most difficult balancing acts that archivists perform in carrying out their professional duties.... Amid the complex motives of donors, there is often a desire to establish a favorable historical image of the record-creating institution, family, or person. That desire can lead to the destruction of some materials before they are donated and to restrictions on access to what is saved.”).

The recent focus of researchers and archivists on more vulnerable populations, such as dissidents, people of color, and members of LGBTQ communities, has increased the need for restricting immediate access to papers containing personal information in order to preserve them for future research. Premature disclosure of this information could be harmful or even life-threatening to the people identified in these papers or their families.<sup>4</sup> Moreover, this information might concern third parties who may not have been consulted concerning the donation of the papers, such as the authors of letters to the donors. *Privacy & Confidentiality Perspectives*, pp. 88-89.

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<sup>4</sup> UCLA Library, for example, stores a collection of protest videos, pamphlets and underground newspapers relating to the Iranian Green Movement created after the contested 2009 Iranian elections. The donor, Iranian journalist Ali Jamshidi, required UCLA to agree to prevent public disclosure of any personally identifiable information in the collection to protect the safety of those individuals. *Green movement, Iran/curated by Ali Jamshidi*, UCLA Library, <https://catalog.library.ucla.edu/vwebv/holdingsInfo?bibId=9351016>.

This approach of agreeing to donor restrictions on access to sensitive materials is “clearly a very successful policy, one which presided over the accumulation of great manuscript collections in many institutions.” *The Origins of Restrictions*, p. 149.

**B. Personal Papers Provide Researchers with Valuable Insights.**

The sensitive information contained in personal papers is often enormously valuable to researchers. Archivist Sara Hodson describes them as “hidden treasures” that can be “kept secret and sealed in silence until they can be safely revealed.” *In Secret Kept*, p. 211. For example, the diaries of Nobel-prize winning novelist Thomas Mann, made public ten years after his death, “totally revised the image of the stodgy patrician. The diary entries were written by a man who was consumed his entire life by suppressed homoeroticism. Today, the revelations from the private diaries are considered essential background for understanding his greatest works.” Elena Danielson, *The Ethical Archivist* (Society of American Archivists, 2010), p. 190. Danielson adds, “had Mann or his family destroyed all of the diaries out of prudery or fear, the depth of his life and work would have remained an enigma.” *Id.* Likewise, Ann Richards’ personal papers, opened to the public after her death by the Briscoe Center for American History at the University of Texas, provided many important details for Jan Pierce’s biography of the Texas governor. Jan Reid, *Let the People In: The Life and Times of Ann Richards* (Univ of Texas Press, 2013).

Personal papers can be important for legal scholarship as well. When the Library of Congress opened Justice Thurgood Marshall’s papers after his death, they provided startling insights into *Sony Corporation of America v Universal City Studios*, 464 US 417; 104 S Ct 774; 78 L Ed2d 574(1984), a/k/a the *Betamax* case, perhaps the most important copyright decision of the twentieth century. Undersigned counsel Band published a law review article about the

papers' revelations in 1994 concerning the case.<sup>5</sup> Jonathan Band and Andrew McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of Sony v. Universal*, 17 Colum VLA J of L & Arts 427 (1993). See also Jessica Litman, *The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler*, in *Intellectual Property Stories* 358 (Jane Ginsburg and Rochelle Cooper Dreyfuss eds., Foundation Press, 2006), p. 358. Additionally, the memoranda and draft opinions contained in Justice Marshall's papers demonstrate that the Supreme Court "worked just as hard on a non-Constitutional issue as it is reputed to work on Constitutional issues." *The Marshall Papers*, p. 428.

### C. The Risk of Destruction of Sensitive Documents is Real.

Without reasonable access restrictions to personal papers donated to archives, "the risk of destruction is real." *Playing Darts with a Rembrandt*, p. 121. There are many instances of well-known authors burning letters in their possession, including Robert Browning, Charles Dickens, Henry James, Thomas Hardy, Benjamin Jowett, Cassandra Austen, and Hallam Tennyson. *The Shrinking Back*, p. 330, n 176. Robert Todd Lincoln planned on destroying his father's papers, but "an agreed-on lengthy sequestration alone finally persuaded him to leave the papers" with the Library of Congress. *Playing Darts with a Rembrandt*, p. 121.

