

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
 :
 v. :
 :
 CHAKA FATTAH, SR., et al. : NO. 15-346

MEMORANDUM

Bartle, J.

March 18, 2016

The Grand Jury has returned a 29-count indictment against defendants Chaka Fattah, Sr. ("Fattah"), Herbert Vederman ("Vederman"), Robert Brand ("Brand"), Karen Nicholas ("Nicholas"), and Bonnie Bowser ("Bowser"). Also named as unindicted coconspirators are Thomas Lindenfeld ("Lindenfeld") and Gregory Naylor ("Naylor"). Count One of the indictment charges all five defendants with conspiracy to commit racketeering in violation of § 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq.¹ Now before the court are the motions of each defendant for dismissal of Count One for failure to state an

1. The remaining 28 counts charge one or more defendants with: conspiracy to commit wire fraud (18 U.S.C. §§ 1343 and 1349); conspiracy to commit honest services wire fraud (18 U.S.C. §§ 1343, 1346, and 1349); conspiracy to commit mail fraud (18 U.S.C. § 1341); mail fraud (18 U.S.C. § 1341); falsification of records (18 U.S.C. §§ 1519 and 2); conspiracy to commit bribery (18 U.S.C. § 371); bribery (18 U.S.C. § 201(b)(1)); bank fraud (18 U.S.C. §§ 1344 and 2); false statements to financial institutions (18 U.S.C. §§ 1014 and 2); money laundering (18 U.S.C. §§ 1957 and 2); money laundering conspiracy (18 U.S.C. § 1956(b)); and wire fraud (18 U.S.C. § 1343).

offense under Rule 12(b)(3)(B)(v) of the Federal Rules of Criminal Procedure.

I.

Under 18 U.S.C. § 1962(d), it is unlawful for any person to conspire to violate 18 U.S.C. § 1962(c), which in turn makes it a crime "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The indictment charges that all defendants, plus Lindenfeld and Naylor, were coconspirators and constituted an association-in-fact enterprise as defined by 18 U.S.C. § 1961(4) with Fattah, the leader of the enterprise.

Fattah is and was at all relevant times a member of the United States House of Representatives. In 2006 and 2007, while a Congressman, he ran an unsuccessful campaign to become Mayor of the City of Philadelphia. Vederman acted as finance director for the mayoral campaign, "Fattah for Mayor" ("FFM"). During that time period, Vederman was also a senior consultant in the field of government affairs at a Philadelphia-based law firm. Brand, who is married to one of Fattah's former Congressional staffers, is the founder of Company 2, a for-profit public technology company. Nicholas was at all relevant

times the Chief Executive Officer of Educational Advancement Alliance ("EAA"), a nonprofit entity founded by Fattah, and also managed certain financial affairs for College Opportunity Resources for Education Philly, a second Fattah-founded nonprofit organization. The indictment charges Bowser, the fifth defendant, with serving as the Philadelphia District Chief of Staff for Fattah's Congressional office and as the treasurer of both FFM and Fattah's Congressional campaign, "Fattah for Congress" ("FFC"). She also held power of attorney for Fattah personally and assisted him in his personal financial affairs.

Both Naylor and Lindenfeld, the two additional members of the alleged conspiracy and enterprise, have been charged separately. Naylor was the founder of the political consulting firm Sydney Lei & Associates ("SLA"), and Lindenfeld was the founder of the political consulting firm LSG Strategies ("LSG"). Naylor has pleaded guilty to: one count of misprision of felony under 18 U.S.C. § 4; one count of falsifying, concealing, or covering up by trick, scheme or device a material fact in a matter within the jurisdiction of a department or agency of the United States in violation of 18 U.S.C. §§ 1001(a)(1) and 2; and one count of making a materially false, fictitious, or fraudulent statement or representation in a matter within the jurisdiction of a department or agency of the United States in violation of 18 U.S.C. § 1001(a)(2). Lindenfeld has entered a

plea of guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1343, 1346, and 1349.

The indictment alleges that the enterprise had two purposes. The first was to further and support "the political and financial interests of [Fattah] and his coconspirators through fraudulent and corrupt means." Its second purpose was to promote Fattah's "political and financial goals through deception by concealing and protecting the activities of the Enterprise from detection and prosecution by law enforcement officials and the federal judiciary, as well as from exposure by the news media, through means that included the falsification of documents and obstruction of justice."

Count One, as noted above, charges that defendants violated 18 U.S.C. § 1962(d) in that they conspired to violate § 1962(c), that is, agreed to take part in the affairs of an enterprise through a pattern of racketeering activity. The pattern of racketeering activity described in Count One consists of violations of the following statutes: 18 U.S.C. §§ 1341 (relating to mail fraud), 1343 and 1346 (relating to wire fraud), 1344 (relating to financial institution fraud), 201 (relating to bribery), 1512 (relating to obstruction of justice and evidence tampering), and 1956 and 1957 (relating to money laundering). As charged in the indictment, that pattern of racketeering activity involved acts in furtherance of the

enterprise which the Government groups into what it characterizes as five separate "schemes."

The first of these five "schemes" involved the financing of Fattah's 2007 mayoral campaign. Count One charges that Fattah, Bowser, Lindenfeld, and Naylor agreed to violate the applicable campaign finance laws by obtaining an illegal \$1,000,000 loan for FFM from an individual known as Person D. To disguise the loan, Fattah arranged for Person D to "loan" the funds to LSG. The campaign spent \$600,000 of the loan, but LSG returned \$400,000 in unused funds to Person D after the election. Naylor concealed the source of \$193,580.19 of these funds by submitting a false invoice from SLA to FFM for election-day expenses. Fattah and Bowser proceeded to report this \$193,580.19 "debt" on FFM's annual campaign finance reports. They also falsely reported that SLA was "forgiving" the debt in annual increments of \$20,000, which was at the time the applicable annual limit for corporate campaign donations under Philadelphia's campaign finance rules.

