



February 19, 2025

Chief Neil Noakes
Bob Bolen Public Safety Complex
Fort Worth Police Department
505 W. Felix St.
Fort Worth, Texas 76115

Sent via U.S. Mail and Electronic Mail (Neil.Noakes@fortworthtexas.gov)

Dear Chief Noakes:

The Foundation for Individual Rights and Expression (FIRE), the National Coalition Against Censorship (NCAC), and the American Civil Liberties Union (ACLU) of Texas are deeply concerned by the Fort Worth Police Department's unconstitutional seizure and investigation of artist Sally Mann's photographs, which were on view at the Modern Art Museum of Fort Worth.¹ While some may find the images inappropriate, that does not strip them of the First Amendment protection afforded to artistic expression. We therefore call on the Fort Worth Police Department to uphold its binding obligations to defend the Constitution by ceasing its investigation and returning the photographs.

I. Fort Worth Police Confiscate Works on Exhibit at City's Modern Art Museum

Sally Mann is a celebrated artist and photographer whose career spans more than 40 years.² She is renowned for her "experimental and hauntingly beautiful photographs that explore the overarching themes of existence: family, desire, mortality, memory, and nature's indifference to the human condition."³ A member of the American Academy of Arts & Sciences, Mann has received numerous awards, including grants from the National Endowment for the Arts, the

¹ FIRE is a nonpartisan nonprofit that defends free speech. NCAC is an alliance of more than 60 national nonprofit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. The ACLU of Texas is a nonpartisan nonprofit organization that works with communities, at the State Capitol, and in the courts to protect and advance civil rights and civil liberties for every Texan, no exceptions. Neither FIRE, the NCAC, nor the ACLU of Texas currently represent Mann or the Modern Art Museum of Fort Worth. We write to you independently as advocates for free expression.

² The narrative in this letter reflects our understanding of the pertinent facts. We appreciate that you may have additional information and invite you to share it with us.

³ *Sally Mann: A Thousand Crossings*, J. PAUL GETTY MUSEUM, https://www.getty.edu/art/exhibitions/sally_mann/inner.html.

National Endowment for the Humanities, and the Guggenheim Foundation.⁴ Her work has been exhibited at major museums and galleries, including the Metropolitan Museum of Art, the Whitney Museum of American Art, the San Francisco Museum of Modern Art, and the Tokyo Metropolitan Museum of Photography.⁵ In 2001, TIME magazine named her “America’s Best Photographer.”⁶

In 1990, the Edwynn Houk Gallery in Chicago exhibited “Immediate Family,” a collection of black-and-white photographs Mann took of her children as they went about their lives on the family farm in rural Virginia.⁷ Two years later, Aperture, “a nonprofit publisher dedicated to creating insight, community, and understanding through photography,” published those photos and others in a book by the same name.⁸ “Immediate Family” has since been exhibited in museums around the world.⁹

“Immediate Family” became controversial because Mann’s children appear nude in 13 of the collection’s 65 photos.¹⁰ During a period characterized by intense societal debates over the boundaries of artistic expression, some decontextualized Mann’s photos and attempted to frame them as pornography rather than works of art evoking themes of family and childhood.¹¹ “Popsicle Drips,” arguably the most controversial photograph of the series, depicts Mann’s son with a melted popsicle running down his nude body. It references artist Edward Weston’s 1925 photo, “Neil,” leading one commentator to remark of Mann’s “reworking” that it “speaks not only to cultural obsessions with childhood, innocence, and perfection, but also comments on what is sometimes a lack of subjectivity in artistic subjects.”¹²

Mann was blindsided by the controversy “Immediate Family” generated: “I was just a mother photographing her children as they were growing up. I was exploring different subjects with them.”¹³ She allowed her children to exclude any photo they did not want published.¹⁴ Her

⁴ *Sally Mann*, AM. ACAD. OF ARTS & SCIS., <https://www.amacad.org/person/sally-mann>.

