975 F.3d 236
United States Court of Appeals, Second Circuit.

George H. BUTCHER III,
Plaintiff-Appellant,
v.
Bradley W. WENDT, Rick Fitzgerald, Michael D. Cassell, Joseph Farneti,
Defendants-Appellees.

Docket No. 19-224-cv
|
August Term, 2019
|
Argued: March 10, 2020
|
Decided: September 22, 2020

Opinion

Judge Menashi concurs in part and concurs in the judgment in a separate opinion.

LOHIER, Circuit Judge:

George Butcher III, pro se, appeals from a judgment of the United States District Court for the Southern District of New York (Schofield, J.) dismissing his complaint in part under the Rooker-***239** Feldman[1] doctrine and in part under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(c), (d), as well as 42 U.S.C. § 1983. Butcher alleged that the individual defendants—former employees of Butcher's company, a lawyer for one of the employees, and a New York Supreme Court justice—conspired against him in arbitration and judicial proceedings arising out of an employee compensation dispute.

We affirm the dismissal of all the claims under Rule 12(b)(6), without addressing the dismissal in part under the Rooker-Feldman doctrine.

BACKGROUND

At all times relevant to this litigation, Butcher was the Chairman and Chief Executive Officer of the BondFactor Company. In April 2010 BondFactor hired Bradley Wendt to be its president. After some negotiation, Wendt's employment contract provided for a base compensation of $1.2 million, which would accrue each year and vest when the company received a $10 million capital infusion. Until that time, Wendt was entitled to a minimum salary of $28,000. By May 2013 the initial capital infusion of $10 million had occurred, and Wendt's accrued base compensation was fully vested. In July 2013, however, Butcher and BondFactor amended employee contracts to delay payment of unpaid vested compensation until the company had raised $500 million. Although Wendt objected to adding the new $500 million infusion target to his contract, he eventually signed the amended contract.

Rick Fitzgerald was hired as BondFactor's managing director in 2011 with a base compensation of $250,000, which accrued annually and was set to vest upon a capital infusion of $20 million. Fitzgerald elected to forgo a minimum salary in exchange for reimbursements for weekly travel between New York and Fitzgerald's home in Florida.

Wendt and Fitzgerald soon began to complain about their compensation, and both were fired in November 2013. They started an arbitration proceeding against BondFactor and Butcher, raising several claims relating to their employment and compensation. In a partial final award entered in February 2015, the arbitrator dismissed all of Wendt's claims and several of Fitzgerald's claims. As for Fitzgerald's claim under the Fair Labor Standards Act (FLSA) and his contractual claim that BondFactor improperly refused to reimburse his travel expenses, however, the arbitrator awarded Fitzgerald $156,459.76 plus attorneys' fees, for which Butcher and BondFactor were jointly and severally liable. In May 2015 the arbitrator issued a final award that determined the amount of Fitzgerald's attorneys' fees.

Having lost, Wendt challenged the arbitrator's decision in State Supreme Court under Article 75 of New York's Civil Practice Law and Rules.[2] Justice Joseph Farneti, a defendant in this litigation, presided over the action. Attorney Michael Cassell, another defendant in this litigation, represented Wendt in the Article 75 proceeding. Butcher and BondFactor principally moved to dismiss the petition as untimely, but Justice Farneti denied the motion, concluding ***240** that the time for filing the petition began to run upon entry of the final award in May 2015 rather than the partial award in February. Turning to the merits, Justice Farneti vacated the arbitration award. He explained that the 2013 amendment to Wendt's contract violated New York public policy because it increased the capital infusion target upon which Wendt's base compensation would vest after the original infusion target had already been reached. Butcher and BondFactor

appealed Justice Farneti's decision. The New York State Appellate Division reversed Justice Farneti's judgment, concluding that Wendt's petition should have been dismissed as untimely. Wendt v. BondFactor Co., 94 N.Y.S.3d 134, 169 A.D.3d 808 (2d Dep't 2019).

In October 2016 Wendt and Fitzgerald, represented by Cassell, filed a lawsuit in the Southern District of New York claiming that Butcher had retaliated against them in violation of the federal Dodd-Frank Act. The district court dismissed the complaint as barred under the doctrine of res judicata because Wendt and Fitzgerald could have raised their retaliation claims in the earlier arbitration. See Wendt v. BondFactor Co., No. 16 Civ. 7751 (DLC), 2017 WL 3309733, at *7 (S.D.N.Y. Aug. 2, 2017).

