

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 16-13031

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RYAN PERRY,

Plaintiff-Appellant,

v.

CABLE NEWS NETWORK, INC., and  
CNN INTERACTIVE GROUP, INC.,

Defendants-Appellees.

On appeal from United States District Court  
for the Northern District of Georgia

No. 1:14-cv-02926-ELR

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RESPONSE IN OPPOSITION TO MOTION FOR SANCTIONS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT

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Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Defendants-Appellees certify that the certificate of interested persons and corporate disclosure statement, as amended on June 27, 2016, is complete and correct.

Dated: July 18, 2016

Respectfully submitted,

**Cable News Network, Inc. & CNN Interactive  
Group, Inc.**

By: /s/ Jeffrey Landis

Jeffrey Landis

ZWILLGEN PLLC

1900 M St. NW, Ste. 250

Washington, DC 20036

(202) 706-5203

[jeff@zwillgen.com](mailto:jeff@zwillgen.com)

## INTRODUCTION

Appellant Ryan Perry's motion seeks to sanction Appellees Cable News Network, Inc. and CNN Interactive Group, Inc. (collectively "CNN") for asking this Court to address a threshold issue: does the Supreme Court's holding in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016) ("*Spokeo*") compel this Court to dismiss Mr. Perry's case because he lacks standing to sue under the Video Privacy Protection Act, 18 U.S.C. § 2710? But Perry does not identify a single Eleventh Circuit case (or any case for that matter) suggesting that raising a good faith objection to Appellant's standing on a motion to dismiss early in the appellate process is procedurally improper, let alone sanctionable. That is because it is not. Appellate courts expressly encourage parties to address such issues early in proceedings for the sake of efficiency (which was CNN's goal in making its motion). If anything, Ryan Perry's appeal—one directly controlled by a binding circuit decision—is without merit, not CNN's motion. This Court can decide to refer the question of whether Mr. Perry has standing to the merits panel, but that does not make CNN's motion improper.

Mr. Perry's motion rests on four faulty premises that, once corrected, confirm that CNN's motion is proper. First, Mr. Perry asserts that CNN's motion is one to dismiss solely for lack of appellate jurisdiction. It is not. CNN moved to

dismiss because this Court, like the District Court, lacks subject matter jurisdiction because of *Spokeo*. CNN agrees this Court has appellate jurisdiction to dismiss Mr. Perry's claims for lack of subject matter jurisdiction. Second, Mr. Perry wrongly assumes that motions to dismiss for lack of subject matter jurisdiction are improper. They are not. Appellate courts may address jurisdictional issues at any time. Third, Mr. Perry suggests that *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at \*3 (11th Cir. July 6, 2016) (per curiam) renders CNN's motion without merit. It does not. An unpublished, non-precedential case addressing a different statute with different facts does not apply here. Fourth, Mr. Perry claims that CNN filed its motion to expand CNN's word limitations. Not true. CNN, in good faith, raised a threshold legal issue at an early stage in the appeal that, if resolved as CNN believes it should be, would *reduce* briefing, not increase it.

Mr. Perry's motion for sanctions appears to be little more than a tactical ploy. Knowing this Court's binding decision in *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015), which affirmed the dismissal of virtually identical VPPA claims, likely dooms his appeal, his only choice is to prevent CNN from fully addressing the roadblock *Ellis* presents. This is evidenced by the sanctions he requests—asking the Court to treat CNN's motion as its merits brief or deducting

from CNN's merits brief *double* the number of words used in its motion. The Court should reject Mr. Perry's request.<sup>1</sup>

### LEGAL STANDARD

CNN's motion is not frivolous under any subsection of Eleventh Circuit Rule 27-4. Three types of motions may be frivolous under that rule: motions that (1) lack a legal basis, (2) contain false or unsupported assertions of material facts, or (3) are presented for an improper purpose—such as to harass or cause unnecessary delay or needless increase in the cost of litigation. 11th Cir. R. 27-4. Mr. Perry does not specifically state which, if any, of these grounds he relies on, but it appears that he believes that the motion lacks a legal basis or that the motion was brought only to cause delay or an increase in the cost of litigation. Neither is the case.