⁵ *Sally Mann: Immediate Family*, APERTURE, <https://aperture.org/books/immediate-family>.

⁶ *Sally Mann*, *supra* note 4.

⁷ “*Sally Mann: Immediate Family*” 1990 Exhibition, EDWYNN HOUK GALLERY, <https://www.houkgallery.com/exhibitions/1990-sally-mann-immediate-family/works>.

⁸ *Sally Mann: Immediate Family*, *supra* note 5.

⁹ *Sally Mann Biography*, GAGOSIAN, <https://gagosian.com/media/artists/sally-mann/Mann-Sally-Bio-2025-01-28.pdf>.

¹⁰ Blake Morrison, *Sally Mann: The naked and the dead*, GUARDIAN (May 28, 2010), <https://www.theguardian.com/artanddesign/2010/may/29/sally-mann-naked-dead>.

¹¹ *Id.*; *The 90s: Culture Wars*, OPERA AM. (Apr. 4, 2020), <https://www.operaamerica.org/magazine/spring-2020/the-90s-culture-wars>.

¹² Andrea Miller, *Portrait of Family Values: Transgressions and Controversy in the Work of Sally Mann*, <https://mintwiki.pbworks.com/f/Sally+Mann+Paper+for+Mint+Museum.pdf>.

¹³ Roy Proctor, *VMFA show gives Mann chance to transcend controversy*, RICHMOND TIMES-DISPATCH (Nov. 21, 2010), <https://bit.ly/4hHZuSy>; *see also* Morrison, *supra* note 10 (“Showing my children’s bodies didn’t seem unusual to me. Exploitation was the farthest thing from my mind.”).

¹⁴ James Christen Steward, *The Camera of Sally Mann and the Spaces of Childhood*, MICH. QUARTERLY REV. Vol. XXXIX, Issue 2 (Spring 2000).

children have never suggested they were sexually abused and have continued as adults to be subjects of and to support their mother's work.¹⁵ Mann's elder daughter called the controversy "puritanical idiocy" and lamented that the "images, our childhood stories, our very characters, were consumed by an outside meaning."¹⁶

From November 17, 2024, to February 2, 2025, the Modern Art Museum of Fort Worth hosted an exhibition called "Diaries from Home," featuring works that "explore the multilayered concepts of family, community, and home."¹⁷ The exhibit included several of the 1992 images from "Immediate Family" in which Mann's children appear nude.

In December, several local officials publicly condemned those images. Tarrant County Judge Tim O'Hare, for example, called them "grossly inappropriate at best" and said they "should be taken down immediately and investigated by law enforcement for any and all potential criminal violations."¹⁸ Tarrant County Republican Party Chairman Bo French said, "Our wonderful museums should be promoting excellence instead of radical perversion."¹⁹ Shortly thereafter, the Fort Worth Police Department seized several of Mann's portraits from the exhibit as part of a criminal investigation into potential child abuse.²⁰ One media report indicated that several works were removed, including "Popsicle Drips," "The Perfect Tomato," "The Wet Bed," and "Cereus."²¹ The latter three images depict, respectively, Mann's naked daughter jumping onto a picnic table and appearing to hold a ballet pose; Mann's daughter lying naked on a bed with a stain from a nighttime accident; and Mann's daughter with a flower across her bare torso. The photographs remain in a police storage facility and the investigation is ongoing.²²

¹⁵ Kino Lorber, *What Remains: The Life and Work of Sally Mann | Full Documentary Movie*, YOUTUBE (Sept. 14, 2022), <https://www.youtube.com/watch?v=o8s7BKLBWq4> (featuring interviews with Mann's children).

¹⁶ Jessie Mann, *Self-Possessed*, APERTURE (Summer 2006), <https://archive.aperture.org/article/2006/2/2/self-possessed>.

¹⁷ *Diaries of Home*, MOD. ART MUSEUM OF FORT WORTH, <https://www.themodern.org/exhibition/diaries-home>.

