No. 21-5031

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARLY GRAFF, et al.,

Plaintiffs-Appellants,

v.

ABERDEEN ENTERPRIZES II, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Oklahoma
Civil Action No. 4:17-cv-00606-TCK-JFJ
Hon. Terence C. Kern

PLAINTIFFS-APPELLANTS' RESPONSIVE SUPPLEMENTAL BRIEF RELATED TO THE COURT'S ORDER OF FEBRUARY 24, 2022

Pursuant to this Court's order dated February 24, 2022, Plaintiffs-Appellants ("Plaintiffs") submit the following response to Defendants-Appellees' ("Defendants") Joint Supplemental Brief regarding the impact of *Kerr v. Polis*, 20 F.4th 686 (10th Cir. 2021), on this appeal.

Plaintiffs agree with Defendants that *Kerr* and the cross-appeal rule prohibit the Court from affirming a jurisdictional dismissal on Rule 12(b)(6) grounds if the dismissal would "'enlarg[e]' the judgment" for Defendants by "'changing a dismissal without

prejudice to a dismissal with prejudice.'" Appellees' Suppl. Br. 2 (quoting *Kerr*, 20 F.4th at 714 (Bacharach, J., concurring)). As this Court recognized in its order for supplemental briefing, the "merits-based dismissal" urged by Defendants "would, by necessity, be with prejudice." Order 2. It follows that this Court may not affirm the district court's judgment on those grounds.

Defendants reject the premise of this Court's order and argue that the Court can dismiss on alternate, merits-based grounds *without* prejudice. Appellees' Suppl. Br. 3–4. They contend that this appeal is "remarkably similar to the procedural posture of *Kerr*," *id.* at 2, where the Court affirmed what the district court had deemed a dismissal without prejudice under Rule 12(b)(1) as a dismissal without prejudice under Rule 12(b)(6). But as explained below, that conversion in *Kerr* was based on the Court's conclusion that the district court had done the relevant 12(b)(6) analysis and (understandably) mislabeled it as a 12(b)(1) analysis. Here, by contrast, Defendants do not ask the Court to merely relabel the district court's 12(b)(1) analysis as a 12(b)(6) one, nor can they: the district court dismissed based on *Rooker-Feldman*, *Heck*, and *Younger*, which are jurisdictional grounds, *see* Order 1–2. Instead, Defendants ask the Court to decide merits issues not considered by the district court at all, and then to depart from the usual rule that dismissals based on such grounds are dismissals "with prejudice." *Kerr* does not support that approach, and other case law counsels against it.

Kerr involved a group of plaintiffs, including several school districts and various other political subdivisions, that challenged a Colorado law requiring voter approval for

any new tax. The plaintiffs alleged that the law deprived them of a Republican form of government guaranteed by the U.S. Constitution and Colorado's statehood Enabling Act. Applying then-standing precedent from this Circuit, the district court held that these plaintiffs lacked "political subdivision standing" because neither the Republican Form of Government Clause nor the Enabling Act authorized political subdivisions to sue their parent state. *See Kerr*, 20 F.4th at 689. Thus, the district court dismissed their claims for lack of subject-matter jurisdiction under Rule 12(b)(1). *Id.*

Sitting en banc, this Court ultimately affirmed the district court's dismissal without prejudice, but under Rule 12(b)(6) rather than Rule 12(b)(1). *Id.* The Court found it appropriate to affirm on Rule 12(b)(6) grounds as a result of its departure from prior cases that treated political subdivision standing as a threshold jurisdictional inquiry. *See id.* The Court held that what it had "formerly referred to as political subdivision standing," rather than being jurisdictional, actually concerned whether plaintiffs stated a claim on which relief could be granted, because it involved "discerning whether political subdivisions have alleged a cause of action against their parent state in a given case." *Id.* at 696. Evaluating the plaintiffs' claims through this lens, the Court held that the plaintiffs failed to state a viable claim for relief because they "ha[d] not identified any constitutional or statutory provisions that authorize[d] them to bring the present cause of action." *Id.* at 692.