### ARGUMENT

#### **I. CNN Moved to Dismiss Based on Lack of Subject Matter Jurisdiction; Not for Lack of Appellate Jurisdiction.**

First, Mr. Perry claims that CNN has moved to dismiss solely for lack of appellate jurisdiction under 28 U.S.C. § 1291, attacking an argument that CNN never made. CNN moved to dismiss because this Court, like the District Court, lacks subject matter jurisdiction in light of *Spokeo*.<sup>2</sup> CNN does not cite to 28 U.S.C.

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<sup>1</sup> To the extent the Court does not wish to entertain briefing on Mr. Perry's standing, it should simply refer the issue to the merits panel.

<sup>2</sup> The fact that CNN described the relief it sought as this Court dismissing Mr. Perry's appeal as opposed to vacating the district court's decision and remanding with

§ 1291 because it does not dispute that this Court has appellate jurisdiction to determine that it and the district court lack subject matter jurisdiction. Appellate jurisdiction is derivative of district court jurisdiction. *A.L. Rowan & Son, Gen. Contractors, Inc. v. Dep't of Hous. and Urban Dev.*, 611 F.2d 997, 998-99 (5th Cir. 1980). CNN's motion argues that this Court (and the district court) lack subject matter jurisdiction based on *Spokeo*. As a result, the appeal, and Mr. Perry's case, should be dismissed. Mr. Perry's attack on a strawman argument that CNN did not assert should be ignored.

## **II. Motions to Dismiss for Lack of Subject Matter Jurisdiction Are Proper.**

Appellate courts may address jurisdictional issues at any time, including before or after briefing on the merits. *Beta Upsilon Chi Upsilon Chapter at the Univ. of Florida v. Machen*, 586 F.3d 908, 916 (11th Cir. 2009) (explaining that “[t]he law is clear that if pending an appeal, events transpire that make it impossible for this court to provide meaningful relief, the matter is no longer justiciable”). Mr. Perry does not cite a single Eleventh Circuit case suggesting otherwise. Instead, he relies on two inapposite Seventh Circuit cases. But even that court recognizes that *subject matter jurisdiction* issues can, and indeed should, be addressed at the outset of the

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instructions to dismiss for want of jurisdiction, does not change the fact that the substance of CNN's motion is focused on underlying subject matter jurisdiction, not appellate jurisdiction. Mr. Perry seems to understand this, devoting the majority of his response to CNN's motion to this argument. See Appellant's Opp. to Appellee's Mot. to Dismiss (July 15, 2016) at 3-20.

case. In the Seventh Circuit, the docketing statement must include a jurisdictional statement, and appellees must note objections to that statement at the outset of the appeal. 7th Cir. R. 3(c)(1); *United States v. Lloyd*, 398 F.3d 978, 981 (7th Cir. 2005).

As the Seventh Circuit explains:

One of the purposes of the docketing statement, therefore, is to enable the court of appeals to affirmatively determine whether subject matter jurisdiction exists. The parties are ordered early on to clear up any inadequacies or deficiencies noted in the information provided in the statement as to either appellate or subject matter jurisdiction. Failure to remedy a problem may result in the dismissal of the case or imposition of sanctions.

Practitioner’s Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (2014 ed.) at 19 (citing *Meyerson v. Harrah’s East Chicago Casino*, 312 F.3d 318 (7th Cir. 2002); *Tylka v. Gerber Products Co.*, 211 F.3d 445 (7th Cir. 2000)) available at <http://www.ca7.uscourts.gov/forms/Handbook.pdf> (accessed July 18, 2016).