¹⁸ Carlos Turcios, *County Official Calls For Criminal Investigation Of Museum Exhibit In Fort Worth*, DALLAS EXPRESS (Dec. 26, 2024), <https://dallasexpress.com/tarrant/county-official-calls-for-criminal-investigation-of-museum-exhibit>.

¹⁹ *Id.*

²⁰ David Moreno, *No charges filed yet in child pornography case against Fort Worth museum as police withhold report*, FORT WORTH REPORT (Jan. 30, 2025), <https://fortworthreport.org/2025/01/30/no-charges-filed-in-child-pornography-case-against-fort-worth-museum-as-police-withhold-report>.

²¹ Jessica Fuentes, *The Modern Releases Statement Regarding Removed Sally Mann Photographs in Fort Worth*, GLASSTIRE (Jan. 10, 2025), <https://glasstire.com/2025/01/10/the-modern-releases-statement-regarding-removed-sally-mann-photographs-in-fort-worth>. "Cereus" presumably refers to Mann's photograph in "Immediate Family" titled "Night Blooming Cereus." The report also indicated that a work titled "Another Cracker" was removed, though there does not appear to be any record online of this work.

²² Marcheta Fornoff, *Fort Worth police confirm seizure of Sally Mann photos from museum, a move rarely seen nationally*, KERA NEWS (Feb. 3, 2025), <https://www.keranews.org/arts-culture/2025-02-03/fort-worth-police-confirm-seizure-of-sally-mann-photos-from-museum-a-move-rarely-seen-nationally>.

II. The First Amendment Protects Mann’s Artistic Expression and the Fort Worth Museum’s Exhibition

The photos under investigation are entitled to full First Amendment protection. Both the creation and dissemination of photographs are “inherently expressive” acts protected by the First Amendment.²³ The “First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,” except in a few “well-defined and narrowly limited classes of speech,” such as defamation, incitement, obscenity, and child pornography.²⁴ **No such exception applies to Mann’s photographs.**

A. The photographs are not legally obscene.

Although the First Amendment does not protect obscene expression, “obscenity” is a legal term of art with a narrow, precise definition. Mann’s photographs do not meet this definition simply because they depict nude minors.

In *Miller v. California*, the Supreme Court adopted a three-part test for determining whether expression is legally obscene. A work may be banned as “obscene” only if “taken, as a whole,” the “average person, applying contemporary community standards” would consider it to “appeal[] to the prurient interest”; it depicts or describes “sexual conduct” in a “patently offensive” manner; *and* it lacks “serious literary, artistic, political, or scientific value.”²⁵ Works must meet all three prongs of this test to fall outside the First Amendment’s protection.

The confiscated photographs do not meet any of the three *Miller* prongs.

While Mann’s children appear nude in some of the photos, there are no depictions of sexual conduct, let alone the type of “patently offensive hard core sexual conduct” contemplated by *Miller*.²⁶ And, taken as a whole, the images do not appeal to a prurient interest in sex. The Supreme Court has expressly rejected the suggestion that every depiction of nudity appeals to the prurient interest.²⁷ Mann’s images are not sexualized but rather “exemplify her reflection on childhood and motherhood, family and intimacy, nature and Southern sensibility.”²⁸ While,

²³ *Ex parte Thompson*, 442 S.W.3d 325, 336–37 (Tex. Crim. App. 2014); *see also Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (First Amendment protects books, plays, movies, video games, and other art forms); *United States v. Stevens*, 559 U.S. 460 (2010) (statute that broadly criminalized creation, sale, and possession of photos, videos, and other depictions of animal cruelty violated First Amendment); *Irizarry v. Yehia*, 38 F.4th 1282, 1291 (10th Cir. 2022) (“First Amendment protects actual photos, videos, and recordings, . . . and for this protection to have meaning the Amendment must also protect the act of creating that material”).

²⁴ *Stevens*, 559 U.S. at 468–69, 471.