In October 2017, while Butcher's appeal to the Appellate Division was still pending, Butcher filed this action in federal court alleging that Wendt, Fitzgerald, Cassell, and Justice Farneti conspired to defraud him and to deprive him of his due process rights in the Article 75 proceeding, in violation of RICO, 18 U.S.C. § 1962(c), (d), and 42 U.S.C. § 1983. In his second amended federal complaint, Butcher alleged that Wendt and Fitzgerald made a number of false statements that were designed to manufacture a future lawsuit against BondFactor, that Wendt and Fitzgerald conspired to testify falsely during the arbitration proceedings, and that attorney Cassell knowingly filed false statements in the Article 75 proceeding and the Dodd-Frank lawsuit. Butcher also alleged that, as early as December 2014, well prior to entry of the final arbitration award, Wendt, Fitzgerald, Cassell, and Justice Farneti were already conspiring to vacate the award. Wendt and Cassell delayed filing the Article 75 proceeding, Butcher claimed, "to facilitate the selection of Farneti as the presiding officer." App'x at 308. Finally, Butcher asserted that Wendt and Cassell must have bribed Justice Farneti to rule in Wendt's favor.

The District Court held that the Rooker-Feldman doctrine deprived it of subject matter jurisdiction over Butcher's RICO claims related to Wendt's compensation and certain claims arising from the Article 75 proceeding. It dismissed Butcher's remaining claims on the merits for failure to state a claim. It was after the District Court dismissed Butcher's complaint that the New York Appellate Division reversed Justice Farneti's judgment. See supra at 6.

This appeal followed.

DISCUSSION

I

Butcher first argues that the District Court improperly relied on the Rooker-Feldman doctrine to dismiss his claims related to Wendt's compensation for lack of jurisdiction while an appeal of Justice Farneti's judgment in the Article 75 proceeding was pending. We conclude that these claims, like the others in Butcher's complaint, were properly dismissed for failure to state a claim and, therefore, we affirm on a different basis from that relied on by the District Court. See Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 396 n.2 (2d Cir. 2018).

***241** We review de novo the dismissal of Butcher's claims under Federal Rule of Civil Procedure 12(b)(6). See Fink v. Time Warner Cable, 714 F.3d 739, 740 (2d Cir. 2013). "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quotation marks omitted), and that "raise[s] a right to relief above the speculative level," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

All of Butcher's claims against Justice Farneti are for money damages and arise out of acts or omissions taken in his judicial capacity related to the Article 75 proceeding over which he presided. "It is well settled that judges generally have absolute immunity from suits for money damages for their judicial actions." Bliven v. Hunt, 579 F.3d 204, 209 (2d Cir. 2009). Because Butcher's claims against Justice Farneti are barred by absolute judicial immunity, they were correctly dismissed under Rule 12(b)(6).

The District Court also correctly dismissed Butcher's RICO and § 1983 claims against Wendt, Fitzgerald, and Cassell. To state a claim of a substantive RICO violation under § 1962(c), a plaintiff must allege, among other things, two or more predicate acts "constituting a pattern" of "racketeering activity." Williams v. Affinion Grp., LLC, 889 F.3d 116, 124 (2d Cir. 2018) (quotation marks omitted). Those predicate acts must be the "proximate cause" of the alleged injury. Empire Merchs., LLC v. Reliable Churchill LLLP, 902 F.3d 132, 140 (2d Cir. 2018) (quotation marks omitted). To state a claim for RICO conspiracy under § 1962(d), the plaintiff must also "allege the existence of an agreement to violate RICO's substantive provisions." Williams, 889 F.3d at 124 (quotation marks omitted). And "[t]o state a claim against a private entity on a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act." Ciambriello v. County of Nassau, 292 F.3d 307, 324 (2d Cir. 2002) (quotation marks omitted).

Butcher's allegations in support of his conspiracy claims of a corrupt agreement between the private defendants and Justice Farneti are uniformly conclusory, speculative, and implausible. See id., at 324; Betts v. Shearman, 751 F.3d 78, 84 n.1 (2d Cir. 2014). Notably, his barebones claim of a conspiracy involving Justice Farneti—that Wendt knew that Justice Farneti would preside over the proceedings over a year before those proceedings commenced, and that Wendt, Fitzgerald, and Cassell began to conspire with Justice Farneti well before the final arbitral award—is unaccompanied by any factual allegation to support it. We agree with the District Court that Butcher's allegations of a corrupt agreement, which rest on rank speculation, are inadequate to support his conspiracy claims under RICO and § 1983.