In or around late 2007, Person D sought repayment of the outstanding \$600,000. Fattah arranged for EAA, the nonprofit organization run by Nicholas, to repay the debt. The funds to be contributed by EAA had been obtained from the charitable arm of Sallie Mae, a financial institution that specializes in student loans, and from a federal grant made by the National

Aeronautics and Space Administration ("NASA") to EAA for educational purposes. Because these funds could not legally be used to repay a campaign loan, Nicholas, Brand, and Bowser worked together to disguise the source of the repayment. Nicholas first transferred \$600,000 from EAA to Brand's firm, Company 2. Brand, in turn, transferred the funds to LSG and executed a fake contract with Lindenfeld to disguise the transaction. Lindenfeld, on behalf of LSG, proceeded to repay the debt to Person D.

Following the transfer of funds from EAA to Company 2, Brand received a subpoena from the United States Department of Justice, which was investigating EAA's finances. In order to conceal the reason for the transfer, Nicholas and Brand executed a fake contract for services between EAA and Company 2. Bowser, Nicholas, Brand, Lindenfeld, and Naylor also made false entries in the business records of FFM, EAA, LSG, and Company 2, as well as in tax returns and campaign finance forms.

The second "scheme" that was part of the alleged "pattern of racketeering activity" involved Fattah's efforts to compensate Lindenfeld for his work on Fattah's mayoral campaign. During a meeting in 2008, Fattah informed Lindenfeld that he did not have and could not legitimately raise the funds to repay him. He also noted that he needed to write down his debt to LSG, in part to convey a public impression of political strength

and viability. Consequently, Fattah proposed that he would use his status as a public official to obtain federal grant funding for Lindenfeld's benefit. He proposed that Lindenfeld create a nonprofit organization called "Blue Guardians." According to the indictment, Fattah "suggested that 'Blue Guardians' could obtain federal funding for vaguely defined efforts concerning coastal environmental conservation." He instructed Lindenfeld to use Brand's Philadelphia business address as a "mail drop" for the organization. In exchange for the funds that Fattah suggested Lindenfeld could receive in connection with "Blue Guardians," Fattah and Bowser began to reduce FFM's debt to LSG and Lindenfeld in \$20,000 annual increments on FFM's Philadelphia campaign finance statements.

The third "scheme" described in Count One involved the allegedly unlawful use of campaign funds to repay the student loan debt of Fattah's son. According to the indictment, campaign funds from FFC and FFM were used to pay these debts by first being funneled through Naylor's firm, SLA. Bowser would issue checks from the campaigns to SLA, on one occasion writing "election day expenses" in the memo line. These payments were falsely documented by Fattah and Bowser as "expenditures" against the false debt to SLA that had been "incurred" by FFM during the mayoral campaign. SLA would then issue checks to Drexel University, where Fattah's son was enrolled, and to

Sallie Mae, which held loans for the debts of Fattah's son. Naylor concealed this arrangement by creating false IRS 1099 forms for 2007, 2008, and 2010. These forms falsely claimed that the payments were "earned income" in that they were for services rendered by Fattah's son as an independent contractor to SLA.

According to Count One, at the same time that the campaign funds of FFC and FFM were being used to repay the college debts of Fattah's son, members of the enterprise renegotiated FFM's campaign debt with vendors including two entities described in the indictment as "Law Firm 1" and "Printer 1." In or around December 2008, Vederman and Bowser persuaded Law Firm 1 to forgive approximately \$20,000 of the approximately \$80,977 debt owed to it by FFM, in part by representing that Fattah and FFM lacked the funds to repay the debt in full. In or around December 2011, Vederman convinced Printer 1 to forgive approximately \$30,000 in campaign debt, again on the ground that Fattah and FFM were unable to repay their full debt to Printer 1. Count One charges that defendants never "disclose[d] to Law Firm 1 or Printer 1 that [Fattah]'s campaign money was being used to pay off the college debt of [Fattah]'s son when those funds could have been used to pay down or retire the campaign debt."

Count One also details a fourth "scheme," this one involving Fattah's promises to engage in certain official acts for Vederman's benefit in exchange for things of value. Beginning in 2008, Fattah undertook to secure for Vederman an ambassadorship or an appointment to a United States Trade Commission. Fattah worked to obtain these appointments through meetings, emails, calls, and letters with elected officials and members of the Executive Branch, including the President of the United States. Fattah also hired Vederman's girlfriend onto his Congressional staff in January 2012. The indictment charges that in exchange for these actions, Vederman provided things of value to Fattah. For example, Vederman agreed to sponsor a visa for Fattah's au pair and paid part of the au pair's tuition. He also paid sums of money to Fattah's son, who, in turn, made payments to Fattah.

Further, in January 2012 Vederman made an \$18,000 wire transfer to Fattah so that Fattah and his spouse could qualify for a mortgage on a vacation home in the Poconos. Bowser provided Vederman with instructions on how to complete the transfer. In order to deceive the mortgagor, circumvent the House ethics rules prohibiting gifts from lobbyists, and omit the payment from Fattah's Congressional Financial Disclosure form, Fattah, Vederman, and Bowser disguised the transaction as a car sale. They did so by creating records which purported to

reflect the sale of a Porsche belonging to Fattah's spouse to Vederman. In fact, Fattah and his spouse continued to possess, use, and pay insurance on the Porsche after the "sale."

Finally, Count One sets forth a fifth "scheme," which involves the alleged efforts of Nicholas to defraud the National Oceanic and Atmospheric Administration ("NOAA") of federal grant funds. In late 2011 and early 2012, Nicholas sought a grant from NOAA to be used toward the annual Fattah-founded National Conference on Higher Education. In August 2012, NOAA agreed to provide \$50,000 toward the conference, which Nicholas had represented would take place in October 2012 in Philadelphia. As charged in the indictment, the conference was never held, and Nicholas obtained the funds, which she "spent . . . on Naylor and herself."