²⁵ 413 U.S. 15, 24 (1973) (internal quotation marks omitted).

²⁶ *Id.* at 27. *See also Brown v. Entertainment Merchs. Ass’n*, 564 U.S. 786, 808 (2011) (Alito, J., concurring) (the government may not restrict works that fall outside the “threshold limitation that restricts” obscenity to the kinds of “specifically described ‘hard core’ materials” *Miller* identified) (citing *Miller*, 413 U.S. at 23–25).

²⁷ *Ashcroft v. ACLU*, 535 U.S. 564, 579 (2002) (“For example, we have great difficulty understanding how pictures of a war victim’s wounded nude body could reasonably be described under the vast majority of circumstances as erotic.”).

²⁸ *Sally Mann: Immediate Family*, EDWYNN HOUK GALLERY, https://www.houkgallery.com/exhibitions/75-sally-mann-immediate-family/press_release_text.

like much art, the images' meaning may be ambiguous or controversial, there is no question they are intended to provoke thought and challenge viewers to engage with ideas, not to satisfy to satisfy their sexual desires.

The photos also demonstrably have serious artistic value. They are part of a renowned body of work that has been exhibited in major museums and galleries, and which catapulted Mann to prominence as an artist. That collection, in the words of one Pulitzer Prize-winning art critic, "offered a read on family dynamics that had the aura of a dream and the psychological complexity of a novel."²⁹ Upon naming Mann America's best photographer in 2001, TIME said of "Immediate Family," "No other collection of family photographs is remotely like it, in both its naked candor and the fervor of its maternal curiosity and care."³⁰

To be sure, not everyone will find value in Mann's work, but the same can be said for every other artist. Works can have serious literary, artistic, political, or scientific value for an audience "regardless of whether the government or a majority of the people approve of the ideas these works represent."³¹ Because the photos do not appeal to the prurient interest, do not depict sexual conduct, and have serious artistic value, they do not meet any of the *Miller* prongs and are cannot be not legally obscene.

B. The photographs do not constitute child pornography or abuse.

The photos also do not constitute proscribable child pornography, which encompasses images that are "themselves the product of child sexual abuse."³² While the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance,"³³ it does not require or allow the government to prohibit any content involving minors that some simply find inappropriate, provocative, or offensive.³⁴

Texas defines child pornography whose production, possession and distribution are prohibited by state law as materials depicting minors engaged in various sex acts (none of which appear in Mann's photos) or the "lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola,"³⁵ and federal law is to like effect.³⁶ But none of Mann's photos that your Department seized depict such "lewd exhibition" simply because Mann's children appear nude in them. "[D]epictions of nudity, without more, constitute protected expression," even if the person depicted is a minor, for the obvious reason that not all such

²⁹ Sebastian Smee, *Sally Mann: A great artist who loves tumbling into trouble*, WASH. POST (Feb. 28, 2018), https://www.washingtonpost.com/entertainment/museums/sally-mann--a-great-artist-who-loves-tumbling-into-trouble/2018/02/28/c3a752c0-1b04-11e8-b2d9-08e748f892c0_story.html.

³⁰ Reynolds Price, *Photographer: Sally Mann*, TIME (July 9, 2011), <https://time.com/archive/6664305/photographer-sally-mann>.

³¹ *Miller*, 413 U.S. at 34.

³² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 249 (2002).

³³ *New York v. Ferber*, 458 U.S. 747, 757 (1982).

³⁴ *Ashcroft*, 535 U.S. at 245.

³⁵ Tex. Penal Code § 43.25.