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<sup>5</sup> First, Justice Blackmun was initially assigned the task of writing the majority opinion affirming the Ninth Circuit's decision finding Sony contributorily liable for copyright infringement for selling video cassette recorders that consumers could employ to record over-the-air television broadcasts. When Blackmun failed to get a majority to join him, his draft opinion became the dissent. Second, Justice Stevens' first draft of what eventually became the majority opinion relied not on fair use, but on the theory that private copying did not infringe the exclusive rights of the 1976 Copyright Act. Third, Justice O'Connor proved to be the swing vote. Although she initially favored affirming, she had considerable difficulty with some of Justice Blackmun's positions, and ultimately worked with Justice Stevens to fashion a majority opinion she could support.

During his lifetime, Franz Kafka destroyed an estimated ninety percent of his unpublished writings. He requested his executor, Max Brod, to burn his remaining papers upon his death, including the unpublished manuscripts of *The Trial*, *The Castle*, and *Amerika*. Brod disregarded Kafka's wishes, and published these literary masterpieces. Thomas Mann burned most of his diaries at the end of World War II. *The Ethical Archivist*, p. 189. Justice Thurgood Marshall planned on destroying his personal papers before the Librarian of Congress, James Billington convinced him not to. Benjamin Weiser and Joan Biskupic, *Papers Afford a Rare Glimpse of Justices' Deliberations*, Washington Post, May 23, 1993. Stephen Joyce announced in 1988 that he had destroyed letters written to his grandfather James Joyce from the playwright Samuel Beckett and other authors to protect their privacy. *In Secret Kept*, p. 204. Novelist Bernard Malamud's daughter, Janna Malamud Smith, publicly debated whether to destroy her father's papers after his death. *Id.* at 205.

Archivist Sara Hodson noted that "both Stephen Joyce and Janna Malamud Smith expressed understandably deep and legitimate concern over the revelation of personal details in the increasingly frank biographies that became standard in the latter part of the twentieth century." *Id.* at 207. Clearly, many "literary figures, families, or heirs...purge personal letters and documents to safeguard privacy..." *Id.* Archivist Judith Schwarz described a conversation with an author of letters revealing lesbian relationships, where the author acknowledged that by donating the letters subject to an access restriction, she was keeping the letters "safe from harm, including the harm I might do them." *Privacy & Confidentiality Perspectives*, p. 91.

The risk of destruction is particularly high with controversial figures, such as John Tanton, whose papers might reveal information that could discredit his policy positions. *See, e.g.,* Julie Herrada, *Letters to the Unabomber: A Case Study and Some Reflections*, 28 *Archival*

Issues 36 (2003) (describing efforts to secure the papers of the Unabomber, Ted Kaczynski). Obviously, there could be great public benefit from immediate disclosure of records showing that, for example, a climate change denier was on the payroll of the petroleum industry, or a gun control lobbyist had a private arsenal of assault rifles. However, such individuals would never donate their papers to an archives if they knew that they faced imminent disclosure. Instead, they or their heirs would destroy the papers, and the papers would be lost to historians forever. Disclosure of one person's papers now – despite his or her express request that certain papers not be disclosed until a certain time – ensures the destruction of the papers of hundreds, if not thousands, of potential donors in the future.

Even a decision to delay donating materials to an archives until the demise of people who might be harmed by their disclosure risks destruction of the materials. Certain storage formats, such as cassette tapes, are fragile and prone to deterioration with the passage of time, particularly if they are not stored properly. Leaving these materials for decades in a humid attic with wildly fluctuating temperatures places them at serious risk relative to climate controlled storage by trained archivists. Archives, on the other hand, have the means to digitize materials if necessary for their preservation and ultimate availability for researchers. *See Mike Casey, Why Media Preservation Can't Wait: The Gathering Storm*, 44 Int'l Assoc of Sound and Audiovisual Archives J 15 (2015).

This is yet another reason why people should be encouraged to donate private papers, rather than to keep them on their own (if not destroy them). The destruction of sensitive documents results in the loss of “an important personal dimension that in most instances can never be replaced or recreated.” *In Secret Kept*, p 207. Temporary access restrictions are an effective means of eliminating the “risk of damaging living people and exposing to public view

communications and revelations which were made in complete confidence,” while “preserving the integrity of the collection for future researchers.” Megan Floyd Desnoyers, *Personal Papers*, in *Managing Archives and Archival Institutions* (James Gregory Bradsher ed., Univ of Chicago Press, 1989).

