

By Email and U.S. Priority Mail

Brittini A. Penland-Broadnax
U.S. Customs and Border Protection
477 Michigan Avenue, Room 200
Detroit, MI 48226
(313) 442-0229
brittini.a.penland-broadnax@cbp.dhs.gov

September 3, 2019

Re: Petition for Remission of Forfeiture, Case No. 2019-3807-001311-01

Dear Ms. Penland-Broadnax,

We are writing on behalf of Tim Stegmaier, a U.S. citizen and professional photographer based in Cincinnati, Ohio whose laptop, camera, and smartphone were wrongfully seized by U.S. Customs and Border Protection (CBP) at Detroit Metropolitan Airport on June 28, 2019.

This letter constitutes Mr. Stegmaier's administrative petition for remission of forfeiture of that equipment pursuant to 19 U.S.C. § 1618 and 19 C.F.R. §§ 171.1 and 171.2. The property to be returned to Mr. Stegmaier includes:

- 1) One Apple iPhone 6S Plus;
- 2) One Sony Cyber Shot RX 100 camera; and
- 3) One Apple MacBook Pro 2015.

Proofs of interest are enclosed with this letter. *See* Attachment 1 (notice of seizure); Attachment 2 (seizure receipt); Attachment 3 (iPhone and MacBook device information and photograph of camera box).

Mr. Stegmaier's Photography Exhibits Human Conditions in Poverty

Tim Stegmaier is an accomplished, widely published artistic and journalistic photographer. His work has been published in *National Geographic* magazine, exhibited in art museums and galleries, and featured in twelve self-published books encompassing topics ranging from animal conservation to yoga. Much of his photography takes on an anthropological, sociological, or environmental bent, depicting the realities of daily life in a wide range of cultures. *See generally* www.timstegmaier.com (for example, pages entitled "The Homeless," "Imported Dream," "Hong Kong 2016," "Bali 2016"). His work has taken him to Vietnam, Cambodia, Guinea, Senegal, and most recently, to China and the Philippines.

In Manila, he captured numerous images of abject poverty and desperate conditions. He observed and photographed children swimming in filthy water

ACLU

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Ohio

4506 Chester Avenue
Cleveland, OH 44103
P: (614) 586-1959
F: (216) 472-2210

1108 City Park Avenue
Suite 203
Columbus, OH 43206
P: (614) 586-1959
F: (614) 586-1974

acluohio.org
contact@acluohio.org

Hasan Kwame Jeffries
President

J. Bennett Guess
Executive Director

and industrial waste, surrounded by heaps of plastic garbage and fecal matter. Juxtaposed against this grim backdrop, he was struck by, and documented, people going about their daily routines. His photographs are candid; he did not stage or pose the people he photographed.

As in many developing countries, the presence of unclothed children in public in the Philippines is unremarkable. Images of such scenes appear routinely in journalistic, cultural, and scientific publications. The social and educational value of Mr. Stegmaier's photography is both extraordinary and obvious – he seeks to cast a light on the wretched conditions experienced by vulnerable individuals and populations in need of aid. Perhaps no other means of expression would serve this goal as effectively as photography.

Mr. Stegmaier's Photographs Are Protected First Amendment Expression

On June 28, 2019, Mr. Stegmaier was detained as he returned from abroad, traveling through Detroit Metropolitan Airport, on his way home to Cincinnati. He was held for over four hours—without water, without any means of contacting anyone, and without explanation—while CBP officials searched his devices and interrogated him. Eventually, he was released. His passport was returned to him, but his computer, smartphone, and camera were not.

As its rationale for seizing Mr. Stegmaier's photography equipment, CBP alleges that the equipment “was used or intended to be used to commit or promote the commission of an offense involving any visual depiction of sexual exploitation of children, namely 18 U.S.C. §§ 2251, 2251A, 2252, 2252A, and 2260.” See Attachment 1 (Notice of Seizure).

This is an obviously untenable allegation in light of the content—let alone the context—of the photographs. Mere depictions of nudity, including “innocuous photographs of naked children,” are protected expression under the First Amendment. *Osborne v. Ohio*, 495 U.S. 103, 112-13 (1990) (citing *New York v. Ferber*, 458 U.S. 747, 765 n. 18 (1982)). In order to constitute “sexual exploitation of children,” visual depictions must contain not merely nudity, but “sexually explicit conduct.” See 18 U.S.C. §§ 2251 *et seq.* “Sexually explicit conduct,” in turn, denotes actual or simulated:

- (A) sexual intercourse [...];
- (B) bestiality;
- (C) masturbation;
- (D) ***lascivious exhibition*** of the genitals or pubic area of a person or animal; or
- (E) sadistic or masochistic abuse;

18 U.S.C. § 3509(a)(9) (emphasis added).

In determining whether a particular image constitutes “lascivious” exhibition, the Sixth Circuit applies a six-factor inquiry:

- 1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
- 2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
- 3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
- 4) whether the child is fully or partially clothed, or nude;

- 5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;
- 6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009) (citing factors devised in *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). Courts are also instructed not to view the pictures in isolation, but to take into account appropriate context, including “where, when, and under what circumstances the photographs were taken,” *id.* at 684-85, in order to determine whether the images are “intended to elicit a sexual response in the viewer.” *Id.*


Nothing about Mr. Stegmaier’s photography even vaguely resembles the evils sought to be remedied by bans on child pornography. The images on his computer meet none of the *Dost* factors except mere nudity, which on its own is protected expression. *See Osborne*, 495 U.S. at 112-13. The photographs depict children among plastic garbage, or swimming in foul and polluted water. Even looking only at the four corners of the images themselves, they are not remotely “sexually suggestive,” “unnatural[ly] pose[d],” or suggestive of “willingness to engage in sexual activity.” *Brown*, 579 F.3d at 680.

The broader context of the images—namely, that they are stored on the devices of a professional photographer with a long history of social activism—simply confirms this assessment. *See id.* at 684-85. Surely they are intended to elicit a response in the viewer, but hardly a sexual one; they are intended to make the viewer aware of the deplorable living conditions of the people shown in the images.

In short, these are exactly the sort of “innocuous” expressions shielded by the First Amendment. The prohibitions of 18 U.S.C. §§ 2251 *et seq.* do not and cannot apply here. Moreover, to seize Mr. Stegmaier’s photographs under a claim of such a serious violation can and will have a profound chilling effect upon meritorious and valuable expression such as this. Mr. Stegmaier himself, and others like him, may refrain from their critical work for fear of suffering wrongful government suppression.

As the underlying rationale for CBP’s seizure is plainly meritless, we therefore request that Mr. Stegmaier’s property be returned to him immediately. Please feel free to contact the undersigned with any questions or concerns.

Very truly yours,



Freda J. Levenson
Legal Director
ACLU of Ohio Foundation



David J. Carey
Senior Staff Attorney
ACLU of Ohio Foundation



Harold Gurewitz
Gurewitz & Raben, PLC
333 W. Fort St., Ste. 1400
Detroit, MI 48226