Butcher's substantive RICO claim fares no better. We recently explained that "allegations of frivolous, fraudulent, or baseless litigation activities—without more—cannot constitute a RICO predicate act." Kim v. Kimm, 884 F.3d 98, 104 (2d Cir. 2018). For that reason, we conclude that Butcher's allegations that the private defendants made false statements in their various filings and in the course of testifying in the arbitration and Article 75 proceedings cannot support a claim of a substantive RICO violation. Butcher's allegations that Wendt and Fitzgerald sent fraudulent emails during their employment with BondFactor do not constitute ***242** a pattern of racketeering activity for the separate reason that Butcher failed to allege that the emails proximately caused any of his injuries. See Empire Merchs., LLC, 902 F.3d at 140. Butcher did not allege that either the arbitrator or Justice Farneti relied on the emails as a basis for their rulings in favor of Fitzgerald and Wendt. They relied instead on a legal analysis under the FLSA and New York public policy, the undisputed fact that Fitzgerald did not receive any salary during his employment with BondFactor, and the initial vesting target under Wendt's contract, which Butcher admitted was met.

Accordingly, we affirm the District Court's judgment on the ground that Butcher's complaint failed to state any claim on which relief could be granted.

II

A side note. Our concurring colleague says that we should have fully grappled with the Rooker-Feldman doctrine before reaching the merits because it is a jurisdictional bar that we cannot avoid. Our refusal to address the doctrine as a threshold jurisdictional issue, he insists, contravenes Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

To the contrary, resolving this appeal on the merits is in step with both our precedent and Steel Co. In Steel Co., the Supreme Court instructed that we could not assume hypothetical jurisdiction over questions of Article III jurisdiction, as had been the practice. "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." Id. at 101–02, 118 S.Ct. 1003. But the Court's holding in Steel Co. was limited to standing under Article III (that is, constitutional standing), which it distinguished from "statutory standing." Id. at 97, 118 S.Ct. 1003; see also, e.g., id. at 93, 118 S.Ct. 1003 (disapproving of the resolution of "cause-of-action questions ... where there is no genuine case or controversy" under Article III).

We have consistently kept faith with Steel Co.'s focus on Article III jurisdiction. "The bar on hypothetical jurisdiction," we have held, "applies only to questions of Article III jurisdiction." Moore v. Consol. Edison Co. of N.Y., Inc., 409 F.3d 506, 511 n.5 (2d Cir. 2005). So "where the potential lack of jurisdiction is a constitutional question," we decide the question. Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497 (2d Cir. 2002) (quotation marks omitted). By contrast, we may assume hypothetical jurisdiction where the jurisdictional issue is statutory in nature. See Doyle v. U.S. Dep't of Homeland Sec., 959 F.3d 72, 79 (2d Cir. 2020); Vera v. Banco Bilbao Vizcaya Argentaria, S.A., 946 F.3d 120, 137 n.22 (2d Cir. 2019); Ahmed v. Holder, 624 F.3d 150, 154–55 (2d Cir. 2010); Abimbola v. Ashcroft, 378 F.3d 173, 180 (2d Cir. 2004); United States v. Miller, 263 F.3d 1, 4 n.2 (2d Cir. 2001).[3] If, as here, "the jurisdictional constraints are imposed by statute, not the Constitution," we have found it particularly prudent to assume hypothetical jurisdiction "where the jurisdictional ***243** issues are complex and the substance of the claim is ... plainly without merit." Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 338 n.2 (2d Cir. 2006).[4]

The Rooker-Feldman doctrine does not raise a question of Article III jurisdiction, and no circuit court has ever seriously claimed that the doctrine has constitutional status under Article III. The doctrine instructs that district courts lack subject-matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005). Rooker-Feldman thus "bars a losing party in state court from seeking what in

substance would be appellate review of the state court judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Id. at 287, 125 S.Ct. 1517 (quotation marks omitted).