³⁶ *See* 18 U.S.C. § 2258.

content is a product of child sexual abuse.³⁷ It would, for example, be difficult to argue with a straight face that a photograph of a naked nine-year-old girl fleeing a napalm attack during the Vietnam war is “child pornography.”³⁸ “[M]any works of art or family photos of, say, naked children in bathtubs,” not to mention educational and medical materials, remain protected by the First Amendment despite depicting child nudity.³⁹

To determine whether an image depicts “lewd exhibition” of a minor, Texas courts and the U.S. Court of Appeals for the Fifth Circuit use the six factor test from *United States v. Dost*, which examines: “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.”⁴⁰ No single factor is dispositive, and the overall question is whether the depiction “displays or brings forth to view in order to attract notice to the genitals or pubic area of children, *in order to excite lustfulness or sexual stimulation in the viewer.*”⁴¹ Lewdness “is not a characteristic of the child photographed but of the exhibition which the photographer sets up for an audience that consists of himself or likeminded pedophiles.”⁴² The photographer’s intent is important.⁴³

There is no serious argument that Mann’s artful portraits of her children depict their genitals, anuses, or breasts to “excite lustfulness or sexual stimulation in the viewer.” While her son’s genitals are conspicuous in “Popsicle Drips,” the composition, like the others, is not intended to excite lust in the viewer, but to convey ideas about childhood and family. Mann’s images have been interpreted to present a raw and unvarnished look at childhood in all its complexity,

³⁷ *Osborne v. Ohio*, 495 U.S. 103, 112 (1990).

³⁸ Oscar Holland, ‘*Napalm Girl*’ at 50: *The story of the Vietnam War’s defining photo*, CNN (June 9, 2022), <https://www.cnn.com/style/article/napalm-girl-50-snap/index.html>.

³⁹ *United States v. Grimes*, 244 F.3d 375, 381-82 (5th Cir. 2001); *see also United States v. Williams*, 553 U.S. at 301 (analogous federal child porn statute did not apply to “harmless picture of a child in a bathtub”); *Ferber*, 458 U.S. at 773 (non-sexual “educational, medical, or artistic works” that depict nude children would not fall within the First Amendment exception for child pornography).

⁴⁰ *Romo v. State*, 663 S.W.3d 716, 720 (Tex. Crim. App. 2022) (citing *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986)). Similarly, the Fifth Circuit applies the *Dost* factors to determine whether a visual depiction of a minor constitutes “lascivious” exhibition of the genitals under analogous federal child pornography statutes. *See, e.g., Grimes*, 244 F.3d at 380.

⁴¹ *United States v. McCall*, 833 F.3d 560, 563 (5th Cir. 2016) (emphasis added).

⁴² *State v. Bolles*, 541 S.W.3d 128, 141 n.66 (Tex. Crim. App. 2017). A non-lewd image of a nude child does not become lewd simply because it might appeal to the sexual desire of a pedophile. *United States v. Villard*, 885 F.2d 117, 125 (3d Cir. 1989) (“Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo.”); *see also Ashcroft*, 535 U.S. at 251 (“There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.”).

⁴³ *Alexander v. State*, 906 S.W.2d 107, 110 (Tex. App. 1995).

challenging idealized notions of innocence, purity, and perfection.⁴⁴ Nothing about the images conveys sexual coyness or a willingness to engage in sexual activity, nor are they intended or designed to appeal to pedophiles' sexual desire.

As Mann describes it:

The photographs show them going about their lives, sometimes without clothing, on our farm tucked into the Virginia hills. For miles in all directions, there was not a breathing soul. When we were on the farm, we were isolated, not just by geography but by the primitive living conditions: no electricity, no running water and, of course, no computer, no phone. Out of a conviction that my lens should remain open to the full scope of their childhood, and with the willing, creative participation of everyone involved, I photographed their triumphs, confusion, harmony and isolation, as well as the hardships that tend to befall children — bruises, vomit, bloody noses, wet beds — all of it.⁴⁵

Mann's technical use of composition, lighting, and black-and-white film reflect deliberate aesthetic choices rooted in the traditions of fine-art photography. The series "explores emotional moments counterbalanced by the commonplaces of childhood."⁴⁶ Like much art, it communicates ideas and invites viewers to reflect on the human experience.

