

19-224

Butcher v. Wendt

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2019

5
6 (Argued: March 10, 2020 Decided: September 22, 2020)

7
8 Docket No. 19-224-cv
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10 _____
11 GEORGE H. BUTCHER III,

12 *Plaintiff-Appellant,*
13

14 v.
15

16 BRADLEY W. WENDT, RICK FITZGERALD, MICHAEL D. CASSELL, JOSEPH
17 FARNETI,
18

19 *Defendants-Appellees.*
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21 _____
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25 Before:

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27 RAGGI, LOHIER, and MENASHI, *Circuit Judges.*
28

29 George Butcher III, pro se, appeals from a judgment of the United States
30 District Court for the Southern District of New York (Schofield, L) dismissing his
31 complaint under the Rooker-Feldman doctrine and for failure to state a claim.
32 We decline to address the applicability of the Rooker-Feldman doctrine to
33 Butcher's claims and **AFFIRM** the dismissal of his claims on the merits.
34

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

1 GEORGE H. BUTCHER III, *pro se*, New Rochelle, NY.

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3 DANIEL L. MILLMAN, Daniel L. Millman, P.C., Jericho,
4 NY, *for Defendant-Appellee Bradley W. Wendt*.

5
6 Rick Fitzgerald, *pro se*, Orlando, FL.

7
8 MICHAEL D. CASSELL, *pro se*, Hogan & Cassell, LLP,
9 Jericho, NY.

10
11 DAVID LAWRENCE III, Assistant Solicitor General
12 (Barbara D. Underwood, Solicitor General, Anisha S.
13 Dasgupta, Deputy Solicitor General, *on the brief*), *for*
14 Letitia James, Attorney General of the State of New
15 York, New York, NY, *for Defendant-Appellee Joseph*
16 *Farneti*.

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18 LOHIER, *Circuit Judge*:

19 George Butcher III, pro se, appeals from a judgment of the United States
20 District Court for the Southern District of New York (Schofield, L) dismissing his
21 complaint in part under the Rooker-Feldman¹ doctrine and in part under Rule
22 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim under
23 the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.
24 §§ 1962(c), (d), as well as 42 U.S.C. § 1983. Butcher alleged that the individual
25 defendants—former employees of Butcher’s company, a lawyer for one of the

¹ D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Tr. Co., 263 U.S. 413 (1923).

1 employees, and a New York Supreme Court justice—conspired against him in
2 arbitration and judicial proceedings arising out of an employee compensation
3 dispute.

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

6 BACKGROUND

7 At all times relevant to this litigation, Butcher was the Chairman and Chief
8 Executive Officer of the BondFactor Company. In April 2010 BondFactor hired
9 Bradley Wendt to be its president. After some negotiation, Wendt's employment
10 contract provided for a base compensation of \$1.2 million, which would accrue
11 each year and vest when the company received a \$10 million capital infusion.
12 Until that time, Wendt was entitled to a minimum salary of \$28,000. By May
13 2013 the initial capital infusion of \$10 million had occurred, and Wendt's accrued
14 base compensation was fully vested. In July 2013, however, Butcher and
15 BondFactor amended employee contracts to delay payment of unpaid vested
16 compensation until the company had raised \$500 million. Although Wendt

1 objected to adding the new \$500 million infusion target to his contract, he
2 eventually signed the amended contract.

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

8 Wendt and Fitzgerald soon began to complain about their compensation,
9 and both were fired in November 2013. They started an arbitration proceeding
10 against BondFactor and Butcher, raising several claims relating to their
11 employment and compensation. In a partial final award entered in February
12 2015, the arbitrator dismissed all of Wendt's claims and several of Fitzgerald's
13 claims. As for Fitzgerald's claim under the Fair Labor Standards Act (FLSA) and
14 his contractual claim that BondFactor improperly refused to reimburse his travel
15 expenses, however, the arbitrator awarded Fitzgerald \$156,459.76 plus attorneys'
16 fees, for which Butcher and BondFactor were jointly and severally liable. In May

1 2015 the arbitrator issued a final award that determined the amount of
2 Fitzgerald's attorneys' fees.