The doctrine's roots lie in two jurisdictional statutes, 28 U.S.C. § 1257, in which Congress granted appellate jurisdiction to the Supreme Court over certain final judgments of a State's highest court, and 28 U.S.C. § 1331, which provides that federal "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." See id., 544 U.S. at 283–86, 125 S.Ct. 1517 (2005); D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Tr. Co., 263 U.S. 413, 416, 44 S.Ct. 149, 68 L.Ed. 362 (1923); McKithen v. Brown, 481 F.3d 89, 96 (2d Cir. 2007); Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 85 (2d Cir. 2005). In Feldman, the Supreme Court explained that "appellate jurisdiction to reverse or modify a state-court judgment is lodged ... exclusively in" the Supreme Court by 28 U.S.C. § 1257. Exxon Mobil Corp., 544 U.S. at 283, 125 S.Ct. 1517 (citing Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206). 28 U.S.C. § 1331, on the other hand, "is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments." Id. at 292, 125 S.Ct. 1517. Thus, "[i]f, instead of seeking review of an adverse state supreme court decision in the Supreme Court, [plaintiffs] sued in federal district court, the federal action would be an attempt to obtain direct review of the state supreme court decision and would represent a partial inroad on Rooker-Feldman's construction of 28 U.S.C. § 1257." Id. at 287, 125 S.Ct. 1517 (quotation marks omitted). As a reflection of the doctrine's statutory rather than constitutional origins, there is no jurisdictional bar that prevents Congress from reversing course and giving the lower federal courts appellate jurisdiction over the same state court judgments. What Congress gives, Congress can later modify.

The concurrence attempts to distinguish or sideline the long line of cases in which we have assumed hypothetical jurisdiction. While this Court has appropriately assumed jurisdiction in some circumstances, the concurrence asserts, we have been "more hesitant" to do so when "faced with ***244** plainly jurisdictional limitations." See post 251 – ——. But the cases cited by the concurrence in support of this view are inapposite; unlike this case, they involved a straightforward jurisdictional issue or a potentially complicated merits question, or they addressed Article III rather than statutory jurisdiction. See United States ex rel. Hanks v. United States, 961 F.3d 131, 138 (2d Cir. 2020) (noting that the statutory jurisdictional question was "relatively straightforward"); Ventura de Paulino v. N.Y.C. Dep't of Educ., 959 F.3d 519, 530 n.45 (2d Cir. 2020) (acknowledging that there exists a "discretionary exception to Steel Co." allowing a court to "dispose of the case on the merits without addressing a novel question of jurisdiction"); C. Hudson Gas & Elec. Corp. v. FERC, 783 F.3d 92, 108–119 (2d Cir. 2015) (offering no suggestion that the substance of the claims was plainly without merit); ProShipLine, Inc. v. Aspen Infrastructures, Ltd., 585 F.3d 105, 113 n.7 (2d Cir. 2009) (noting its intention to address whether the court had Article III jurisdiction).

Our established practice of assuming hypothetical statutory jurisdiction is not unique. The majority of our sister circuits have assumed jurisdiction under similar circumstances in the wake of Steel Co. See, e.g., Am. Hosp. Ass'n v. Azar, 964 F.3d 1230, 1246 (D.C. Cir. 2020); United States v. Olson, 867 F.3d 224, 228 (1st Cir. 2017); Montague v. NLRB, 698 F.3d 307, 313 (6th Cir. 2012); Minesen Co. v. McHugh, 671 F.3d 1332, 1337 (Fed. Cir. 2012); Jordon v. Att'y General of U.S., 424 F.3d 320, 327 n.8 (3d Cir. 2005); Lukowski v. INS, 279 F.3d 644, 647 n.1 (8th Cir. 2002).

[11]In summary, we may assume hypothetical statutory jurisdiction in order to resolve this appeal on the merits because the Rooker-Feldman doctrine does not implicate Article III jurisdiction. Doing so is particularly appropriate in this case, where the jurisdictional issue is both novel and arguably complex, while Butcher's claims are plainly meritless.[5]

***245** CONCLUSION

For the foregoing reasons, Butcher's complaint failed to plausibly allege RICO violations or a § 1983 conspiracy. The judgment of the District Court is

AFFIRMED.

Concurring opinion omitted.

Footnotes

1 D.C. Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); Rooker v. Fidelity Tr. Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

2 Article 75 governs arbitration proceedings in New York State and contains a provision permitting a party to bring an action in state court to vacate or modify an arbitration award. See N.Y. C.P.L.R. § 7511.

