

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

RICHARD FIELDS,

Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, ET AL.

Defendants-Appellees.

AMANDA GERACI,

Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA, ET AL.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**BRIEF *AMICUS CURIAE* OF THE SOCIETY FOR PHOTOGRAPHIC
EDUCATION IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING
REVERSAL**

October 31, 2016

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel certifies that the Society for Photographic Education is a membership organization that provides and fosters an understanding of phytography as a means of diverse creative expression, cultural insight, and experimental practice. The Society has no parent corporation, and no publicly held company has 10% or greater ownership in the Society.

Dated: October 31, 2016

/s/ Eli Segal

Eli Segal

INTEREST OF *AMICUS CURIAE*

The Society for Photographic Education (“SPE”) is a national nonprofit organization that seeks to promote a wider understanding of photography in all of its forms and to foster the development of its practice, teaching, scholarship and critical analysis. SPE represents more than 2,200 members, which include fine art photographers, educators, curators, critics, historians, and artists.

This litigation raises issues of direct concern to SPE, because SPE and its membership have a strong interest in the development of legal rules that enable photographers to make pictures in public places free from unreasonable governmental interference.

All parties, including counsel for Defendants-Appellees, have consented to the filing of this brief. No party (or counsel for a party) authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No one other than amici curiae, its members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

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I. SUMMARY OF ARGUMENT

Vivian Maier, a professional nanny, made over 100,000 photographs from the 1950s to the 1990s, many featuring ordinary people on the streets of New York and Chicago. About Vivian Maier, <http://www.vivianmaier.com/about-vivian-maier>. She showed her photographs to nobody, stashing away the negatives in storage lockers. *Id.* After the payments on the storage lockers lapsed, the negatives made their way to an auction house. *Id.* A Chicago historian purchased a box of them and realized, after Maier died in 2009, that her photography was extraordinary. *Id.* Today, Maier's photographs fill three books and draw crowds at art shows and museums. Vivian Maier, <http://www.vivianmaier.com>. As *New York Times* critic Michael Kimmelman put it, "[t]hat rare case of a genuine undiscovered artist, she left behind a huge trove of pictures that rank her with the great American midcentury street photographers." Through the Nanny's Eyes, <http://www.nytimes.com/interactive/2012/02/19/magazine/vivian-maier.html>.

Yet under the district court's opinion, the First Amendment would not have protected Maier if the police ordered her not to make her photographs. For according to the district court, photography is protected only if the photographer has "an intent to convey a particularized message" and "the likelihood [is] great that the message would be understood by those who view[] it." JA12 (Memorandum at 6). Because Maier never "asserted anything to anyone" and did

not “intend[] to share [her] images immediately upon image capture,” she would have had no protection at all. JA12, 17 (Memorandum at 6, 11). The government could have prohibited her from practicing her art.

But that is not and cannot be the law. Making a photograph merits First Amendment protection because it is artistic expression just the same as painting a landscape, sketching a street scene, or sculpting a statue. People who make photographs practice their craft, exercise creativity, and edit and refine their art. And a candid photograph of a public scene—like much of Maier’s now-acclaimed body of work and like Plaintiff Richard Fields’ photograph of police officers standing outside a Philadelphia home hosting a party—fits squarely in the “street photography” genre, a nearly century-old movement rooted in the artistic desire to “arrest the continuous flux of life, to scrutinize and savor discrete segments of time, and to capture them.” Naomi Rosenblum, *A World History of Photography* 259, 261 (4th ed. 2007). Articulating this same artistic desire—albeit less eloquently—Fields testified that he made his photograph at issue in this case because he thought to himself, “what a scene,” and that it “would make a great picture.” JA8 (Memorandum at 2) .

The fact that Fields did not make his photograph for the purpose of communicating a particular message to an audience does not make it any less worthy of protection. Many artists, including photographers, do not intend to convey any message with their art. For those who do have such an intent, it is often the case that the audience does not understand their message. And many artists—Vivian Maier among them—create their work with no intent to share it with any audience at all.

The First Amendment would protect describing in a diary the scene that Fields witnessed or sketching it in a private notebook. Making a photograph of that same scene should be treated no differently.



Richard Fields, Philadelphia, 2013



Vivian Maier, Chicago, 1961.

II. ARGUMENT

A. Making a Photograph Is Artistic Expression.

“You Don’t Take a Photograph, You Make It.”

-Ansel Adams

Painting a landscape is artistic expression. Sketching a street scene is artistic expression. Sculpting a statue is artistic expression. So is making a photograph. For photographers practice their medium, use creativity, and edit and refine their art, just as other kinds of artists do. And the ultimate artistic goal of many photographers—including the street photographers who emerged after the

advent of the small, 35-millimeter camera in the mid-1920s—is to capture the spontaneity of public scenes and arrest discrete moments in a way that stirs the emotions or intellect.