Count One enumerates a series of overt acts allegedly committed by defendants and other members of the enterprise in furtherance of the conspiracy. These overt acts include numerous meetings conducted and communications and agreements made in the process of carrying out the five "schemes" detailed above, as well as various monetary transactions and expenditures. The overt acts also include the filing of false campaign finance reports and the falsification of other records to conceal the alleged malfeasance of defendants.

II.

All five defendants, as mentioned above, seek dismissal of Count One pursuant to Rule 12(b)(3)(B)(v) on the ground that it fails adequately to allege an offense. Specifically, they argue that Count One does not set forth a RICO conspiracy because it does not sufficiently state an "enterprise," "association-in-fact," or "pattern of racketeering activity."

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Detailed allegations or technicalities are not required. United States v. Resendiz-Ponce, 549 U.S. 102, 110 (2007). Our Court of Appeals has held that an indictment states an offense if it:

(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.

United States v. Bergrin, 650 F.3d 257, 264 (3d Cir. 2011) (quoting United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007)).

An indictment must do more than simply recite in general terms the essential elements of the offense. See id. Similarly, the specific facts alleged in the indictment may not fall beyond the relevant criminal statute. Id. at 264-65. However, "no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." Kemp, 500 F.3d at 280 (quoting United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989)). We take as true all well-pleaded factual allegations in the indictment. United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990).

18 U.S.C. § 1962(d), the only section of RICO under which the five defendants are charged, makes it a crime to conspire to violate § 1962(c). Section 1962(c) of RICO, as noted above, reads that it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). To establish a violation of § 1962(c), the Government must prove: "(1) the existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the

defendant participated in, either directly or indirectly, in [sic] the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity." United States v. Irizarry, 341 F.3d 273, 285 (3d Cir. 2003). The terms of the RICO statute "are to be liberally construed to effectuate its remedial purposes." Boyle v. United States, 556 U.S. 938, 944 (2009) (internal citation omitted).

A § 1962(d) charge must allege "an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense." In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 373 (3d Cir. 2010) (quoting Salinas v. United States, 522 U.S. 61, 65 (1997)) (alternation in original). To obtain a conviction under § 1962(d), the Government must prove:

"(1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity." United States v. John-Baptiste, 747 F.3d 186, 207 (3d Cir. 2014) (citing United States v. Riccobene, 709 F.2d 214, 224 (3d Cir. 1983), abrogated on other grounds by Bergrin, 650 F.3d at 266

n.5). There is no requirement that the Government prove that the defendant was in fact a member of the enterprise or that an enterprise even existed.

Significantly, RICO's conspiracy provision is "even more comprehensive than the general conspiracy offense" in 18 U.S.C. § 371. Salinas, 522 U.S. at 63; see also id. at 64. Unlike § 371, § 1962(d) contains "no requirement of some overt act or specific act." Id. Similarly, "the requirements for RICO's conspiracy charges under § 1962(d) are less demanding" than those applicable to substantive violations under § 1962(c). Baisch v. Gallina, 346 F.3d 366, 376 (2d Cir. 2003); see also City of N.Y. v. Bello, 579 F. App'x 15, 17 (2d Cir. 2014).

Accordingly, "a defendant may be held liable under § 1962(d) even where [his or her] own actions would not amount to a substantive RICO violation." In re Ins. Brokerage Antitrust Litig., 618 F.3d at 372. Thus, a defendant can be convicted of a RICO conspiracy even if he or she did not agree to commit two or more acts of racketeering. Salinas, 522 U.S. at 65-66; see also, e.g., United States v. Ligambi, 972 F. Supp. 2d 699, 706 (E.D. Pa. 2013). At least one Court of Appeals has inferred from the Supreme Court's decision in Salinas that "the establishment of an enterprise is not an element of the RICO conspiracy offense." United States v. Applins, 637 F.3d 59, 75 (2d Cir. 2011); see also Bello, 579 F. App'x at 17.

For a defendant to be a RICO conspirator, then, "it suffices that he adopt the goal of furthering or facilitating the criminal endeavor," which he "may do . . . in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion." Salinas, 522 U.S. at 65. The Government must merely prove that the defendant "agreed to conduct the affairs of the enterprise through a pattern of racketeering activity to be accomplished through the acts of his co-conspirators." Ligambi, 972 F. Supp. 2d at 706 (citing United States v. Pungitore, 910 F.3d 1084, 1130 (3d Cir. 1990)). There is no indication that alleged RICO conspirators must agree upon the breadth and contours of a conspiracy, or upon all of its details, prior to carrying it out.

Furthermore, it is well established that "one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." Riccobene, 709 F.2d at 225, abrogated on other grounds by Bergrin, 650 F.3d at 266 n.5. This point is particularly important to remember in light of the fact that several defendants have attacked the Government's RICO conspiracy allegations by urging that the purported coconspirators had few or no ties to one another. This mischaracterizes the indictment. In fact, Count One asserts that Fattah knew and had

political and in some cases financial ties with each of the other four defendants, as well as with Naylor and Lindenfeld. In addition to Fattah's association with all the others, the indictment sets forth numerous additional connections between and among various defendants. To give several examples, the indictment reveals that: (1) Vederman and Bowser had ties relevant to certain charges; (2) Brand, Nicholas, and Bowser had such ties; (3) Bowser and Naylor did so also; (4) Nicholas had ties with both Lindenfeld and Naylor; (5) Lindenfeld and Naylor had such ties; and (6) Brand and Lindenfeld did so likewise. At this stage we must accept these allegations as true.

Notwithstanding these alleged interlocking political and financial relationships, defendants urge that Count One fails adequately to allege an offense by insufficiently setting forth the existence of an "enterprise." The term "enterprise" is defined under RICO as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The Government charges in Count One that the enterprise alleged in this matter was "associated in fact."