Mann's celebrated fine-art photography is a far cry from images Texas courts have found to constitute "lewd exhibition," such as a substitute teacher's photo of a minor student laying on her back completely topless with her legs spread, her pants unzipped, and a bottle of lubricant against her genital area, suggesting a willingness to engage in sexual activity.⁴⁷ Notably, Texas courts have contrasted lewd images of children with those that are "documentary or artistic in nature."⁴⁸ One court emphasized that a lewd image was "not a work of art hanging in a museum or depicted in books."⁴⁹

Mann's photos, conversely, *are* documentary and artistic in nature, hanging in museums, and depicted in books. "Immediate Family" has been exhibited in prestigious institutions, is available at major retailers like Amazon, and is recognized as a significant contribution to contemporary photography, which speaks to its artistic value, regardless of whether Fort Worth

⁴⁴ This theme is found throughout "Immediate Family," which includes photos of the children when they are ill, or after they have suffered injuries, and depicts them experiencing a range of emotions from anger and sadness to joy and playfulness.

⁴⁵ Sally Mann, *Sally Mann's Exposure*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/2015/04/19/magazine/the-cost-of-sally-manns-exposure.html>.

⁴⁶ *Sally Mann: Immediate Family*, *supra* note 28.

⁴⁷ *Pearce v. State*, Nos. 05-07-01350-CR, 05-07-01351-CR, 2009 Tex. App. LEXIS 5807, at *4 (July 29, 2009).

⁴⁸ *Dawes v. State*, No. 05-07-01544-CR, 2009 Tex. App. LEXIS 2114, at *14 (Mar. 27, 2009).

⁴⁹ *Bolles*, 541 S.W.3d at 144; *see also United States v. X-Citement Video*, 513 U.S. 64, 84 (1994) (Scalia, J., dissenting) ("Let us be clear about what sort of pictures are at issue here. They are not the sort that will likely be found in a catalog of the National Gallery or the Metropolitan Museum of Art.").

politicians or others find it objectionable. It is ludicrous to suggest a prominent and influential outlet like TIME named Mann *America's best photographer* in large part for a collection of child pornography, and her children, now adults, have rejected that characterization of her work. All of which reinforces that the photos the Department seized are constitutionally protected expression, not child pornography.

III. The Photographs' Seizure Violates the First Amendment

Not only are Mann's photos protected by the First Amendment, but the Fort Worth Police Department's seizure of them prior to and without thereafter promptly seeking any adversarial hearing itself raises serious constitutional concerns.

While police generally may seize evidence of alleged crimes pursuant to a warrant issued by a magistrate upon a finding of probable cause, it requires additional procedural safeguards when "materials presumptively protected by the First Amendment are involved."⁵⁰ Authorities may not seize such materials to "block their distribution or exhibition" without a prior judicial determination of their illegality in an adversarial proceeding.⁵¹ This mitigates the "risk of prior restraint,"⁵² the "most serious and the least tolerable infringement on First Amendment rights."⁵³ A prior adversarial hearing may be unnecessary when police seize a single copy of a book, film, or other expressive work "for the *bona fide* purpose of preserving it as evidence in a criminal proceeding."⁵⁴ But even then, affected parties must thereafter have a prompt opportunity to challenge the seizure's constitutionality in an adversarial proceeding and to retrieve or copy the material for continued display pending the proceeding's conclusion.⁵⁵

It is hard to escape the conclusion that the Fort Worth Police Department seized the photos—removing them from the exhibit for the back half of its duration—at least in part to block their exhibition. Seizing the works was not necessary to preserve them as evidence, as the police could have easily accessed them online or photographed them in the museum. And the seizure came on the heels of complaints about the art by local officials and politicians. These facts point

⁵⁰ *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63 (1989).