Photographers—like other artists—develop a command for their craft through practice and experience. Photographers using traditional or digital cameras learn the characteristics of lenses, shutters, and flashes, just as poets learn meter and sculptors learn the properties of different types of stone. *See generally* Ansel Adams, *The Camera* (Little, Brown and Co. 2003) (1980). While perhaps not as complex an endeavor, mobile phone photographers explore their camera settings, too. And no matter the type of camera, photographers—through practice and experience—come to understand how the mechanical or digital, optical, and (sometimes) chemical processes of photography make a photograph look different than its subject. *See id.* at 1, 95-96. For example, like painters learn perspective, photographers learn that the closer they stand to an object in the foreground, the more it will appear to dwarf the objects in the background. *Id.* at 98. Similarly, photographers learn that they can create a larger depth of field (so that objects at a broader range of distances will appear crisp) by choosing a shorter focal length and a smaller aperture, and by moving away from the subject. *Id.* at 48-49.

In the process of composing a photograph, even choices that may seem simple—like positioning the camera—involve creativity. Because

photographs do not capture the multiplicity of viewpoints that the human eyes do, photographers must use their experience and creativity to select the best vantage point. Ansel Adams, *The Camera* 95 (Little, Brown and Co. 2003) (1980).

Photographers consider what is in the foreground and background, how those objects appear to relate with one another, what appears on the edges of the frame, and the position of the light. Ansel Adams encapsulated this artistic process in his description of the many factors he might take into account when planning to make a photograph of his friend sitting in an old chair in a living room, with a spray of flowers in a tall glass vase on a nearby table:

I note that, from my present point of view, my friend's face is visually confused with the lines of the chair back, and the flowers conflict with the wall paneling. If I move about two feet to the right, the face is now nicely placed with the chair back. The flowers too have moved into a better position, but they now intrude upon a horizontal shelf. I raise my head about one foot . . . and the flowers are now seen against a clean space. I might decide that moving away from my friend by a foot or two would further clarify the relationships of all the elements.

Id. at 98, 100.

In contrast, street photographers aim to capture human expressions and fleeting relationships of moving elements in candid scenes. In other words, they seek what street photography pioneer Henri Cartier-Bresson calls “the decisive moment.” To Cartier-Bresson, “photography is the simultaneous recognition, in a fraction of a second, of the significance of an event as well as of a

precise organization of forms which give that event its proper expression.” Henri Cartier-Bresson, Forward, *The Decisive Moment* (Steidl 2015). For example, Cartier-Bresson stuck a tiny 35-millimeter camera between the slats of a fence near the Gare St. Lazare railway station in Paris at exactly the right time to create *Behind the Gare St. Lazare*, below. Michael Kimmelman, “Cartier-Bresson, Who Photographed the ‘Decisive Moment,’ Dies,” *N.Y. Times*, Aug. 4, 2014, available at <http://www.nytimes.com/2004/08/04/obituaries/cartierbresson-who-photographed-the-decisive-moment-dies.html>. That photograph won acclaim—it was *Time Magazine*’s photograph of the century—in part because of how successfully it captured the “decisive moment”:

the figure of a leaping dancer on a pair of posters on a wall behind the man mirrors him and his reflection in the water; the rippling circles made by the ladder echo circular bands of discarded metal debris; another poster, advertising a performer named Railowsky, puns with the railway station and also the ladder, which, flat, resembles a railroad track.

Id.; Beetles + Huxley, *The Photo of the Century*, <http://www.beetlesandhuxley.com/photo-century.html>.



Henri Cartier-Bresson, *Behind the Gare St. Lazare*, 1932.

The fact that Fields used a mobile phone camera to make his photograph does not make his photograph fit any less within this street photography tradition. Street photography does not depend on bulky equipment, or precise calibration of the camera; indeed, because street photographers prize candid scenes, they aim to capture images discretely (with tiny cameras) and

quickly. David Gibson, *The Street Photographer's Manual* 9 (Thames & Hudson 2014). Cartier-Bresson himself often concealed his camera by wrapping a handkerchief around it and pretending to blow his nose while making a picture. See William Solesbury, *World Cities, City Worlds: Explorations with Metaphors, Icons, and Perspectives* 88 (Troubador 2013). The ubiquity and size of mobile phone cameras help photographers pass unnoticed, making them an ideal choice for the genre. As one street photographer put it, “[t]he profound hope must be that mobile phone cameras are in reality just another tool, which, in the right hands, carry on a tradition, spiking it with different styles and attitudes.” David Gibson, *The Street Photographer's Manual* 21, 178 (Thames & Hudson 2014). And Fields did just that, using his mobile phone camera to make a photograph after thinking to himself, “what a scene.” JA8 (Memorandum at 2).

B. As Artistic Expression, Making a Photograph Merits First Amendment Protection Regardless of Whether the Photograph Communicates a Particular Message to an Audience.