The concept of an association-in-fact enterprise in the RICO context "has a wide reach." In re Ins. Brokerage Antitrust Litig., 618 F.3d at 366 (quoting Boyle, 556 U.S. at

944). The existence of such an enterprise "is proven 'by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" Irizarry, 341 F.3d at 285-86 (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)). An association-in-fact enterprise must have a structure, that is a shared "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit those associates to pursue the enterprise's purpose." Boyle, 556 U.S. at 946. The Government must prove "(1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages." Irizarry, 341 F.3d at 286 (quoting United States v. Pelullo, 964 F.2d 193, 211 (3d Cir. 1992)); see also In re Ins. Brokerage Antitrust Litig., 618 F.3d at 365. However, in evaluating allegations of an association-in-fact enterprise we are not bound to look only to the purported enterprise's structure, for "the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." See Boyle, 556 U.S. at 951.

Moreover, an association-in-fact enterprise "need not have a hierarchical structure or a 'chain of command.'" Id. at

948. The definition of an enterprise is not limited to "business-like entities." Id. at 945. Instead, an enterprise may make its decisions "on an ad hoc basis and by any number of methods," and its members "need not have fixed roles." Id. at 948. The association-in-fact enterprise "need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies." Id. It may "engage in spurts of activity punctuated by periods of quiescence," and its crimes need not be "sophisticated, diverse, complex, or unique." Id.

An enterprise exists "separate and apart" from its unlawful activity as long as it "has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate" to satisfy this requirement. Riccobene, 709 F.2d at 223-24.

In asserting that Count One is deficient in failing adequately to allege an association-in-fact enterprise, defendants forget that they are charged with conspiracy under § 1962(d) and not with the substantive RICO offense of § 1962(c). As we have already mentioned, the Second Circuit, in a well-reasoned opinion, has interpreted the Supreme Court's decision in Salinas to hold that "the establishment of an

enterprise is not an element of the RICO conspiracy offense."² Applins, 637 F.3d at 75; see also Bello, 579 F. App'x at 17. We reiterate that § 1962(d)'s requirements are "less demanding" than those of § 1962(c). See, e.g., Bello, 597 F. App'x at 17; see also In re Ins. Brokerage Antitrust Litig., 618 F.3d at 372.

Moreover, even if the Government is required to allege the participation of each defendant in an association-in-fact enterprise, it has done so. Count One describes a group of individuals who conspired to act together over a multi-year period with the dual purposes of advancing "the political and financial interests of [Fattah] and his coconspirators through fraudulent and corrupt means" and furthering the "political and financial goals" of Fattah "through deception by concealing and protecting the activities of the [e]nterprise from detection and prosecution . . . as well as from exposure by the news media, through means that included the falsification of documents and obstruction of justice." According to the indictment, the enterprise had in place a decisionmaking framework in that Fattah, as its leader, "directed other members of the enterprise in furtherance of its affairs."

What is more, the enterprise existed "separate and apart" from the alleged pattern of racketeering activity. Those

2. Indeed, counsel for Vederman conceded this point at oral argument.

named in the indictment were linked not only by the allegedly criminal conduct in which they took part but also by their shared connections to Fattah and to his political career and to some extent with each other. As such, the enterprise "ha[d] an existence beyond that which [was] necessary merely to commit each of the acts charged as predicate racketeering offenses." Riccobene, 709 F.2d at 224.

Defendants Fattah, Vederman, and Brand urge that the Government cannot establish a RICO enterprise by grouping together a series of "unrelated" persons and designating them "a criminal organization." In addressing whether an association-in-fact enterprise has adequately been alleged, we need not restrict our inquiry to the purported enterprise's structure, as "the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." See Boyle, 556 U.S. at 951. In this instance, the purposes and methods of the enterprise, as set forth in the indictment, make clear that it was an "ongoing organization" which functioned "as a continuing unit." Irizarry, 341 F.3d at 285-86. The argument of Fattah, Vederman, and Brand fails.

The same is true of Bowser's argument that the alleged purposes of the enterprise are "so broad as to eviscerate any

limits to the application of RICO.”³ Bowser cites no authority for her position that there is some limitation on the breadth of an enterprise’s alleged purpose. Indeed, a similar argument was recently rejected by our Court of Appeals in Bergrin, 650 F.3d at 270. There, defendants took issue with allegations that a RICO enterprise had as its purpose “promoting and enhancing the Bergrin Law Enterprise and its leaders’, members’ and associates’ activities; enriching the leaders, members and associates of the Bergrin Law Enterprise; and concealing and otherwise protecting the criminal activities of the Bergrin Law Enterprise.” Id. The Third Circuit concluded that far from being too broad, this purpose encompassed predicate acts which satisfied RICO’s “‘relatedness’ sub-element.” Id. The articulated “purpose” here, like the one at issue in Bergrin is not impermissibly broad. We reiterate that the Supreme Court has described the concept of a RICO “enterprise” as one that “has a wide reach.” Boyle, 556 U.S. at 944.⁴

3. Vederman makes a similar argument in his reply brief, positing that the articulated purpose of the enterprise “is so vague as to have no limits and attempts to bootstrap the unrelated acts into an entity or whole.”

4. At oral argument, defense counsel argued for the first time that when the conduct at issue is protected by the First Amendment, we must construe the terms of RICO more narrowly than we would otherwise. Regardless of whether this is true, the conduct alleged here is not protected by the First Amendment. The fact that a defendant’s conduct has a tenuous relationship to his political affiliations does not automatically insulate

Meanwhile Nicholas contends that the indictment fails adequately to set forth a uniform "course of conduct," a relationship between the alleged members of the enterprise, or evidence that the defendants operated as a "continuing unit." We disagree. Count One adequately alleges "(1) that the enterprise is an ongoing organization with some sort of framework for making or carrying out decisions; (2) that the various associates function as a continuing unit; and (3) that the enterprise be separate and apart from the pattern of activity in which it engages." Boyle, 556 U.S. at 946 (quoting Pelullo, 964 F.2d at 211). Even if the Government must establish the existence of an enterprise in order to make out a § 1962(d) violation, this is all that is required at this stage.