Other circuits’ rules also contemplate motions for dismissal and specifically require that Appellees file them at an early stage. The Federal Circuit’s rules, for instance, state that “[a] motion to dismiss for lack of jurisdiction or to remand should be made as soon after docketing as the grounds for the motion are known.” Fed. Cir. R. 27(f). The Eighth Circuit’s rules set a short and specific period, stating “[t]he appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court's jurisdiction. Except for good cause or on the motion of the

court, a motion to dismiss based on jurisdiction must be filed within 14 days after the court has docketed the appeal.” 8th Cir. R 47A(b).<sup>3</sup>

Although this Court’s rules do not specifically address motions to dismiss for lack of subject matter jurisdiction<sup>4</sup> or when the parties should address such issues, they do not foreclose such a motion. This court can entertain CNN’s motion and stay further merits briefing,<sup>5</sup> refer CNN’s motion to the merits panel, or decline to entertain CNN’s motion. It is not frivolous to present this Court with the opportunity to resolve jurisdictional issues early, as the Seventh Circuit requests in every case.

### **III. CNN Need Not Withdraw Its Motion Based on an Unpublished, Non-Binding, and Distinguishable Decision.**

Mr. Perry suggests, but stops short of expressly claiming, that CNN should withdraw its motion in light of a recent decision by a panel of this Court in *Church v. Accretive Health, Inc.*, 2016 WL 3611543 at \*3. But Perry fails to point out that *Church* came out after CNN filed its motion and it is an unpublished opinion. This Circuit’s rules state that “Unpublished opinions are not considered binding

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<sup>3</sup> See also 1st Cir. R. 27.0(c) (“on motion of appellee or sua sponte . . . the court may dismiss the appeal . . . if the court lacks jurisdiction,” and “[m]otions for such relief should be promptly filed when the occasion appears.”); DC Cir. R. 27(g)(1) (“Any motion which, if granted, would dispose of the appeal or petition for review in its entirety . . . must be filed within 45 days of the docketing of the case in this court. . .”)

<sup>4</sup> 11th Cir. R. 27-1(d) states that a single judge may address any relief that may be sought by motion, “except to dismiss.”

<sup>5</sup> This is what the Sixth Circuit did with respect to a similar motion filed by appellant in that case. See Ex. A, Letter Re: Case No. 16-1321/16-1380, *Rose Coulter-Owens, et al v. Time Inc.* Originating Case No. : 2:12-cv-14390 (May 26, 2016).



precedent, but they may be cited as persuasive authority.” 11th Cir. R. 36-2. As a result, “the court generally does not cite to its ‘unpublished’ opinions because they are not binding precedent.” I.O.P. 7. Nor does he state that *Church* involved an entirely different statute and wholly different facts than those presented here. Put simply, a non-binding case about a different statute that came out after CNN filed its motion does not render CNN’s motion frivolous.

Mr. Perry’s reliance on *Church* to support his request for sanctions is also somewhat ironic. In *Ellis v. Cartoon Network, Inc.*, 803 F.3d 1251 (11th Cir. 2015), this Court addressed VPPA claims virtually identical to Mr. Perry’s and affirmed the district court’s dismissal. And unlike *Church*, *Ellis* is a published decision that is *binding precedent* under this Court’s rules. If CNN’s motion to dismiss is frivolous because of *Church*, then Mr. Perry’s appeal is frivolous because of *Ellis*.

#### **IV. The Sanctions Mr. Perry Seeks Demonstrate the Tactical Nature of His Motion.**

Despite citing no Eleventh Circuit authority suggesting CNN’s motion was improper, let alone sanctionable, Mr. Perry asks this Court to (1) prevent CNN from filing a merits brief, (2) shorten its merits brief by nearly 10,000 words, or (3) strike its motion entirely. Mr. Perry cites no case that has sanctioned a party that has filed a motion by preventing it from filing a merits brief. Of course, that is not surprising; such a sanction would significantly hamper CNN’s due process rights by preventing it from responding to Mr. Perry’s arguments on the merits of his claim.