⁵¹ *Id.* While the relevant Supreme Court decisions involved obscenity determinations, the rationale for heightened procedural protections—preventing "the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line," *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964)—applies equally to alleged child pornography consisting exclusively of prohibited "lewd exhibition." To be sure, the Fifth Circuit has held such heightened protection may not be appropriate for "visual depictions of minors engaging in sexually explicit *conduct*," that call for "a factual determination that leaves little latitude to the officers," *United States v. Kimbrough*, 69 F.3d 723, 727-28 (5th Cir. 1995) (emphasis added). But while that may hold true for explicit sex *acts*, "lewd exhibition," assessed under the six-factor *Dost* test, often requires nuanced, context-dependent analysis. This very case—involving artistic works publicly displayed for three decades without criminal consequences—demonstrates that law enforcement determinations of what constitutes "lewd exhibition" will be far from perfunctory.

⁵² *Fort Wayne Books*, 489 U.S. at 63–64.

⁵³ *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

⁵⁴ *Fort Wayne Books*, 489 U.S. at 63.

⁵⁵ *Heller v. New York*, 413 U.S. 483, 492–93 (1973).

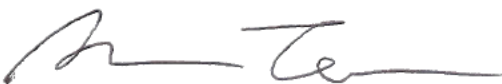
to a deliberate effort to prevent display of the photos, despite the absence of any judicial determination of their legality in an adversarial proceeding. And there is no indication city officials have moved to initiate such proceedings anytime soon. These apparent procedural shortcomings are inconsistent with the city's First Amendment obligations.

While Mann's work could serve as the basis for a meaningful debate about privacy and artists' ethical responsibilities, seizing her art and launching a criminal investigation based on complaints that dishonestly equate it with child pornography crosses a First Amendment line and trivializes the very real issue of child sexual exploitation. There is a reason why Mann has never been arrested or charged with a crime over "Immediate Family" in the 33 years since its release: there is nothing to investigate or prosecute.

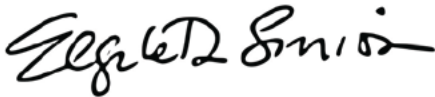
Courts do not look kindly on bad-faith prosecutions that target artistic expression under the guise of combating child pornography. The District Attorney for Tyler County, Texas, recently learned as much when he pursued child pornography charges against Netflix for streaming the film "Cuties," a coming-of-age story of an eleven-year-old girl who joins a dance team, in which preteen girls perform (fully clothed) in provocative ways. Acknowledging the film's themes of "the dangers and consequences of leaving children unrestrained from—and at the mercy of—[a] highly sexualized and media-driven culture,"⁵⁶ a federal district court readily concluded it did not constitute child pornography.⁵⁷ More pointedly for present purposes, the court held the District Attorney brought the charges in bad faith, with no hope of obtaining a valid conviction, and blocked him from prosecuting Netflix,⁵⁸ in a decision the Fifth Circuit affirmed.⁵⁹ Any similar pursuit of Mann or the Modern Art Museum of Fort Worth over clearly protected artistic expression is likewise unconstitutional, and doomed to failure.

For the foregoing reasons, the Fort Worth Police Department must immediately close its investigation of the confiscated photographs and return them, and the Tarrant County District Attorney's Office must forgo any charges based on their creation, possession, or dissemination. We respectfully request a response no later than March 5, 2025.

Sincerely,



Aaron Terr
Director of Public Advocacy, FIRE



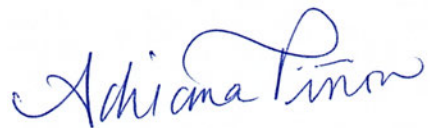
Elizabeth Larison,
Arts and Culture Advocacy Program Director, NCAC

⁵⁶ *Netflix, Inc. v. Babin*, 641 F. Supp. 3d 319, 326 (E.D. Tex. 2022).

⁵⁷ *Id.* at 326, 335–38.

⁵⁸ *Id.* at 335–39, 343.

⁵⁹ *Netflix, Inc. v. Babin*, 88 F.4th 1080 (5th Cir. 2023).



Adriana Piñon
Legal Director, ACLU of Texas

Cc: Phil Sorrells, District Attorney, Tarrant County