Finally, Bowser argues that Count One fails adequately to allege an offense against her in that it is insufficient to establish her "association" with the purported enterprise. For such an "association" to be established, the defendant "must be shown to have been aware of at least the general existence of the enterprise named in the indictment." United States v. Eufrazio, 935 F.2d 553, 577 n.29 (3d Cir. 1991) (quoting United States v. Castellano, 610 F. Supp. 1359, 1401 (S.D.N.Y. 1985)).

that conduct from scrutiny. Moreover, as the Government pointed out during oral argument, crimes like the RICO predicate offenses charged here are not protected by the First Amendment.

This threshold "is not difficult to establish." United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998).

Bowser points out that Count One does not allege her contemporaneous awareness of events including the grants made by NASA and NOAA, the events surrounding the creation of "Blue Guardians," Lindenfeld's solicitation of a campaign loan from Person D, Vederman's payment of the school costs and debts of Fattah's au pair and son, EAA's expenditures, Fattah's efforts to secure an Executive Branch appointment for Vederman, or the fact that Fattah's hiring of Vederman's girlfriend was allegedly done in exchange for things of value. But the indictment need not allege Bowser's knowledge of these specifics. As noted above, her alleged knowledge of "the general existence of the enterprise" is sufficient. See Eufrazio, 935 F.2d at 577 n.29 (citation omitted). Count One contains allegations that Bowser worked alongside other members of the enterprise to carry out several of the acts described therein with the knowledge that she was falsifying campaign finance reports and other records. And again, "one conspirator need not know the identities of all his co-conspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." Riccobene, 709 F.2d at 225. In sum, Count One adequately alleges her "association" with the enterprise.

Defendants next argue that Count One does not adequately allege the existence of a "pattern of racketeering activity" because there is no relatedness or continuity among the alleged predicate acts. RICO defines "racketeering activity" to include "any act which is indictable under any of" a long list of statutory provisions which includes those criminalizing mail fraud, wire fraud, financial institution fraud, bribery, obstruction of justice, evidence tampering, and money laundering. 18 U.S.C. § 1961(1). A "pattern of racketeering activity" as defined by RICO "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." Id. § 1961(5).

The Supreme Court has concluded that Congress, in enacting RICO,

had a . . . natural and common-sense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237 (1989). In H.J., Inc., the Court emphasized that for purposes of RICO, the existence of a "pattern" is linked not to the number of

predicates but instead to “the relationship that [the predicate acts] bear to each other or to some external organizing principle that renders them ‘ordered’ or ‘arranged.’” Id. at 238. Under this “flexible approach,” the Government can demonstrate that a “pattern” exists “by reference to a range of different ordering principles or relationships between predicates.” Id. While “sporadic activity” does not satisfy this standard, a “pattern” is established by a “showing of a relationship between the predicates . . . and of the threat of continuing activity,” that is “*continuity plus relationship.*” Id. at 239 (internal citations omitted) (emphasis in original), see also John-Baptiste, 747 F.3d at 207 (quoting United States v. Mark, 460 F. App’x 103, 108 (3d Cir. 2012)). In practice, these “continuity” and “relationship” requirements “often overlap.” H.J., Inc., 492 U.S. at 239.

There is a “relationship” between predicate acts that have “the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” Id. at 240; see also John-Baptiste, 747 F.3d at 207 (quoting Barticheck v. Fid. Union Bank/First Nat’l State, 832 F.2d 36, 39 (3d Cir. 1987)) (emphasis added). Since the Court uses the disjunctive, any of these characteristics, standing alone, is sufficient. Consequently, “[s]poradic and separate criminal

activities alone cannot give rise to a pattern for RICO purposes." John-Baptiste, 747 F.3d at 207 (quoting Mark, 460 F. App'x at 108). Nevertheless, "separately performed, functionally diverse and directly unrelated predicate acts and offenses" can amount to a "pattern" for RICO purposes "as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise." Eufrazio, 935 F.2d at 566.

RICO's "continuity" requirement, meanwhile, is "centrally a temporal concept." H.J., Inc., 492 U.S. at 241-42. It refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241. Thus the Government, when alleging a substantive RICO violation under § 1962(c), "may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." Id. at 242. For example, "the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business," even if that entity is otherwise legitimate. Id. When a § 1962(c) RICO action is brought "before continuity can be established in this way," the Government may allege the "threat of continuity." Id. (emphasis in original). Our inquiry into

whether an alleged RICO pattern is sufficiently continuous "depends on the specific facts of each case." Id.

Defendants again overlook the significance of the fact that they are charged with a RICO conspiracy under § 1962(d) and not with substantive RICO violations under § 1962(c). It is true that the Government, to allege a § 1962(d) violation, must establish "an endeavor which, if completed, would satisfy all of the elements" of a § 1962(c) offense. In re Ins. Brokerage Antitrust Litig., 618 F.3d at 373 (quoting Salinas, 522 U.S. at 65). However, a defendant indicted under § 1962(d) need not have actually committed any predicate acts of racketeering. E.g., Salinas, 522 U.S. at 65-66. It suffices that each defendant "agreed to conduct the affairs of the enterprise through a pattern of racketeering activity to be accomplished through the acts of his co-conspirators." Ligambi, 972 F. Supp. 2d at 706 (citing Pungitore, 910 F.3d at 1130) (emphasis added).