Nor does Mr. Perry cite any Circuit authority for deducting nearly 10,000 words from CNN's merits brief. Instead, Mr. Perry points to two Seventh Circuit opinions, *Custom Vehicles v. Forest River, Inc.*, 464 F.3d 725 (7th Cir. 2006) and *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007), issued by the same judge (one of which cited the other). But these two out-of-circuit cases are easily distinguished.

In *Custom Vehicles*, the appellant filed a brief asking that the Court strike particular sentences of the appellee's brief that allegedly included misstatements of facts. The court noted that regardless of whether the appellee's brief included misstatements, asking an appeals court to edit a brief was "a different kettle of fish" that "does nothing but squander time." *See* 464 F.3d at 727. Noting that he saw "one such motion during each week" that he was acting as motions judge, Judge Easterbrook decided to "raise the stakes" and shorten the permissible length of appellant's reply brief by twice the length of the motion. *Id* at 728.

*Redwood* is similarly distinguishable. That case, which Judge Easterbrook described in the first sentence of his opinion as a "grudge match," involved "a profusion of motions and cross-motions for sanctions" and a "breakdown of decorum," including a deposition during which various attorneys' behavior was "shameful. . . unprofessional and violated the Federal Rules of Civil Procedure," which led to censure and admonition. 476 F.3d at 465-66, 469-70. On top of this behavior, both parties filed "motions to strike sentences or sections" out of the other

party's brief. Judge Easterbrook criticized both parties for filing such motions, noting that they "serve no purpose except to aggravate the opponent" and waste everyone's time because "[t]hey go to a motions panel, which does not know (and cannot efficiently learn) which statements are accurate depictions of the record and, if erroneous, whether the error is legally material." *Id.* at 471.

CNN's choice to file a motion addressing a threshold legal question of jurisdiction based on a change in law that occurred after the district court ruled on defendants' motion to dismiss bears no similarity to either case Mr. Perry cites. Subject-matter jurisdiction must be considered in every case, and where the Supreme Court has recently adjusted the standard, it deserves special attention.

A party could include arguments regarding the lack of subject matter or appellate jurisdiction in its response brief—but it need not; it can move to dismiss. And this Court could invite briefing on jurisdictional issues *sua sponte* before the parties file merits briefs. Here, where an intervening change in law should alter the result of a district court's decision, CNN continues to believe that addressing that issue separately before reaching the merits would be more, not less, efficient. There is nothing sanctionable about that approach.

## CONCLUSION

Mr. Perry's appeal faces an uphill battle. This Circuit has already addressed nearly identical claims in *Ellis* and affirmed the district court's judgment dismissing

those claims. Thus, to win his appeal, he has the daunting task of distinguishing binding precedent on nearly identical facts. Knowing he cannot do so, his only recourse is simply to prevent CNN from responding to his arguments and hoping this Court will follow him down the path of creating an intra-circuit split. The Court should reject that invitation. Rather than cutting off CNN's ability to address the merits of Mr. Perry's appeal as a sanction for addressing jurisdictional issues, it should reject Mr. Perry's unfounded request for sanctions, consider CNN's motion to dismiss, and allow CNN to brief the issues fully on appeal.

Dated: July 18, 2016

Respectfully submitted,

**Cable News Network, Inc. & CNN Interactive Group, Inc.**

By: /s/ Jeffrey Landis  
Marc Zwillinger  
Jeffrey Landis  
ZWILLGEN PLLC  
1900 M St. NW, Ste. 250  
Washington, DC 20036  
(202) 706-5203  
[marc@zwillgen.com](mailto:marc@zwillgen.com)  
[jeff@zwillgen.com](mailto:jeff@zwillgen.com)

James Lamberth  
TROUTMAN SANDERS LLP  
600 Peachtree Street NE, Suite 5200  
Atlanta, GA 30308  
(404) 885-3362  
[james.lamberth@troutmansanders.com](mailto:james.lamberth@troutmansanders.com)

*Attorneys for Defendants-Appellees Cable News Network, Inc. & CNN Interactive Group, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 18, 2016, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Jeffrey Landis* \_\_\_\_\_  
*Attorney for Defendants/Appellees*