

MENASHI, *Circuit Judge*, concurring in part and concurring in the judgment:

I do not agree with the court that “we may assume hypothetical jurisdiction where the jurisdictional issue is statutory in nature.” *Ante* at 12. I write separately to express my view that we should not sidestep questions of subject-matter jurisdiction. After considering the jurisdictional question here, I conclude that we have jurisdiction over Butcher’s appeal and may reach the merits of his claims. Accordingly, I concur in the part of the court’s opinion that dismisses Butcher’s claims under Rule 12(b)(6) and concur in the judgment.

Federal courts, such as ours, “are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). Because of this basic principle, the Supreme Court has squarely rejected the practice of “‘assuming’ jurisdiction for the purpose of deciding the merits—the ‘doctrine of hypothetical jurisdiction’”—because it “carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998).

In *Steel Co.*, the Supreme Court made clear that “[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.” *Id.* at 101. Accordingly, for a court “to resolve contested questions of law when its jurisdiction is in doubt” is, “by very definition, for a court to act *ultra vires*.” *Id.* at 101-02.

Despite this precedent, our court has continued to employ the doctrine of hypothetical jurisdiction to bypass questions of “statutory jurisdiction.” *See, e.g., Fama v. Comm’r of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000). In some of the cases in which the court has done so, it seems to have confused non-jurisdictional questions with true jurisdictional limitations. For example, to the extent that a prior decision bypassed an issue of “statutory standing” to address the merits, it was not assuming jurisdiction. *See Lexmark Int’l v. Static Control Components*, 572 U.S. 118, 128 n.4 (2014) (noting that “statutory standing” previously has been treated “as effectively jurisdictional” even though it “does not implicate subject-matter jurisdiction”); *see also Whitaker v. Dep’t of Com.*, 970 F.3d 200, 210 & n.49 (2d Cir. 2020).

But to the extent circuit precedent purports to afford us discretion to ignore statutory limits on our jurisdiction, it is inconsistent with *Steel Co.* and with the Constitution. *See* U.S. CONST. art. 3, § 1; *see also Funk v. Belneftekhim*, 861 F.3d 354, 371 (2d Cir. 2017) (“Federal courts are not empowered to confer subject-matter jurisdiction on themselves.”). Even if we have that discretion, I respectfully decline to exercise it.

In this case, however, it is clear that we have jurisdiction over Butcher’s claims and that the district court erred in concluding that the *Rooker-Feldman* doctrine prevents the court from exercising jurisdiction over those claims. The *Rooker-Feldman* doctrine “is confined to 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 (2005). When Butcher commenced the district court proceedings in this case, his state-court appeal was still pending—and he ultimately *prevailed* in state court. He was not a

state-court loser injured by a judgment entered before the district court proceedings commenced.

When our court has indulged in the doctrine of hypothetical jurisdiction, it has said it would do so only “where the jurisdictional issues are complex.” *United States ex rel. Hanks v. United States*, 961 F.3d 131, 137 (2d Cir. 2020) (quoting *Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 338 n.2 (2d Cir. 2006)). But here, the jurisdictional issue could not be simpler. “Since *Saudi Basic Industries*, all federal circuits that have addressed the issue have concluded that *Rooker-Feldman* does not apply if, as here, a state-court appeal is pending when the federal suit is filed.” *Parker v. Lyons*, 757 F.3d 701, 705 (7th Cir. 2014) (citing cases). To resolve this jurisdictional issue, we need only adopt the unanimous position of every other circuit court to address it. Unlike the court, I see no reason to avoid doing so.

Because we have jurisdiction to consider the merits of Butcher’s claims, and because I agree with the court that “Butcher’s complaint failed to state any claim on which relief could be granted,” *ante* at 11, I concur in the part of the court’s opinion that addresses Butcher’s failure to state a claim and concur in the judgment affirming the dismissal of his complaint.

I

“It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded.” *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). In this case, the district court held that the federal courts lack subject-matter jurisdiction over Butcher’s claims. We cannot ignore that ruling and decide the merits of Butcher’s claims without assuring ourselves that we have subject-matter jurisdiction.