Although defendants do not fully argue in their briefs that they did not "agree to" conduct the alleged enterprise's affairs through a pattern of racketeering activity, they did raise this contention at oral argument. Their argument seems to be that Count One does not adequately charge the "agreement" that serves as the basis for the § 1962(d) conspiracy. However, as mentioned above, no defendant has pointed to any case which holds that RICO conspirators must settle on the scope and

contours of a course of unlawful conduct before setting out to complete it. As the Government pointed out at oral argument, a conspiratorial "agreement" often becomes apparent only through the resulting conduct. It would defy logic to conclude that a RICO conspiracy only arises when a group of defendants sits down together and agrees that they will form an enterprise and that the enterprise will commit at least two predicate RICO acts. In the indictment before us, the Government has charged that all five defendants "conspired . . . to conduct and participate . . . in the conduct of the affairs of the Enterprise, through a pattern of racketeering activity." Of course, the indictment goes on to describe that "enterprise" and "pattern of racketeering activity" in greater detail. The Government also alleges that "[i]t was part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the Enterprise." These assertions are sufficient to allege a "conspiracy" under § 1962(d).

Moreover, to the extent that the Government must allege the existence of a "pattern of racketeering activity" in order to state a conspiracy under § 1962(d), it has done what is necessary. Count One describes a continuous course of conduct consisting of what the Government characterizes as five "schemes." These alleged "schemes," while different, had "the

same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.” See H.J., Inc., 429 U.S. at 240. Specifically, the activities detailed in Count One were carried out with the common goals of: (1) advancing the political and financial interests of Fattah and his coconspirators and (2) furthering the political and financial goals of Fattah by concealing the activities of the enterprise. Far from being “isolated events,” the alleged acts of defendants were “interrelated.” See id. All were “undertaken in furtherance of one or another varied purposes of a common organized crime enterprise.” Eufrasio, 935 F.2d at 566. The specific crimes involved do not have to be identical. The racketeering acts alleged here in Count One are related. Furthermore, there was continuity to the alleged racketeering acts, which are claimed to have begun in or around 2007 and continued without any significant break until as recently as January 2014. In sum, the allegations of Count One are sufficient to describe a “pattern of racketeering activity.”⁵

5. In support of her position that the “clusters” of conduct alleged in Count One are not sufficiently related to constitute a pattern of racketeering activity, Bowser points to several district court opinions dismissing RICO claims on the ground that the underlying acts were not related to one another. See Kades v. Organic Inc., 2003 WL 470331, at *10 (S.D.N.Y. Feb. 24, 2003); Hughes v. Halbach & Braun Indus., Ltd., 10 F. Supp. 2d 491, 500 (W.D. Pa. 1998); Bernstein v. Misk, 948 F. Supp. 228,

Nicholas argues that her alleged misappropriation of the proceeds of a grant made by NOAA to EAA for the personal use of herself and Naylor is not sufficiently related to the other alleged activities to constitute part of Count One's putative RICO "pattern." She contends that these purported acts bear no relationship to the conspiracy's alleged purpose of advancing the political and financial interests of Fattah. As a result, Nicholas maintains, the acts described in the indictment are not sufficiently related to constitute a pattern of racketeering activity. In particular, she asserts that her purported diversion of funds would actually have harmed Fattah's interests, since the money was intended for a conference he had established. This argument misreads the purpose of the enterprise as alleged in the indictment. In fact, Count One states that the enterprise operated with two purposes, one of which was to advance "the political and financial interests of [Fattah] and his coconspirators." (emphasis added.) The alleged misuse of funds for the benefit of Nicholas and Naylor served this purpose.

236-37 (E.D.N.Y. 1997); Eisenberg v. Davidson, 1996 WL 167626, at *5 (E.D. Pa. Apr. 9, 1996); Davis v. Hudgins, 896 F. Supp. 561, 565-66, 568-69 (E.D. Va. 1995). We find those cases distinguishable. In each one, the RICO claims were dismissed due at least in part to deficiencies unrelated to the adequacy of the alleged pattern of racketeering activity. Furthermore, the cases cited by Bowser are factually distinguishable from this one. In any event, those cases do not control our analysis.

Furthermore, even if Nicholas is correct that her alleged misappropriation of the funds EAA received from NOAA lacks adequate ties to the rest of the alleged RICO "pattern," this does not mean that Count One should be dismissed insofar as it applies to her. As mentioned above, Nicholas is also charged with participating in the efforts to conceal the campaign loan made by Person D, and committing multiple acts in furtherance of these efforts. Specifically, the indictment avers that Nicholas, "on behalf of EAA, first transferred the funds used to repay the \$600,000 debt from EAA to Company 2," from which the funds were transferred to LSG and then to Person D. In the next paragraph, the indictment charges that in response to a subpoena received by Brand, Nicholas and Brand together "executed a fake contract for services between EAA and Company 2 to disguise the fraudulent nature of the transaction between EAA and Company 2." These two acts of Nicholas constituted a "pattern" for RICO purposes, notwithstanding her additional alleged conduct in connection with the NOAA grant.

Vederman, meanwhile, asserts that the acts in which he is alleged to have been involved are not sufficiently related to the other acts described in the indictment to constitute part of the "pattern of racketeering activity" in which he is alleged to have conspired. He contends that his alleged acts are "limited to the alleged payment of several conduit checks to Mr. Fattah's

son, sponsoring an *au pair* for the family and . . . participation in an allegedly sham car sale." This is an incomplete picture of what is painted by the indictment. As Count One also accuses Vederman of working with Fattah and Bowser to renegotiate FFM's debt to Printer 1 and Law Firm 1 without disclosing that the campaign had used some of its funds to pay the college debts of Fattah's son.

In any event, we disagree with Vederman's contention that the Government has failed to allege a RICO conspiracy that involves him. All of the unlawful acts he is alleged to have committed had "the same or similar purposes, results, participants, victims or methods of commission" as the other conduct described in Count One. See, e.g., H.J., Inc., 492 U.S. at 239. The acts of Vederman were carried out in furtherance of and resulted in financial benefit to Fattah. They were taken in collaboration with Fattah and Bowser, both of whom are involved in the allegations which do not directly involve Vederman, and they had similar methods of commission, that is the disguising of unlawful financial transactions as lawful ones. We reiterate that since Vederman is charged with RICO conspiracy, he need not have committed two predicate racketeering acts - or, for that matter, any predicate acts - in order to be found guilty. Finally, as a temporal matter, the activities involving Vederman

were also part of the continuous course of conduct that forms the alleged RICO conspiracy. See id. at 241-42.