The district court held that the First Amendment would have protected Fields while making his photograph only if Fields had “an intent to convey a particularized message” and “the likelihood was great that the message would be understood by those who viewed” his photograph. JA12 (Memorandum at 6). But First Amendment protection for artistic expression does not turn on whether the artist creates the work of art at issue with the intent to convey a particular message,

or on how an audience would understand the work of art upon viewing or hearing it. The Supreme Court has made that clear.¹

In *Hurley*, the Court explained that “a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Gp. of Boston*, 515 U.S. 557, 569 (1995) (citation and internal quotation marks omitted); *see also Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (“It goes without saying that artistic expression lies within [the] First Amendment protection.”) (Souter, J., dissenting); *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1015-18 (3d Cir. 2008) (discussing First Amendment protection for “artistic expression”). Similarly, recognizing that “totalitarian state[s] in our own times” have censored music because of its “capacity to appeal to the intellect and to the emotions,” the Court held that “[m]usic, as a form of expression and communication, is protected under the First Amendment.” *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). Furthermore, the Court has deemed monuments—such as the mosaic of the word “Imagine” in New York

¹ For a more extensive discussion of many of the principles discussed in this section, see Seth F. Kreimer, “Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record,” 159 *U. Pa. L. Rev.* 335 (2011).

City’s Central Park and the statue of Pancho Villa in Tucson—protected expression, even though they are “almost certain to evoke different thoughts and sentiments in the minds of different observers.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 474-79 (2009).

In addition to paintings, music, poetry, and monuments, the Supreme Court has repeatedly affirmed that the First Amendment shields photographs and videos in particular—without conditioning such protection on the communication of a particular message to an audience. *See, e.g., United States v. Stevens*, 559 U.S. 460, 482 (2010) (holding unconstitutional on First Amendment grounds a statute that criminalized creating, selling, or possessing any photographs or videos depicting animal cruelty); *Osborne v. Ohio*, 495 U.S. 103, 114 n.9 (1990) (observing that the First Amendment would protect a parent who gave a family friend a photograph of the parent’s naked infant); *Schad v. Bor. of Mt. Ephraim*, 452 U.S. 61, 65 (1981) (“[M]otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”); *Kaplan v. California*, 413 U.S. 115, 119 (1973) (“The Court has applied . . . First Amendment standards to moving pictures, to photographs, and to words in books.”); *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (finding motion pictures protected, because they “may affect

public attitudes and behavior in a variety of ways, [including by] . . . the subtle shaping of thought which characterizes all artistic expression”).

For at least three reasons, protecting artistic expression regardless of whether it attempts to and does communicate any particular message to an audience is not only good law but also good policy. *First*, it should go without saying that many artists do not intend to convey any particular message with their art. *See, e.g.*, Archibald MacLeish, “Ars Poetica” (“A poem should not mean. But be.”). *Second*, for artists who do intend to convey a particular message, those who view or listen to their art often understand it to mean something entirely different. That is because art does not entail a meeting of the minds between artist and audience. A person admiring an exhibit at an art museum rarely knows what message, if any, the artist intended to convey. And he can confirm that ignorance simply by discussing his own interpretation with another patron, for two people rarely agree on the meaning of any particular piece of art. *Third*, many artists create their art with no present intent to share it with anyone else. Some—like Vivian Maier—do not intend to share any of their work, ever. Others—like Henri Cartier-Bresson—only decide what to share after reviewing what they have created. *See* Henri Cartier-Bresson, Forward, *The Decisive Moment* (Steidl 2015) (“[Y]ou find yourself compulsively shooting, because you cannot be sure in advance exactly how the situation, the scene, is going to unfold.”).

If would therefore be devastating if protection were limited to those specific works of art that are created for the purpose of conveying a particular message to an audience. The next Jackson Pollack, Arnold Schoenberg, and Lewis Carroll would not be free to create their art. The next Henri Cartier-Bresson and Vivian Maier could be stopped by the government from making their photographs. Artistic expression would be suppressed, and our lives as individuals and as a society would be all the poorer as a result. As President Johnson put it upon signing into law the legislation that called for the creation of the National Endowment for the Arts: “Art is a nation’s most precious heritage. For it is in our works of art that we reveal to ourselves, and to others, the inner vision which guides us as a nation. And where there is no vision, the people perish.” President Lyndon B. Johnson, Remarks at the Signing of the Arts and Humanities Bill (Sept. 29, 1965).

III. CONCLUSION

For the foregoing reasons, the Society for Photographic Education urges this Court to reverse the district court' and find that making a photograph is

protected by the First Amendment, regardless of whether the photograph is created for the purpose of communicating a particular message to an audience.

October 31, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,809 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Dated: October 31, 2016

/s/ Eli Segal

Eli Segal

CERTIFICATION OF IDENTICAL COMPLIANCE OF BRIEF

I, Eli Segal, hereby certify that the electronic version of this brief is identical to the text version in the paper copies that will be hand delivered to the Clerk of the Court of the United States Court of Appeals for the Third Circuit.

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/s/ *Eli Segal*
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I, Eli Segal, hereby certify that I am a member of the bar of this court.

Dated: October 31, 2016

/s/ *Eli Segal*
Eli Segal

CERTIFICATE OF SERVICE

I, Eli Segal, certify that I served this Brief on counsel for all parties by causing an electronic copy of the Brief to be filed via CM/ECF.

Dated: October 31, 2016

/s/ Eli Segal
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