See *Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir. 2001) (“[B]efore deciding any case we are required to assure ourselves that the case is properly within our subject matter jurisdiction.”). “Without jurisdiction the court cannot proceed at all.” *Ex parte McCardle*, 74 U.S. 506, 514 (1869).

A

In *Steel Co.*, the Supreme Court explained that “[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers.” 523 U.S. at 101. Subsequently, in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999), the Court held that although “subject-matter jurisdiction necessarily precedes a ruling on the merits, the same principle does not dictate a sequencing of jurisdictional issues.” In so holding, the Court expressly affirmed that it is “subject-matter jurisdiction” —not some subset of subject-matter jurisdiction, such as “Article III jurisdiction,” *ante* at 13, or “constitutional” jurisdiction, *id.* at 15—that must precede a decision on the merits. *Ruhrgas*, 526 U.S. at 584.

The Court in *Steel Co.* defined “subject-matter jurisdiction” as “the courts’ statutory or constitutional power to adjudicate the case.” 523 U.S. at 89 (emphasis omitted); see also *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“Subject-matter jurisdiction ... is an Art. III as well as a statutory requirement.”). Nothing in this definition or the Court’s holding suggests that limitations on subject-matter jurisdiction are less binding when created by statute rather than by the Constitution.

Ruhrgas confirms the scope of the *Steel Co.* rule. In *Ruhrgas*, the Supreme Court addressed the sequencing of two jurisdictional issues: personal jurisdiction and the statutory grant of subject-matter jurisdiction under several statutes. 526 U.S. at 579-80. “In holding that

there is no mandatory ordering of *jurisdictional* issues, the Court clearly treated the issue of whether a claim fits within a statutory grant of subject-matter jurisdiction as being covered by the *Steel Co.* rule of priority.” *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 518 (D.C. Cir. 2018) (Edwards, J., concurring). To be sure, the Supreme Court has sometimes discussed the jurisdiction “that is authorized by Article III of the Constitution,” on the one hand, “and the statutes enacted by Congress,” on the other. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). “But this merely highlights that both requirements exist; it does not intimate that the requirements delineated in a statutory grant of jurisdiction are any less a constraint on courts’ power than the requirements described directly in the Constitution.” *Kaplan*, 896 F.3d at 517 (Edwards, J., concurring); *see also Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (“Only Congress may determine a lower federal court’s subject-matter jurisdiction.”); *Sheldon v. Sill*, 49 U.S. 441, 449 (1850) (“Courts created by statute can have no jurisdiction but such as the statute confers.”).

Accordingly, 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 ... or because Congress has repealed its jurisdiction to hear a particular matter.” *Seale v. INS*, 323 F.3d 150, 156 (1st Cir. 2003). Before addressing the merits, a federal court must confirm that it has subject-matter jurisdiction conferred by statute because, “with limited exceptions, a congressional grant of jurisdiction is a *prerequisite* to the exercise of judicial power.” *Patchak v. Zinke*, 138 S. Ct. 897, 907 (2018). “‘To deny this position’ would undermine the separation of powers by ‘elevat[ing] the judicial over the legislative branch.’” *Id.* (quoting *Cary v. Curtis*, 44 U.S. 236, 245 (1845)). In fact, our court recently reaffirmed the principle that lower courts “may not adjudicate a case or

controversy unless authorized by *both* Article III of the United States Constitution and a federal jurisdictional statute.” *United States v. Assa Co.*, 934 F.3d 185, 188 (2d Cir. 2019) (emphasis added); *see also Kings Choice Neckwear, Inc. v. Pitney Bowes, Inc.*, 396 F. App’x 736, 736 n.1 (2d Cir. 2010); *In re Auction Houses Antitrust Litig.*, 42 F. App’x 511, 515 (2d Cir. 2002) (“Our jurisdiction is limited by both statute ... and by Article III of the United States Constitution.”).