**D. Affirmance of the Court of Appeals’ Decision Could Have an Adverse Impact on Archives and Researchers Across the Country.**

The immediate impact of an affirmance of the Court of Appeals would be on public archives in Michigan; donors would be reluctant to gift personal papers containing sensitive information to these institutions because the institutions would have to disclose the papers in response to FOIA requests. But affirmance could also reverberate across the country. Other states have FOIA laws similar to Michigan’s, and donors could reasonably fear that courts in those states might be influenced by a decision from this Court that personal papers donated to a public archives are public records under FOIA. Donors concerned about privacy but still willing to donate could turn to federal and private archives, but these archives simply do not have the capacity to accept all the potential records. Federal and private archives likely would accept the papers of the best-known artists and public figures, but might not have the space, or the desire, to receive papers from individuals or associations of local or regional importance, or concerning highly specialized topics.<sup>6</sup>

For example, a state university might wish to archive the papers of a prominent anthropologist on its faculty, which could include sensitive information concerning members of a

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<sup>6</sup> Even if courts in other jurisdictions do not follow an overly broad interpretation of “public record,” researchers in Michigan would still suffer. First, they would have to travel out-of-state to examine papers that otherwise would have been donated to institutions in Michigan. Second, some papers of local interest in Michigan would not find archives outside of the state willing to accept them. The owners of these papers might purge their files before turning them over to a Michigan archive, to the detriment of the historical record.

local Native-American tribe he interviewed for his research. Federal or private archives might have little interest in these papers. If the state university could not guarantee that the records of the interviews would remain confidential for, say, 25 years, the professor might feel obligated to purge his files of sensitive material before turning them over to the university. The destruction of this material could prove to be a serious loss to future generations of anthropologists.

Similarly, a state college might want to archive the papers of a local poet, which include unpublished poems and correspondence with friends and lovers. Because the poet lacks a national reputation, no federal or private archives desires her papers. Unless the college could assure the poet that it would restrict access to the papers until after her death, the poet might destroy some of the unpublished poems and correspondence to avoid any potential embarrassment resulting from their disclosure while she still lived. This would prevent researchers from gaining a thorough understanding of her poems. It could also deprive her devotees of a set of poems published posthumously.<sup>7</sup>

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<sup>7</sup> The UC Davis Library, for example, collects the papers of UC Davis Sociology professor John Hall. Under the 2017 deed of gift, access to field notebooks in the collection was restricted for ten years (until 2027) to protect the identities and privacy of the subjects and informants described in the notebooks. *Hall (John R.) Papers*, UC Davis Library; <https://oac.cdlib.org/findaid/ark:/13030/c8pv6r15>. The UC Davis Library also holds the papers of UC Davis Law professor Cruz Reynoso, who served as an associate justice of the California Supreme Court and Vice Chair of the U.S. Commission on Civil Rights. In 2004, the library agreed that five boxes of his documents would be completely restricted until 2024 “due to their sensitive nature.” *Cruz Reynoso Papers*, UC Davis Library; <https://oac.cdlib.org/findaid/ark:/13030/c8ns0x5r>. And the UC Santa Barbara Library collects the papers of Chicana writer and teacher Ana Castillo, which contains correspondence and other unpublished works. *Guide to the Ana Castillo Papers*, UC Santa Barbara Library; <https://oac.cdlib.org/findaid/ark:/13030/tf4z09p0jw/?query=Ana+Castillo+Papers>. It also holds the papers of artist Francisco Camplis, including unpublished photographs, which are restricted under 2022. *Francisco Camplis Papers, 1967-2000*, UC Santa Barbara Library; <https://oac.cdlib.org/search?style=oac4;titlesAZ=f;idT=990025705680203776>.

## II. AFFIRMANCE OF THE COURT OF APPEALS' DECISION WOULD FORCE ARCHIVISTS TO BREACH CONTRACTUAL AND ETHICAL OBLIGATIONS.

### A. Access Restrictions Are Enforceable Contract Terms.

Donors customarily convey title to papers by a deed of gift, “one of the most important legal documents the archivist will ever sign.” Frank Boles, *Selecting & Appraising: Archives & Manuscripts* (Society of Amer Archivists 2005) p. 139. It is a contract between the donor and the archives that typically is vetted by counsel. As one archivist wrote, “[w]hile developing a deed of gift, it is useful to remember that it is a contract in which both parties promise certain things: the donor to give, the archives to respect the conditions stipulated by the donor in the deed.” Trudy Huskamp Peterson, *The Gift and the Deed*, in *A Modern Archives Reader: Basic Readings on Archival Theory and Practice* (Maygene F. Daniels and Timoth Walch eds., Nat’l Archives Trust Fund Board, 1984) p. 144. Huskamp Peterson further explained that “once the conditions are agreed upon, if the archives fails to meet its obligations (for instance, not restricting one category of restricted materials) the contract could be determined to be void and the donor could reclaim the property; alternatively, the donor could sue the archives for damages which result from the breach of the contract.” *Id.* Archivists view this contract as inviolate: the archives “entered into a covenant with the donor: in return for the donor’s transfer of ownership of his papers, the archival repository would agree to certain restrictions on access to the papers. Once such a covenant was made and the conditions of access fixed, no further discussion of these conditions — whether between donor and repository, repository and researcher, or researcher and donor — was anticipated.” *The Origins of Restrictions*, p. 146.