3 Having lost, Wendt challenged the arbitrator's decision in State Supreme
4 Court under Article 75 of New York's Civil Practice Law and Rules.² Justice
5 Joseph Farneti, a defendant in this litigation, presided over the action. Attorney
6 Michael Cassell, another defendant in this litigation, represented Wendt in the
7 Article 75 proceeding. Butcher and BondFactor principally moved to dismiss the
8 petition as untimely, but Justice Farneti denied the motion, concluding that the
9 time for filing the petition began to run upon entry of the final award in May
10 2015 rather than the partial award in February. Turning to the merits, Justice
11 Farneti vacated the arbitration award. He explained that the 2013 amendment to
12 Wendt's contract violated New York public policy because it increased the
13 capital infusion target upon which Wendt's base compensation would vest after
14 the original infusion target had already been reached. Butcher and BondFactor
15 appealed Justice Farneti's decision. The New York State Appellate Division
16 reversed Justice Farneti's judgment, concluding that Wendt's petition should

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.

1 have been dismissed as untimely. Wendt v. BondFactor Co., 94 N.Y.S.3d 134 (2d
2 Dep't 2019).

3 In October 2016 Wendt and Fitzgerald, represented by Cassell, filed a
4 lawsuit in the Southern District of New York claiming that Butcher had retaliated
5 against them in violation of the federal Dodd-Frank Act. The district court
6 dismissed the complaint as barred under the doctrine of res judicata because
7 Wendt and Fitzgerald could have raised their retaliation claims in the earlier
8 arbitration. See Wendt v. BondFactor Co., No. 16 Civ. 7751 (DLC), 2017 WL
9 3309733, at *7 (S.D.N.Y. Aug. 2, 2017).

10 In October 2017, while Butcher's appeal to the Appellate Division was still
11 pending, Butcher filed this action in federal court alleging that Wendt,
12 Fitzgerald, Cassell, and Justice Farneti conspired to defraud him and to deprive
13 him of his due process rights in the Article 75 proceeding, in violation of RICO,
14 18 U.S.C. § 1962(c), (d), and 42 U.S.C. § 1983. In his second amended federal
15 complaint, Butcher alleged that Wendt and Fitzgerald made a number of false
16 statements that were designed to manufacture a future lawsuit against
17 BondFactor, that Wendt and Fitzgerald conspired to testify falsely during the
18 arbitration proceedings, and that attorney Cassell knowingly filed false

1 statements in the Article 75 proceeding and the Dodd-Frank lawsuit. Butcher
2 also alleged that, as early as December 2014, well prior to entry of the final
3 arbitration award, Wendt, Fitzgerald, Cassell, and Justice Farneti were already
4 conspiring to vacate the award. Wendt and Cassell delayed filing the Article 75
5 proceeding, Butcher claimed, “to facilitate the selection of Farneti as the
6 presiding officer.” App’x at 308. Finally, Butcher asserted that Wendt and
7 Cassell must have bribed Justice Farneti to rule in Wendt’s favor.

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

14 This appeal followed.

15 DISCUSSION

16 I

17 Butcher first argues that the District Court improperly relied on the
18 Rooker-Feldman doctrine to dismiss his claims related to Wendt’s compensation

1 for lack of jurisdiction while an appeal of Justice Farneti's judgment in the Article
2 75 proceeding was pending. We conclude that these claims, like the others in
3 Butcher's complaint, were properly dismissed for failure to state a claim and,
4 therefore, we affirm on a different basis from that relied on by the District Court.
5 See Wells Fargo Advisors, LLC v. Sappington, 884 F.3d 392, 396 n.2 (2d Cir.
6 2018).