Under the doctrine of hypothetical jurisdiction that the court applies today, *see ante* at 11-17, we are not constrained by jurisdictional statutes. If the court were right, we could assume jurisdiction over cases that Congress has barred us from considering. We could assume original jurisdiction over federal question and diversity of citizenship cases. *See* 28 U.S.C. §§ 1331-32. We could assume appellate jurisdiction to review the decisions of other courts of appeals, *see id.* § 1254, or the decisions of district courts in other circuits, *see id.* § 1294. We could even assume jurisdiction over matters within the exclusive jurisdiction of the U.S. Court of Appeals for the Federal Circuit, *see id.* § 1295, the U.S. Court of Appeals for the D.C. Circuit, *see, e.g.*, 8 U.S.C. § 1535, or the U.S. Court of Appeals for Veterans Claims, *see* 38 U.S.C. § 7252. Each of these limitations on our jurisdiction is of “statutory rather than constitutional origins,” and “there is no jurisdictional bar that prevents Congress from reversing course and giving” this court jurisdiction over those matters. *Ante* at 15.

This is not what the Supreme Court meant when it said that “[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers.” *Steel Co.*, 523 U.S. at 101; *see also Seale*, 323 F.3d at 156 n.5 (“While the Constitution defines the limits of judicial power, it is up

to Congress to prescribe how much of it shall be exercised by the lower courts.”).

I recognize that the doctrine of hypothetical jurisdiction allows the court to ignore statutory limits on our jurisdiction only when the plaintiff’s claims will be dismissed on the merits. *See Steel Co.*, 523 U.S. at 93 (discussing the practice of assuming jurisdiction when “the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied”); *Ivanishvili*, 433 F.3d at 338 n.2 (approving of hypothesizing jurisdiction when “the substance of the claim is ... plainly without merit”). But even a dismissal on the merits can create binding precedent on important legal questions. In a dismissal on the merits, the court may define the essential “elements a plaintiff must plead to state a claim” for a particular cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009).¹ The court may also determine the scope and application of affirmative defenses including “various types of estoppel, ... a wide range of forms of legal immunity from suit, the equitable doctrine of laches, a claim of privilege, ... [and] the barring effect of res judicata and related preclusion principles.”² To affirm the district court here, the court interpreted the requirements of 18 U.S.C. § 1962(c)-(d) and 42 U.S.C. § 1983.

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).

Opinions issued by the court, even when our jurisdiction is in doubt, are “binding precedent upon this Court,” *Sohm v. Scholastic Inc.*, 959 F.3d 39, 50 (2d Cir. 2020), and upon “lower courts in this Circuit,” *Newsom-Lang v. Warren Int’l*, 129 F.Supp.2d 662, 664 (S.D.N.Y. 2001). These opinions involve the exercise of the judicial power and may follow only from statutory authorization. A court may not “pronounce upon the meaning” of a law “when it has no jurisdiction to do.” *Steel Co.*, 523 U.S. at 101-02. Accordingly, “[t]o dismiss a claim on the merits, or to affirm such dismissal, a court must have jurisdiction.” *Main St. Legal Servs., Inc. v. Nat’l Sec. Council*, 811 F.3d 542, 566 (2d Cir. 2016).

It is true that Congress may grant us jurisdiction and that Congress may take it away. *See ante* at 15. When Congress grants us jurisdiction, we may exercise it. When Congress takes it away, we may not.³

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 17 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)).

B

The court relies on circuit precedent for the proposition that we may apply the doctrine of hypothetical jurisdiction even after *Steel Co.* See *ante* at 11-13. When evaluating these precedents, it is important to recall that it has been “commonplace” in judicial opinions for the word “jurisdiction” to refer to limitations that are not truly jurisdictional, such as the elements of a cause of action. *Steel Co.*, 523 U.S. at 90; see also *id.* (“‘Jurisdiction,’ it has been observed, ‘is a word of many, too many, meanings.’”). We therefore ought to distinguish carefully “between two sometimes confused or conflated concepts: federal-court ‘subject-matter’ jurisdiction over a controversy; and the essential ingredients of a federal claim for relief.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006).

In *Arbaugh*, the Supreme Court explained that “when Congress does not rank a statutory limitation ... as jurisdictional, courts should treat the restriction as nonjurisdictional in character.” *Id.* at 516. And in *Lexmark*, the Court noted that prior references in the caselaw to “prudential” or “statutory standing” were misleading because “the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court’s statutory or constitutional power to adjudicate the case.” 572 U.S. at 128 n.4.