The Court of Appeals’ interpretation of FOIA may often impose on archives conflicting legal obligations: disclosure of restricted materials in compliance with a FOIA request, which means breaching a contractual non-disclosure obligation under a deed of gift.

**B. Ethical Norms Require Compliance With Access Restrictions.**

An archivist's disclosure of materials covered by access restrictions in a deed of gift would also violate well established ethical obligations. The Core Values Statement of the Society of American Archivists provides that "[a]rchivists should promote and provide the widest possible accessibility of materials, while respecting legal and ethical access restrictions including public statutes, cultural protections, *donor contracts*, and privacy requirements." Society of American Archivists, *Core Values Statement and Code of Ethics* , <<https://www2.archivists.org/statements/saa-core-values-statement-and-code-of-ethics>> (accessed September 22, 2020) (emphasis supplied).

The Principles of Access to Archives promulgated by the International Council on Archives ("ICA") likewise mandates compliance with access restrictions in deeds of gift: "Archivists provide the widest possible access to archives, but they recognize and accept the need for some restrictions. Restrictions are imposed by legislation, by institutional policy, either of the archival institution or its parent body, or *by a donor*." International Council on Archives, *Principles of Access to Archives* 9, <[https://www.ica.org/sites/default/files/ICA\\_Access-principles\\_EN.pdf](https://www.ica.org/sites/default/files/ICA_Access-principles_EN.pdf)> (accessed September 22, 2020) (emphasis supplied). Further, the ICA Principles provide: "Access to donated records and personal papers is limited by the conditions established in the instrument of transfer such as a deed of gift, a will, or an exchange of letters. Archivists negotiate and accept donor restrictions on access that are clear, of limited duration and can be administered on equitable terms." *Id.*

More generally, archivists have ethical obligations to protect privacy and to preserve materials for purposes of accountability, history, and memory. Amicus ACRL's Code of Ethics

for Special Collections Librarians<sup>8</sup> provides that “[s]pecial collections practitioners have a responsibility to ensure the privacy and confidentiality of users, donors, record creators, record subjects, and vendors.” Association of College and Research Libraries, *Code of Ethics for Special Collections Librarians*, <[http://rbms.info/standards/code\\_of\\_ethics/](http://rbms.info/standards/code_of_ethics/)> (accessed September 22, 2020). Further, ACRL’s Code states, “[w]hen working with potentially sensitive information within collections, practitioners prioritize access while recognizing the need to respect confidentiality of some materials, including the possible use of time-delimited restrictions.” *Id.*

Archivists “recognize that privacy is an inherent fundamental right and sanctioned by law. They establish procedures and policies to protect the interests of the donors, individuals, groups, and organizations whose public and private lives and activities are documented in archival holdings.” Society of America Archivists, *Core Values Statement*. At the same time, “by preserving records of societal experiences, functions, activities, and decision-making, archivists provide important resources for contemporary and future entities seeking accountability.” *Id.* Additionally, “[a]rchival materials provide digital and physical surrogates for human memory, both individually and collectively, and serve as evidence against which individual and social memory can be compared.” *Id.* To fulfill his or her ethical obligation of enabling the documentary record to promote accountability, history, and memory, the archivist must first obtain possession of the documents. As discussed above, that often requires agreeing to donor imposed access restrictions. And abiding by these access restrictions is consistent with the archivist’s duty to protect privacy and donor intentions.

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<sup>8</sup> Special collections within libraries include archival material as well as rare books, maps, and artworks.

In the final analysis, for archivists, “preservation is regarded as more important than quick access.” *The Origins of Restrictions*, p. 152. Without preservation, there can be no access.

**CONCLUSION**

For the foregoing reasons, this Court should reverse the Court of Appeals and reinstate the Court of Claims’ decision enforcing the access restrictions.

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