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

13 All of Butcher's claims against Justice Farneti are for money damages and
14 arise out of acts or omissions taken in his judicial capacity related to the Article
15 75 proceeding over which he presided. "It is well settled that judges generally
16 have absolute immunity from suits for money damages for their judicial actions."
17 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).

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

12 Butcher's substantive RICO claim fares no better. We recently explained
13 that "allegations of frivolous, fraudulent, or baseless litigation activities—
14 without more—cannot constitute a RICO predicate act." Kim v. Kimm, 884
15 F.3d 98, 104 (2d Cir. 2018). For that reason, we conclude that Butcher's
16 allegations that the private defendants made false statements in their various
17 filings and in the course of testifying in the arbitration and Article 75 proceedings
18 cannot support a claim of a substantive RICO violation. Butcher's allegations

1 that Wendt and Fitzgerald sent fraudulent emails during their employment with
2 BondFactor do not constitute a pattern of racketeering activity for the separate
3 reason that Butcher failed to allege that the emails proximately caused any of his
4 injuries. See Empire Merchs., LLC, 902 F.3d at 140. Butcher did not allege that
5 either the arbitrator or Justice Farneti relied on the emails as a basis for their
6 rulings in favor of Fitzgerald and Wendt. They relied instead on a legal analysis
7 under the FLSA and New York public policy, the undisputed fact that Fitzgerald
8 did not receive any salary during his employment with BondFactor, and the
9 initial vesting target under Wendt's contract, which Butcher admitted was met.

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

12 II

13 A side note. Our concurring colleague says that we should have fully
14 grappled with the Rooker-Feldman doctrine before reaching the merits because it
15 is a jurisdictional bar that we cannot avoid. Our refusal to address the doctrine
16 as a threshold jurisdictional issue, he insists, contravenes Steel Co. v. Citizens for
17 a Better Environment, 523 U.S. 83 (1998).

1 To the contrary, resolving this appeal on the merits is in step with both our
2 precedent and Steel Co. In Steel Co., the Supreme Court instructed that we could
3 not assume hypothetical jurisdiction over questions of Article III jurisdiction, as
4 had been the practice. “For a court to pronounce upon the meaning or the
5 constitutionality of a state or federal law when it has no jurisdiction to do so is,
6 by very definition, for a court to act ultra vires.” Id. at 101–02. But the Court’s
7 holding in Steel Co. was limited to standing under Article III (that is,
8 constitutional standing), which it distinguished from “statutory standing.” Id. at
9 97; see also, e.g., id. at 93 (disapproving of the resolution of “cause-of-action
10 questions . . . where there is no genuine case or controversy” under Article III).

11 We have consistently kept faith with Steel Co.’s focus on Article III
12 jurisdiction. “The bar on hypothetical jurisdiction,” we have held, “applies only
13 to questions of Article III jurisdiction.” Moore v. Consol. Edison Co. of N.Y., Inc.,
14 409 F.3d 506, 511 n.5 (2d Cir. 2005). So “where the potential lack of jurisdiction is
15 a constitutional question,” we decide the question. Monegasque De
16 Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 497 (2d Cir. 2002)
17 (quotation marks omitted). By contrast, we may assume hypothetical
18 jurisdiction where the jurisdictional issue is statutory in nature. See Doyle v. U.S.

1 Dep't of Homeland Sec., 959 F.3d 72, 79 (2d Cir. 2020); Vera v. Banco Bilbao
 2 Vizcaya Argentaria, S.A., 946 F.3d 120, 137 n.22 (2d Cir. 2019); Ahmed v. Holder,
 3 624 F.3d 150, 154–55 (2d Cir. 2010); Abimbola v. Ashcroft, 378 F.3d 173, 180 (2d
 4 Cir. 2004); United States v. Miller, 263 F.3d 1, 4 n.2 (2d Cir. 2001).³ If, as here,
 5 “the jurisdictional constraints are imposed by statute, not the Constitution,” we
 6 have found it particularly prudent to assume hypothetical jurisdiction “where
 7 the jurisdictional issues are complex and the substance of the claim is . . . plainly
 8 without merit.” Ivanishvili v. U.S. Dep't of Justice, 433 F.3d 332, 338 n.2 (2d Cir.
 9 2006).⁴