Our cases assuming hypothetical jurisdiction—even though invoking a concept of “statutory jurisdiction”—often do not involve “the court’s statutory or constitutional power to adjudicate the case” but rather other, nonjurisdictional limitations. See, *e.g.*, *Moore v. Consol. Edison Co.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005) (exercising “hypothetical jurisdiction” to bypass a question involving prudential third-party standing requirements).

For example, in *Doyle v. Department of Homeland Security*, 959 F.3d 72, 78-79 (2d Cir. 2020), the court assumed “statutory jurisdiction” to avoid considering the district court’s conclusion that the Federal Records Act “precludes judicial review” under the Administrative Procedure Act of certain claims. *Doyle v. DHS*, 331 F. Supp. 3d 27, 62 (S.D.N.Y. 2018) (citing *Armstrong v. Bush*, 924 F.2d 282, 297 (D.C. Cir. 1991)). That issue, however, involves the availability of a cause of action.⁴ “Whether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided.” *Air Courier Conf.*, 498 U.S. at 523 n.3; cf. *Main St. Legal Servs.*, 811 F.3d at 566. In *Abimbola v. Ashcroft*, 378 F.3d 173, 180 (2d Cir. 2004), the court exercised “hypothetical jurisdiction” to avoid deciding whether an issue the petitioner had failed to raise before the agency was properly before the court under 8 U.S.C. § 1252(d)(1). Although some courts have held that the requirement of issue exhaustion is jurisdictional, see, e.g., *Massis v. Mukasey*, 549 F.3d 631, 639 (4th Cir. 2008), our court has held that it is not a “jurisdictional requirement,” *Lin Zhong v. DOJ*, 480 F.3d 104, 120 (2d Cir. 2007).

Similarly, in *Fama*, the court invoked “hypothetical jurisdiction” to avoid a question involving the one-year statute of limitations for habeas petitions and relation back under the Federal Rules of Civil Procedure. 235 F.3d at 816 & n.11. Our court has said,

⁴ See *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (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 (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).

however, that “the one-year period is a statute of limitations rather than a jurisdictional bar.” *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). Finally, in *United States v. Miller*, 263 F.3d 1, 4 n.2 (2d Cir. 2001), the court exercised “a form of hypothetical jurisdiction” to avoid deciding whether the appeal met the requirements of 18 U.S.C. § 3742(a). Although our court has, prior to *Arbaugh*, described § 3742(a) as jurisdictional,⁵ a better, more recent view is that § 3742(a) imposes “a mandatory limit on our power, not a subject-matter jurisdiction limit on our power,” *United States v. Marshall*, 954 F.3d 823, 827 (6th Cir. 2020).⁶

In other cases, the court may have avoided true jurisdictional questions without offending the *Steel Co.* rule of priority. In *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497-98 (2d Cir. 2002), the court relied on “hypothetical jurisdiction” to apply the doctrine of *forum non conveniens* without addressing a question of statutory jurisdiction. The Supreme Court, however, has specifically held that *Steel Co.* allows a court to dismiss a case for *forum non conveniens* before considering jurisdiction because it is a threshold, non-merits

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 (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).

consideration. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) (“We hold that a district court has discretion to respond at once to a defendant’s *forum non conveniens* plea, and need not take up first any other threshold objection.”); see *Ruhrgas*, 526 U.S. at 585 (“It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.”).

These cases did not entail skipping over jurisdictional limitations to reach the merits. When faced with plainly jurisdictional limitations, the court has been more hesitant to hypothesize jurisdiction. See, e.g., *Hanks*, 961 F.3d at 138 (remanding “for the district court to consider the jurisdictional question”); *Ventura de Paulino v. N.Y.C. Dep’t of Educ.*, 959 F.3d 519, 530 (2d Cir. 2020) (noting that a court should address jurisdiction first “in all but the rarest of cases”); *C. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 103 (2d Cir. 2015); *ProShipLine, Inc. v. Aspen Infrastructures, Ltd.*, 585 F.3d 105, 113 n.7 (2d Cir. 2009) (“[W]e think it advisable to [address Article III jurisdiction] ... as part of a complete analysis of the issues on appeal.”).