Defendants also take issue with the fact that the Government has not specified in Count One which alleged acts are violations of which statutes. Count One specifies that the alleged "pattern of racketeering activity" in which defendants allegedly conspired to engage involved "multiple acts indictable under" various enumerated statutes. As defendant Brand puts it, this framework "does not provide that any particular act of the many listed constitutes a violation of a specific statute." It is defendants' position that this deficiency gives rise to a host of problems: it deprives them of the ability to know which statutory violations are being alleged, it creates uncertainty as to what they must defend against, and it hobbles the court by making it impossible properly to instruct the jury. Defendants urge that by failing to connect statutes to alleged acts, Count One fails to state an offense pursuant to Rule 7(c). The defendants make a related argument that rather than describing which "acts" constituted statutory violations and therefore amounted to "racketeering activity," the indictment sets forth "acts" in the colloquial sense of the word. As several defendants argue, the alleged acts "have no discrete edges in the sense that one cannot determine what allegedly constitutes a violation of a statute."

Once again, it is critical to note that Count One charges defendants with a RICO conspiracy under § 1962(d), not with violations of § 1962(c). As mentioned above, a RICO conspiracy "does not require proof that any defendant committed a racketeering act . . . or an overt act." Ligambi, 972 F. Supp. 2d at 706 (citing Salinas, 522 U.S. at 63; United States v. Glecier, 923 F.2d 496, 500 (7th Cir. 1991); United States v. Zauber, 857 F.2d 137, 148 (3d Cir. 1988); United States v. Adams, 759 F.2d 1099 (3d Cir. 1985)). Instead, the Government is merely obligated to prove "that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity." John-Baptiste, 747 F.3d at 207 (citing Riccobene, 709 F.2d at 224). There is no requirement that a RICO conspiracy charge "specify the predicate racketeering acts that the defendant agreed would be committed." United States v. Randall, 661 F.2d 1291, 1297 (10th Cir. 2011).

Further, as the Government observes, defendants cite no authority for their proposition that a RICO conspiracy indictment must explicitly link alleged predicate acts to specific RICO-predicate statutes. To be facially sufficient, an indictment must simply "contain[] the elements of the offense intended to be charged," "sufficiently apprise[] the defendant

of what he must be prepared to meet,” and “allow[] the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.” Bergrin, 650 F.3d at 264 (quoting Kemp, 500 F.3d at 280). Count One does this by specifying that the alleged “pattern of racketeering activity” consisted of acts indictable under enumerated RICO-predicate statutes and by providing a detailed recitation of the conduct that made up this pattern. At least at this stage in the prosecution, the Government is under no obligation to do more. See id.

Finally, we emphasize that the motions before us merely test the sufficiency of the indictment’s conspiracy charge under § 1962(d), and not the Government’s evidence. See Bergrin, 650 F.3d at 265. In this context, we take as true the well-pleaded factual allegations set forth in the indictment. Besmajian, 910 F.2d at 1154. Those factual allegations adequately set forth a RICO conspiracy involving all five defendants. Whether the government can prove these allegations at trial is for another day.

III.

Defendants next challenge Count One by arguing that the “pattern” element of the alleged RICO conspiracy is unconstitutionally vague. Each defendant contends that the charged “pattern of racketeering activity” is impermissibly

vague as applied to him or her. Fattah, Vederman, and Brand also assert that the "pattern" element of RICO is unconstitutionally vague on its face.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. This guarantee is breached whenever the Government "tak[es] away someone's life, liberty or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (citing Kolender v. Lawson, 461 U.S. 352, 357-58 (1983)). When a statute "either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its application," a due process violation arises from its enforcement. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); see also, e.g., Pungitore, 910 F.2d at 1104. The vagueness of criminal statutes in particular is "a matter of special concern." See, e.g., Reno v. ACLU, 521 U.S. 844, 871-72 (1997).

A vagueness challenge to a statute which does not implicate the First Amendment "must be examined on an as-applied basis." Johnson, 135 S. Ct. at 2580 (internal quotation marks

omitted). This requires us to consider the challenge "in light of the facts of the case at hand." United States v. Powell, 423 U.S. 87, 92 (1975). Accordingly, "outside of the First Amendment context, a party has standing to raise a vagueness challenge only if the challenged statute is vague as to that party's conduct." United States v. Woods, 915 F.2d 854, 862 (3d Cir. 1990) (emphasis added).

Defendants remind us that for purposes of RICO a "pattern" is characterized by at least two predicate acts that are "related." See, e.g., H.J., Inc., 492 U.S. at 239. This requirement of "relatedness" is satisfied by predicate acts "that have the same or similar purposes, results, participants victims, or methods of commission." Id. at 240. According to several of the defendants, this definition "does nothing more than invite consideration of a variety of circumstances to determine 'relatedness,' a concept that is far less concise than 'pattern.'" Furthermore, defendants urge, the concept of "relatedness" contains no "delimiting calibration of how connected the predicate acts must be."

Defendants also point out that, for a RICO "pattern" to be alleged, there must be "continuity" among the predicate acts, that is the predicates must "amount to, or . . . constitute a threat of, *continuing* racketeering activity." See id. (emphasis in original). This "closed- and open-ended

concept[] refer[s] either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241. It is of particular concern to defendants that, as they put it, the Supreme Court in H.J., Inc. "offered no standard by which the degree of 'continuity' may be measured to determine its sufficiency." See generally id.