In other words, despite applying a different label under Rule 12(b), the *Kerr* Court affirmed the dismissal for virtually the same reasons cited by the district court. *See id.*

at 699–700, 704. Indeed, the Court adopted the same test that the district court had used below. *Id.* at 696–97 & n.4. As a result, the *Kerr* majority was able to dismiss criticisms about the potential usurpation of the district court's authority to consider the merits in the first instance. *See id.* at 700. As the majority explained, the district court had ultimately "performed the correct analysis," and "nothing in [its] analysis turned on its mistake of treating th[e] inquiry as jurisdictional." *Id.* at 700–01 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010)); *see also Morrison*, 561 U.S. at 254 ("Since nothing in the analysis of the courts below turned on the mistake, a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion.").

The present appeal is fundamentally different from *Kerr* in this respect. First, reaching the alternate grounds for dismissal urged by Defendants would require the Court to decide issues not considered by the district court under any heading. Defendants ask the Court to hold that Plaintiffs have failed to state claims under the Constitution, the Racketeer Influenced and Corrupt Organizations Act, and Oklahoma state law, and they have asserted myriad immunity defenses.[1] Unlike in *Kerr*, the district

[1] Though Appellees cite several unpublished cases for the proposition that "there is support for dismissing a claim based upon qualified immunity without prejudice," Appellees' Suppl. Br. 3–4 (emphasis omitted), *in this context* courts have declined to address immunity defenses never considered by the district court, because "[t]he successful assertion of an immunity defense, had the District Court reached that issue, would have resulted in a dismissal of the . . . claims with prejudice," and the appellate court was thus precluded, in the absence of a cross-appeal, from changing a dismissal without prejudice to a dismissal with prejudice. *See Standard Inv. Chartered, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 560 F.3d 118, 126 (2d Cir. 2009).

court never addressed the merits of those claims. This distinction is critical—because this Court would be required to adjudicate questions the district court never considered, this is not simply a case of putting a "new 12(b)(6) label" on "the same Rule 12(b)(1) conclusion," as in *Kerr*. 20 F.4th at 712 (Tymkovich, C.J., concurring) (quoting *Morrison*, 561 U.S. at 254); *see id.* at 700 (majority op.). Affirming upon these alternate grounds *would* require this Court to "usurp the district court and become the first court to consider this case on the merits." *Id.* at 700–01 (quoting *id.* at 731 (Briscoe, J., concurring in part and dissenting in part)); *see also Lee v. Chicago*, 330 F.3d 456, 471 (7th Cir. 2003) (reversing district court's dismissal on jurisdictional grounds, and declining to address alternative grounds on the merits, as "without cross-appeal, an appellee may not attack the decree with a view to either enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below" (internal quotation marks omitted)); *El Paso Nat. Gas Co. v. Neztsosie,* 526 U.S. 473, 479 (1999).[2]

Second, under the logic of *Kerr*, a dismissal on the merits here would enlarge the judgment in favor of Defendants, in contravention of the cross-appeal rule, if Plaintiffs cannot cure the "pleading defect" in question. *See Kerr*, 20 F.4th at 714 (Bacharach, J.,

[2] On the view set forth by Chief Judge Tymkovich's concurrence in *Kerr*, the Court would not, under these circumstances, be able to "convert the [defendant's] Rule 12(b)(1) motion to a motion to dismiss under Rule 12(b)(6)," 20 F.4th at 689, without implicating the cross-appeal rule by "alter[ing] [the] judgment to benefit the non-appealing party," *id.* at 712 n.9 (Tymkovich, C.J., concurring).

concurring). The cross-appeal rule applies "when an appellate court alters a judgment to benefit the non-appealing party" by "enlarging the benefit to the appellee" or "lessening the rights of the appellant." *Id.* at 714 & n.2 (internal quotation marks omitted). In his concurrence, Judge Bacharach emphasized the "factual[]" error underlying Chief Judge Tymkovich's contention that a prejudicial dismissal "wouldn't . . . enlarg[e] the judgment because the pleading defect couldn't be cured." *Id.* at 714. The plaintiffs in *Kerr* could remedy the defect if the dismissal remained without prejudice, Judge Bacharach explained, by refiling and presenting new evidence of legislative history that might bear on whether Congress intended to create a cause of action. *Id.* at 714–15.[3]