This case unmistakably implicates “the court’s statutory or constitutional power to adjudicate.” *Lexmark*, 572 U.S. at 128 n.4 (emphasis omitted). The other circuits that have considered whether it is appropriate to bypass a *Rooker-Feldman* question to reach the merits have concluded that assuming hypothetical jurisdiction in this context is improper. See, e.g., *Alyshah v. United States*, 241 F. App’x 665, 668 n.3 (11th Cir. 2007) (holding that “a court may not assume ‘hypothetical jurisdiction’ to decide the merits of a case despite its lack of jurisdiction” due to the *Rooker-Feldman* doctrine); *In re Knapper*, 407 F.3d 573, 580 n.15 (3d Cir. 2005); *Nguyen v. Phillips*, 69 F. App’x 358, 359 n.3 (9th Cir. 2003) (noting that “[w]e must consider ... jurisdictional challenges” under the *Rooker-Feldman* doctrine “before

turning to the merits of a case”); *Hutcherson v. Lauderdale Cty.*, 326 F.3d 747, 755 (6th Cir. 2003) (“*Rooker-Feldman* should be considered first since its application strips federal courts of jurisdiction and the ability to hear a *res judicata*, or other affirmative, defense.”). These courts are correct; we may not hypothesize jurisdiction to reach the merits when our subject-matter jurisdiction is in doubt.⁷

The court argues that we may assume jurisdiction here because the “result is foreordained by well-established circuit precedent.” *Ante* at 17 n.5. That notion finds some support in the Supreme Court’s decision in *Steel Co.* to reaffirm *Norton v. Mathews*, 427 U.S. 524 (1976), and *Secretary of Navy v. Avrech*, 418 U.S. 676 (1974) (per curiam). *Steel Co.*, 523 U.S. at 98-99. Although the Supreme Court acknowledged that these two cases “diluted the absolute purity of the rule that Article III jurisdiction is always an antecedent question,” it also held that the cases created only a narrow exception to that rule for

⁷ As the court notes, other circuits have retained the doctrine of hypothetical statutory jurisdiction even after *Steel Co.* *Ante* at 16-17. 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.’”).

circumstances in which “the merits question [has been] decided in a companion case” such that “the outcome of [the instant case] ... [is] foreordained.” *Id.* (emphasis omitted).

In *Vera v. Banco Bilbao Vizcaya Argentaria, S.A.*, 946 F.3d 120, 137 n.22 (2d Cir. 2019), we explained that the outcome of a previous case “was indisputably ‘foreordained’” where a collateral proceeding, “argued in tandem,” had “definitively resolved the merits question at issue.” Like *Norton* and *Avrech*, *Vera* is limited to a “peculiar” and “extraordinary procedural posture[]” in which “the merits question was decided *in a companion case*.” *Steel Co.*, 523 U.S. at 98. But unlike *Norton*, *Avrech*, and *Vera*, the merits issue here—whether Butcher plausibly stated a claim upon which relief can be granted—has not been “dispositively resolved in a companion case.” *Id.* No case, let alone a companion case, has foreordained the outcome of Butcher’s appeal. The court decides that issue here, for the first time, after hypothesizing subject-matter jurisdiction.

C

Even if the court may hypothesize jurisdiction despite the *Steel Co.* rule, there remains the separate question of “whether, and when, it *should*.” *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 434 (2010) (Thomas, J., concurring in the judgment). Although our obligation to exercise jurisdiction where it exists is “virtually unflagging,” *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), we are never obligated to hypothesize jurisdiction. Doing so is, at most, a matter of discretion. *See ante* at 12 (arguing that we “may” assume hypothetical jurisdiction).