3 We routinely and appropriately assume hypothetical jurisdiction in summary orders. See, e.g., Jang v. Tr. of St. Johnsbury Academy, 771 F. App'x 86, 87 (2d Cir. 2019); Palaguachi v. Whitaker, 755 F. App'x 81, 84 (2d Cir. 2018). We have done so in cases in which the Rooker-Feldman doctrine is invoked. See, e.g., Yeshiva Imrei Chaim Viznitz of Boro Park, Inc. v. City of New York, 496 F. App'x 122, 124 (2d Cir. 2012); Saferstein v. Lawyers' Fund for Client Prot., 223 F. App'x 39, 40 (2d Cir. 2007).

4 Our concurring colleague observes that subsequent decisions found the statutory limitations at issue in certain of the cited cases to be non-jurisdictional in nature. But that misses the point. These cases show that the Second Circuit has not hesitated to assume hypothetical statutory jurisdiction in rejecting plainly meritless claims. In doing so in these cases, the panels were not acting on any assumption that the statutory question would be found not to be jurisdictional in the future.

5 We have never addressed whether the Rooker-Feldman doctrine applies where, as here, there is a pending state appeal. District court decisions in our circuit show that this question may not be as easily answered as our concurring colleague suggests, for reasons stated by our colleague Judge Bianco when he was sitting on the district court. See Dekom v. Fannie Mae, No. 17-CV-2712, 2019 WL 1403116, at *2 (E.D.N.Y. Mar. 28, 2019); Caldwell v. Gutman, Mintz, Baker & Sonnenfeldt, P.C., 701 F. Supp. 2d 340, 347–48 (E.D.N.Y. 2010). Indeed, district judges within our circuit that have grappled with this issue have concluded that Rooker-Feldman applies even where there is a pending state appeal of the challenged judgment. See Gribbin v. N.Y. State Unified Court Sys., No. 18-CV-6100 (PKC), 2020 WL 1536324, at *3 n.6 (E.D.N.Y. Mar. 31, 2020); Campbell v. Bank of Am., N.A., No. 19-CV-11 (VB), 2019 WL 4083078, at *4 (S.D.N.Y. Aug. 29, 2019); Zapotocky v. CIT Bank, N.A., 587 B.R. 589, 596 (S.D.N.Y. 2018); Deraffele v. City of New Rochelle, No. 15-CV-282 (KMK), 2016 WL 1274590, at *7 (S.D.N.Y. Mar. 30, 2016). Although there is contrary authority from our sister circuits that supports a conclusion that Rooker-Feldman does not pertain to these circumstances, see, e.g., Parker v. Lyons, 757 F.3d 701, 705-06 (7th Cir. 2014) (collecting cases), this Court has strongly suggested—without deciding—that it does. See generally Vossbrinck v. Accredited Home Lenders, Inc., 773 F.3d 423, 426 & n.1 (2d Cir. 2014). Rather than address this issue—one of first impression for our Court—we affirm the dismissal of Butcher's claims under Rule 12(b)(6), as that result is foreordained by well-established circuit precedent. See Moore, 409 F.3d at 511 n.5 (assuming jurisdiction to resolve appeal where statutory standing question "remain[ed] unresolved in this Circuit"); Vera, 946 F.3d at 137 n.22 (explaining that "it would be ironic if, in our desire to avoid rendering an advisory opinion, we were to address a novel jurisdictional question in a case where the result is foreordained by another decision of this Court" (quotation marks and brackets omitted)). We need not pursue the matter here where we can easily affirm on another, clearly established ground.

1 We have recently opined, for example, on the "requisite elements of an ERISA estoppel claim," *Sullivan-Mestecky v. Verizon Commc'n Inc.*, 961 F.3d 91, 100 (2d Cir. 2020), the scope of vertical or horizontal relatedness necessary to "establish a pattern of racketeering activity" under RICO, *Halvorssen v. Simpson*, 807 F. App'x 26, 29 (2d Cir. 2020), and the notice a plaintiff must give to his or her employer of a disability to state a reasonable accommodation claim, *Costabile v. N.Y.C. Health & Hosps. Corp.*, 951 F.3d 77, 82 (2d Cir. 2020).

