

**United States Court of Appeals  
For the First Circuit**

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No. 06-1775

MARY T. JEAN,  
Plaintiff, Appellee,

v.

MASSACHUSETTS STATE POLICE, et al.,  
Defendants, Appellants.

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
[Hon. F. Dennis Saylor IV, U.S. District Judge]

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Before

Boudin, Chief Judge,  
Campbell, Senior Circuit Judge,  
and Lipez, Circuit Judge.

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Ronald F. Kehoe, Assistant Attorney General, with whom Thomas F. Reilly, Attorney General, was on brief, for appellants.

Eric B. Hermanson, with whom Sara E. Solfanelli, Choate, Hall & Stewart LLP, John Reinstein, and American Civil Liberties Union of Massachusetts were on brief, for appellee.

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June 22, 2007

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**LIPEZ, Circuit Judge.** This case presents the question of whether the First Amendment prevents Massachusetts law enforcement officials from interfering with an individual's internet posting of an audio and video recording of an arrest and warrantless search of a private residence, when the individual who posted the recording had reason to know at the time she accepted the recording that it was illegally recorded. The appellant state police officers challenge the district court's grant of a preliminary injunction enjoining them from taking any action that interferes with appellee Mary Jean's posting of the recording on a website. We find this case materially indistinguishable from the Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), and thus conclude that Jean has a reasonable likelihood of success on the merits of her claim that the First Amendment protects the posting of a recording under such circumstances. Consequently, we uphold the preliminary injunction.

## I.

### A. Factual Background

The facts are largely undisputed; where disputes exist, they do not affect the outcome of this appeal.

Jean, a local political activist in Worcester, Massachusetts, maintained a website displaying articles and other information critical of former Worcester County District Attorney

John Conte.<sup>1</sup> In October 2005, Paul Pechonis contacted Jean through her website. They had never met previously. Pechonis explained that, on September 29, eight armed State Police troopers arrested him in his home on a misdemeanor charge. He met the officers at the front door and allowed them to handcuff him. The officers then conducted a warrantless search of his entire house. The arrest was both audiotaped and videotaped by a "nanny-cam," a motion-activated camera used by parents to monitor children's activities within the home. The parties contest whether the recording was accidental; this fact is immaterial to the outcome of the case.

Pechonis provided Jean a copy of the audio/video recording. We assume, for purposes of this appeal, that when Jean accepted the tape she had reason to know that it had been illegally recorded. On January 29, 2006, Jean posted the recording on her website accompanied by an editorial comment critical of Conte's performance in office.

By letter dated February 14, the State Police advised Jean that her actions violated Mass. Gen. Laws ch. 272, § 99 ("section 99"), and were subject to prosecution as a felony.<sup>2</sup> The

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<sup>1</sup> The website is accessible at [www.conte2006.com](http://www.conte2006.com). Conte is no longer in office.

<sup>2</sup> Mass. Gen. Laws ch. 272 § 99(B)(4) defines an "interception" as "to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication." In pertinent part, Mass. Gen. Laws ch. 272

letter stated that, if Jean did not "cease and desist, within 48 hours of receipt of this letter, from posting this unlawful tape on the internet or any other publicly accessible site," the police would "refer this matter to the District Attorney's office for further investigation and possible prosecution." The police sent a second letter on March 29, which clarified the previous letter by stating that, given the statute's limitation to "wire or oral communications," Jean would not be in violation if she removed the audio portion of the recording from her website.

#### **B. Procedural History**

On February 17, 2006, Jean filed a complaint in federal district court in Massachusetts seeking a temporary restraining order and preliminary and permanent injunctive relief against the Massachusetts State Police, State Police Superintendent Thomas G. Robbins, and Attorney General Thomas Reilly in their individual and official capacities (collectively, "the police").<sup>3</sup> Citing her

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§ 99(C)(1) states that any person who "willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception" may be punished with a fine of up to ten thousand dollars, imprisoned for up to five years, or both. Section 99(C)(3) states that an individual who "willfully discloses or attempts to disclose to any person the contents of any wire or oral communication, knowing that the information was obtained through interception . . . shall be guilty of a misdemeanor." Finally, section 99(C)(6) prohibits "permit[ting]," "participat[ing] in a conspiracy to commit," or serving as an "accessory" to other violations of section 99.

<sup>3</sup> Since the time Jean filed her complaint, Reilly has been succeeded as Massachusetts Attorney General by Martha Coakley. Under Federal Rule of Civil Procedure 25, however, "the action does