When this court has recognized such discretion, it has been careful to create limits. The assumption of jurisdiction “is prohibited in all but the narrowest of circumstances,” *Ortiz-Franco v. Holder*, 782

F.3d 81, 86 (2d Cir. 2015), *abrogated on other grounds by Nasrallah v. Barr*, 140 S. Ct. 1683 (2020), and is allowed only ““where the jurisdictional issues are complex”” rather than “relatively straightforward,” *Hanks*, 961 F.3d at 137-38 (quoting *Ivanishvili*, 433 F.3d at 338 n.2); *see also Levin*, 560 U.S. at 434 (Thomas, J., concurring in the judgment) (“[C]ourts should *not* dismiss cases on nonjurisdictional grounds where jurisdiction ... involves no arduous inquiry and deciding it would not substantially undermine judicial economy.”) (internal quotation marks and alteration omitted). Because the jurisdictional question here is straightforward, *see infra* Part II, our precedent suggests that we should not hypothesize jurisdiction.

When deciding whether to hypothesize jurisdiction, “[m]uch more than legal niceties are at stake” —even apart from the fact that the court could be acting *ultra vires*. *Steel Co.*, 523 U.S. at 101-02. A dismissal on the merits may have consequences that a jurisdictional dismissal lacks. For example, a dismissal on the merits is generally with prejudice, *see* Fed. R. Civ. P. 41(b), but a jurisdictional dismissal must be without prejudice, *see Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 123 (2d Cir. 1999). A dismissal on the merits has preclusive effects for future litigation, but a jurisdictional dismissal does not. *See St. Pierre v. Dyer*, 208 F.3d 394, 399-400 (2d Cir. 2000). And a dismissal on the merits could support a claim for malicious prosecution, whereas a jurisdictional dismissal might not. *See Liberty Synergistics, Inc. v. Microflo Ltd.*, 50 F.Supp.3d 267, 283-85 (E.D.N.Y. 2014) (discussing the requirement of a “favorable termination” under New York law).

Although “[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment,” *Steel Co.*, 523 U.S. at 101, such a judgment can have real consequences. For that reason, the constraints

this court has placed on the doctrine of hypothetical jurisdiction are important.

In my view, it is generally improper for a court to exercise the judicial power in the absence of statutory authority to do so, and therefore we should “assure ourselves that the case is properly within our subject matter jurisdiction” before issuing a decision on the merits. *Wynn*, 273 F.3d at 157. The failure to do so, as in this case, is especially unjustified when the jurisdictional question before the court is simple. *Hanks*, 961 F.3d at 138.

II

Butcher’s state-court appeal was still pending when he filed suit in federal court. The jurisdictional question before us, therefore, could not be simpler: Was the state-court judgment “rendered before the district court proceedings commenced”? *Butcher v. Wendt*, No. 17-CV-7988, 2018 WL 6725308, at *4 (S.D.N.Y. Dec. 21, 2018).⁸

The *Rooker-Feldman* doctrine “is confined to cases” in which “the losing party in state court filed suit in federal court after the state proceedings ended.” *Saudi Basic Indus.*, 544 U.S. at 284, 291. In this case, the state proceedings had not yet ended when Butcher filed suit because his state-court appeal was still pending. *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F.3d 17, 24-27 &

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 17 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.

n.13 (1st Cir. 2005). Accordingly, the *Rooker-Feldman* doctrine does not bar jurisdiction over Butcher's claims.

"Since *Saudi Basic Industries*, all federal circuits that have addressed the issue have concluded that *Rooker-Feldman* does not apply if, as here, a state-court appeal is pending when the federal suit is filed." *Parker*, 757 F.3d at 705; see *Malhan v. Sec'y U.S. Dep't of State*, 938 F.3d 453, 459-61 (3d Cir. 2019); *Parker*, 757 F.3d at 705-06; *Nicholson v. Shafe*, 558 F.3d 1266, 1279 (11th Cir. 2009); *Guttman v. Khalsa*, 446 F.3d 1027, 1032 & n.2 (10th Cir. 2006); *Dornheim v. Sholes*, 430 F.3d 919, 923-24 (8th Cir. 2005); *Mothershed v. Justices of the Sup. Ct.*, 410 F.3d 602, 604 n.1 (9th Cir. 2005); *Federacion*, 410 F.3d at 24-27 & n.13.