2 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1357, pp. 721-28 (3d ed. 2004) (footnotes omitted).

3 This case is even more remarkable than the ordinary case in which a court assumes hypothetical jurisdiction to reach the merits. Here, the court does not simply ignore a jurisdictional question but considers that question and appears to be convinced that we *lack* jurisdiction in this case. *Ante* at 244 n.5 (citing district court precedents that "have concluded that *Rooker-Feldman* applies even where there is a pending state appeal of the challenged judgment" and circuit precedent that, in the court's view, "strongly suggest[s] ... that it does"). Despite this conclusion about its own jurisdiction, the court proceeds to the merits. I do not think the court is correct about the scope of the *Rooker-Feldman* doctrine, as I explain in Part II. But if the court believes what it says—that the doctrine likely deprives this court of subject-matter jurisdiction over this case—it should not be deciding the case on the merits. "It is axiomatic that federal courts are courts of limited jurisdiction and may not decide cases over which they lack subject matter jurisdiction." *Funk*, 861 F.3d at 371 (quoting *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 700 (2d Cir. 2000)).

4 *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984) ("The APA confers a general cause of action ... but withdraws that cause of action to the extent the relevant statute 'preclude[s] judicial review.' ") (quoting 5 U.S.C. § 701(a)(1)); *see also Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 n.3, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991) (noting that "[t]he judicial review provisions of the APA are not jurisdictional, so a defense based on exemption from the APA can be waived" and that whether a statute precludes review "is in essence a question whether Congress

intended to allow a certain cause of action") (internal citation omitted).

5 *See, e.g.*, *United States v. Doe*, 93 F.3d 67, 68 (2d Cir. 1996); *United States v. Lawal*, 17 F.3d 560, 563 (2d Cir. 1994).

6 *See Marshall*, 954 F.3d at 826 ("It's usually a mistake, as one case after another now shows, to treat a statutory limit on our power as a statutory limit on our subject-matter jurisdiction. More often than not, the [Supreme] Court has explained, what might seem to be a limit on our subject-matter jurisdiction amounts to a 'mandatory claim-processing rule' or a mandatory limit on our authority to grant a certain form of relief."). Even though the Supreme Court spoke of § 3742(a) in terms of "jurisdiction" in *United States v. Ruiz*, 536 U.S. 622, 627-28, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), it did so before it decided *Arbaugh* and only in "dicta that the Court did not follow in its disposition of the case," *In re Sealed Case*, 449 F.3d 118, 123 (D.C. Cir. 2006).

7 As the court notes, other circuits have retained the doctrine of hypothetical statutory jurisdiction even after *Steel Co*. *Ante* at 241–43 – ——. But the circuits have not done so uniformly, *see, e.g.*, *Friends of the Everglades v. EPA*, 699 F.3d 1280, 1288 (11th Cir. 2012) ("Even if the resolution of the merits were foreordained—an issue we do not decide—the Supreme Court has explicitly rejected the theory of 'hypothetical jurisdiction.' ... [A]n inferior court must have both statutory and constitutional jurisdiction before it may decide a case on the merits."), or without doubts, *see, e.g.*, *Seale*, 323 F.3d at 156 ("As courts created by statute, we can have no jurisdiction but such as the statute confers. A federal court acts 'ultra vires' regardless of whether its jurisdiction is lacking because of the absence of a requirement specifically mentioned in Article III, such as standing or ripeness, or because Congress has repealed its jurisdiction to hear a particular matter.") (internal quotation marks and citation omitted); *Kaplan*, 896 F.3d at 517-19 (Edwards, J., concurring) ("I doubt that we can now say that a lack of statutory jurisdiction need not be a barrier to deciding issues on the merits. ... [T]here is no priority given to 'Article III jurisdiction' over 'statutory jurisdiction.' ").

8 Even as the court describes it, the question is simple: does the *Rooker-Feldman* doctrine apply "even where there is a pending state appeal of the challenged judgment"? *Ante* at 244 n.5. The court has already gone to the trouble of considering that question, examining relevant circuit precedent, surveying the precedents of other circuits and of district courts within our circuit, and concluding that the relevant case law "strongly suggests" an answer. *Id.* Yet the court still declines to take the final step and provide one.

9 *See also Phillips ex rel. Green v. City of New York*, 453 F. Supp. 2d 690, 713-14 (S.D.N.Y. 2006).