10 The Rooker-Feldman doctrine does not raise a question of Article III
 11 jurisdiction, and no circuit court has ever seriously claimed that the doctrine has
 12 constitutional status under Article III. The doctrine instructs that district courts

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.

1 lack subject-matter jurisdiction over “cases brought by state-court losers
2 complaining of injuries caused by state-court judgments rendered before the
3 district court proceedings commenced and inviting district court review and
4 rejection of those judgments.” Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
5 544 U.S. 280, 284 (2005). Rooker-Feldman thus “bars a losing party in state court
6 from seeking what in substance would be appellate review of the state court
7 judgment in a United States district court, based on the losing party’s claim that
8 the state judgment itself violates the loser’s federal rights.” Id. at 287 (quotation
9 marks omitted).

10 The doctrine’s roots lie in two jurisdictional statutes, 28 U.S.C. § 1257, in
11 which Congress granted appellate jurisdiction to the Supreme Court over certain
12 final judgments of a State’s highest court, and 28 U.S.C. § 1331, which provides
13 that federal “district courts shall have original jurisdiction of all civil actions
14 arising under the Constitution, laws, or treaties of the United States.” See id., 544
15 U.S. at 283–86 (2005); D.C. Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983);
16 Rooker v. Fidelity Tr. Co., 263 U.S. 413, 416 (1923); McKithen v. Brown, 481 F.3d
17 89, 96 (2d Cir. 2007); Hoblock v. Albany Cty. Bd. of Elections, 422 F.3d 77, 85 (2d
18 Cir. 2005). In Feldman, the Supreme Court explained that “appellate jurisdiction

1 to reverse or modify a state-court judgment is lodged . . . exclusively in” the
2 Supreme Court by 28 U.S.C. § 1257. Exxon Mobil Corp., 544 U.S. at 283 (citing
3 Feldman, 460 U.S. 462). 28 U.S.C. § 1331, on the other hand, “is a grant of
4 original jurisdiction, and does not authorize district courts to exercise appellate
5 jurisdiction over state-court judgments.” Id. at 292. Thus, “[i]f, instead of
6 seeking review of an adverse state supreme court decision in the Supreme Court,
7 [plaintiffs] sued in federal district court, the federal action would be an attempt
8 to obtain direct review of the state supreme court decision and would represent a
9 partial inroad on Rooker-Feldman’s construction of 28 U.S.C. § 1257.” Id. at 287
10 (quotation marks omitted). As a reflection of the doctrine’s statutory rather than
11 constitutional origins, there is no jurisdictional bar that prevents Congress from
12 reversing course and giving the lower federal courts appellate jurisdiction over
13 the same state court judgments. What Congress gives, Congress can later
14 modify.

15 The concurrence attempts to distinguish or sideline the long line of cases in
16 which we have assumed hypothetical jurisdiction. While this Court has
17 appropriately assumed jurisdiction in some circumstances, the concurrence
18 asserts, we have been “more hesitant” to do so when “faced with plainly

jurisdictional limitations.” See post 9–12. 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

1 Cir. 2017); Montague v. NLRB, 698 F.3d 307, 313 (6th Cir. 2012); Minesen Co. v.
 2 McHugh, 671 F.3d 1332, 1337 (Fed. Cir. 2012); Jordon v. Att’y General of U.S., 424
 3 F.3d 320, 327 n.8 (3d Cir. 2005); Lukowski v. INS, 279 F.3d 644, 647 n.1 (8th Cir.
 4 2002).

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

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

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.

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.