This court has even suggested that this is the correct approach. See *Green v. Mattingly*, 585 F.3d 97, 103 (2d Cir. 2009) (noting that "the *Rooker-Feldman* doctrine would likely apply" if a plaintiff brought suit in federal court "at the completion of her appeals" in state court). We have approvingly cited caselaw from other circuits that endorses this approach to deciding "whether 'the state proceedings have "ended" within the meaning of *Rooker-Feldman*.'" *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 89 (2d Cir. 2005) (quoting *Federacion*, 410 F.3d at 25). We have also followed this approach in summary orders. See *Borrani v. Nationstar Mortg. LLC*, No. 19-2204, 2020 WL 3721480, at *2 (2d Cir. July 7, 2020) (holding that the *Rooker-Feldman* doctrine applied because the federal suit was filed after the "thirty-day deadline for appeal" of the state-court judgment). Other circuits, in fact, believe that our court has already taken a position on this issue. See *Malhan*, 938 F.3d at 459 (including the Second Circuit among those that have "cited *Federacion* with approval"); *Guttman*, 446 F.3d at 1032 (including the Second Circuit among those that have held "*Rooker-*

Feldman applies only to suits filed after state proceedings are final”).⁹ There is no reason for the court to avoid answering this simple question here.

The court says that our circuit has “strongly suggested” it would decide this question differently from every other circuit. *See ante* at 17 n.5 (citing *Vossbrinck v. Accredited Home Lenders, Inc.*, 773 F.3d 423, 426 & n.1 (2d Cir. 2014)). But *Vossbrinck* does not indicate that we would do so. Although the plaintiff in *Vossbrinck* had a pending state-court appeal when he filed suit in federal court, we explicitly noted that “Vossbrinck [did] not argue that the relevant state judgment was not ‘rendered before the district court proceedings commenced’ for *Rooker-Feldman* purposes” and therefore reserved judgment on the question. 773 F.3d at 426 n.1. The court infers a “suggested” answer to the jurisdictional question from the fact pattern of the case. Yet it is well-established that “drive-by jurisdictional rulings of this sort ... have no precedential effect.” *Steel Co.*, 523 U.S. at 91.

At the time Butcher filed suit in federal court, the state proceedings had not yet ended. *Compare* App’x 66, *with id.* at 833. Therefore, the *Rooker-Feldman* doctrine does not bar our consideration of his claims and we have jurisdiction to consider Butcher’s RICO and 42 U.S.C. § 1983 claims.

* * *

The *Rooker-Feldman* doctrine “is not an abstention doctrine.” *VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 402 n.2 (6th Cir. 2020). Nor is it a preclusion doctrine, *Lance v. Dennis*, 546 U.S. 459, 466 (2006), or a doctrine of comity, *see Thana v. Bd. of License Comm’rs*, 827

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

F.3d 314, 320 (4th Cir. 2016). Rather, the *Rooker-Feldman* doctrine proceeds from the statutory grant of appellate jurisdiction to the Supreme Court over state court judgments in 28 U.S.C. § 1257, see *VanderKodde*, 951 F.3d at 405 (Sutton, J., concurring) (“[O]nly the United States Supreme Court, not federal district courts, may entertain appeals from final judgments of the state courts.”). That statutory grant “precludes a United States district court from exercising subject-matter jurisdiction in an action” to which the doctrine applies. *Saudi Basic Indus.*, 544 U.S. at 291.

Unlike “the doctrines of preclusion, comity, and abstention,” each of which may apply when there is concurrent federal and state litigation, *Thana*, 827 F.3d at 320, the *Rooker-Feldman* doctrine does not preclude “concurrent jurisdiction” in both federal and state courts while state-court appeals are pending, as was the case here. *Saudi Basic Indus.*, 544 U.S. at 292.

Having concluded that the *Rooker-Feldman* doctrine does not bar our consideration of Butcher’s claims, I concur in the part of the court’s opinion that holds that “Butcher’s complaint failed to state any claim on which relief could be granted.” See *ante* at 7-11. And because the complaint failed to state a claim, the district court properly dismissed it. I therefore concur in the judgment.