That is not true for the plaintiffs in this case. For some of Plaintiffs' claims, there would be no realistic opportunity to cure the "defect" asserted. *See generally* Aberdeen Br. 16–37; Pls.' Reply Br. 28–47. Thus, the practical effect of affirming the non-prejudicial dismissal here would be a dismissal *with* prejudice. As such, this Court is without jurisdiction to modify the judgment, because Defendants failed to cross-appeal. *Cf. Kerr*, 20 F.4th at 714 & n.3 (Bacharach, J., concurring) (holding for a majority of the Court that "the cross-appeal rule prevents alteration of the dismissal without prejudice

[3] In her partial dissent, Judge Briscoe argued that even affirming the dismissal without prejudice implicated the cross-appeal rule because it imposed "an all but insurmountable burden" on the plaintiffs in their effort to prevail on the merits. *Id.* at 730–31 (Briscoe, J., concurring in part and dissenting in part).

into a dismissal with prejudice"); *id.* at 715 ("[W]e treat the cross-appeal rule as jurisdictional."); *Lee*, 330 F.3d at 471 ("A ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits, whereas a dismissal under Rule 12(b)(6) would be. Accordingly, the City seeks to enlarge its rights and supplement the district court's decree with a ruling on the merits that was not reached below. It cannot do this without filing a cross-appeal." (citation omitted)).

* * *

For the reasons stated here and in Plaintiffs' Reply Brief,[4] if the Court concludes that the district court erred in dismissing the complaint under the *Rooker-Feldman*, *Younger*, and *Heck* doctrines, it should simply vacate the judgment and remand the case to the district court for further proceedings.

[4] Even if Defendants were correct that "*Kerr* does not *prohibit* the Court from considering the 'merits' in conjunction with a proper Rule 12(b)(6) analysis," Appellees' Suppl. Br. 5 (emphasis added), Plaintiffs cite several cases in their Reply Brief that demonstrate why the Court should nevertheless decline to affirm on alternate grounds that were never addressed by the district court in the first instance. *See* Reply Br. 15–16. Although Defendants make much of the "hundreds of pages of briefing related to the underlying Motions to Dismiss" submitted by Plaintiffs below, Appellees' Suppl. Br. 5 n.3, the volume of briefing on the issues cuts against Defendants. Not only did the district court not address the alternate grounds, but there was no hearing on the motions to dismiss. Thus, Defendants are asking this Court to review a cold record, which runs headlong into the general principle that a court of appeals sits as "a court of review, not of first view." *Kerr*, 20 F.4th at 731 (Briscoe, J., concurring in part and dissenting in part) (quoting *Childers v. Crow*, 1 F.4th 792, 801 (10th Cir. 2021)); *accord* Reply Br. 16.

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Respectfully Submitted,

/s/ Shelby Calambokidis

Daniel E. Smolen
Robert M. Blakemore
SMOLEN & ROYTMAN
701 South Cincinnati Ave.
Tulsa, OK 74119
(918) 585-2667
danielsmolen@ssrok.com
bobblakemore@ssrok.com

Tara Mikkilineni
Marco Lopez
CIVIL RIGHTS CORPS
1601 Connecticut Ave. N.W., Ste. 800
Washington, D.C. 20009
(202) 844-4975
tara@civilrightscorps.org
marco@civilrightscorps.org

Attorneys for Plaintiffs-Appellants

Shelby Calambokidis
Seth Wayne
Kelsi Brown Corkran
Mary B. McCord
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
Georgetown University Law Center
600 New Jersey Ave. N.W.
Washington, D.C. 20001
(202) 661-6599
sc2053@georgetown.edu
sw1098@georgetown.edu
kbc74@georgetown.edu
mbm7@georgetown.edu

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the appellate CM/ECF system. Listed counsel in this appeal are registered CM/ECF users who will be served by the appellate CM/ECF system.

/s/ Shelby Calambokidis
Shelby Calambokidis