Each defendant urges that RICO's "relatedness" and "continuity" standards are so vague that he or she did not have adequate notice that the conduct in which he or she was allegedly conspiring to engage amounted to a "pattern of racketeering activity." Invoking the standard set forth in Connally, each argues that a person of ordinary intelligence would not have understood that those acts amounted to a "pattern" for RICO purposes. See 269 U.S. at 391.

Several of the defendants go on to articulate specific reasons why they believe the conduct attributed to them was not clearly "continuous" or "related." Vederman urges that while he is alleged to have "engaged in a sham car sale . . . and to have made three gestures in favor of persons close to Congressman Fattah" for the benefit of Fattah's private interests, he is not charged with involvement with "the other alleged schemes charged in Count One." Brand states that he is charged only with receiving funds from EAA and transferring them to LSG and with

"executing sham contracts for no personal pecuniary gain," conduct which he claims is discrete. Meanwhile, Nicholas points out that although she is charged with involvement in both the diversion of EAA funds for the repayment of a campaign loan and the misappropriation of grant funds intended for EAA, the Government has not alleged that she played any role in "campaign financing, spending or reporting." Her acts, as alleged, took place "four to five years apart" and involved distinct goals and methods of commission. Finally, Bowser argues that the charges against her do not allege her participation "in the affairs of a pre-existing or otherwise established organization, the existence of which would have informed her understanding of what might constitute a pattern of criminal activity."

The Government counters, and defendants do not dispute, that "every federal court of appeals to consider an as-applied vagueness challenge to the RICO statute has rejected it, including the Third Circuit on two different occasions."⁶ For example, our Court of Appeals rejected an as-applied vagueness challenge to a RICO conspiracy charge in United States v. Woods, 915 F.2d 854. There, the defendants had been charged with and convicted at trial of violating § 1962(c) in connection with a scheme involving kickbacks being paid to a Pittsburgh

6. In support of this contention, the Government directs our attention to 24 appellate decisions (two of which are from the Third Circuit).

City Council member in exchange for public contracts. Id. at 856-62. Appealing their convictions after the completion of the trial, they challenged the district court's denial of their pretrial motion to dismiss on the ground that the RICO "pattern" element was unconstitutional as applied to their conduct. Id. at 862. The Court of Appeals rejected that challenge. It reasoned that § 1962(c) put the defendants on notice that the "ongoing, hardcore political corruption" in which they had engaged constituted an offense. Id. at 864. Defendants' alleged acts, the court opined, were without question related and continuous. Id. at 863.

Like the RICO claim in Woods, Count One describes the long-term, intimate involvement of each defendant in pervasive political corruption that lasted years. Each of the five defendants engaged in at least two predicate acts that were "related" in that they had similar purposes, methods of commission, participants, and results. See id. Further, the predicate acts of each defendant were continuous in that they occurred over the course of several years. See id. Each defendant is alleged to have engaged in multiple overt acts that took place over multi-year periods, in cooperation with a core group of coconspirators, were committed through the concealment of illicit financial transactions and the falsification of records, and were committed with the objective (and often the

result) of advancing Fattah's political and financial interests while simultaneously concealing the conspiracy. See id. In short, the "pattern" element of the RICO charge is not unconstitutionally vague as applied to any of the five defendants.⁷

We emphasize once more that defendants are charged with a RICO conspiracy under § 1962(d). Even if § 1962(c)'s "pattern of racketeering activity" is unconstitutionally vague as applied to defendants - and we have concluded that it is not - they are charged merely with agreeing "to conduct the affairs of the enterprise through a pattern of racketeering activity." Ligambi, 972 F. Supp. 2d at 706. For purposes of § 1962(d), what matters is that there is "relatedness" and "continuity" to the overall pattern of racketeering activity in which defendants allegedly conspired to take part. We have already determined that there is. In this instance, persons "of ordinary intelligence" would not "guess as to [the] meaning and

7. As noted above, Nicholas is charged not only with misappropriating funds from NOAA for her own benefit but also with carrying out multiple acts in furtherance of efforts to repay a campaign loan given to FFM by Person D. Thus, even if Nicholas is correct that Count One becomes "unconstitutionally vague" by charging her with participating in these two courses of conduct, there is no vagueness to the charges against her pertaining to the repayment of Person D's loan. If, as Count One alleges, Nicholas improperly transferred funds from EAA to Company 2 and then executed a sham contract to disguise the transaction, then she was "on notice" that she might be charged with a violation of § 1962(d).

differ as to [the] application" of the RICO conspiracy statute as it is applied to each defendant. See Connally, 269 U.S. at 391.

In addition to their as-applied challenge, Fattah, Vederman, and Brand also urge us to consider their arguments that the "pattern" element of RICO is unconstitutional on its face. As noted above, a defendant may advance a facial challenge addressing the vagueness of a criminal statute only if that statute implicates the First Amendment. See, e.g., Johnson, 135 S. Ct. at 2580; Woods, 915 F.2d at 862. Fattah, Vederman, and Brand urge that a facial challenge is warranted here because the activity charged in Count One occurred in the "First-Amendment-protected" realm of party politics.

Fattah, Vederman, and Brand are incorrect that the First Amendment is implicated here. They do not point to any allegation in the indictment that implicates their First Amendment rights. They simply make the bald statements that the charged conduct amounted to First-Amendment-protected "political support for an elected official." They do not contend, nor could they, that their alleged attempts to advance the political and financial interests of Congressman Fattah by conspiring to repay an unlawful campaign loan and by exchanging things of value for official acts are protected by the First Amendment. As such, they "have not demonstrated that as applied to them

RICO implicates values protected by the First Amendment," and they cannot bring a facial challenge to the law. See Woods, 915 F.2d at 862.

The facial challenge of Fattah, Vederman, and Brand fails. As we have already explained, the "pattern" element of RICO is sufficiently specific to put defendants on notice of the type of conduct for which they can be charged.

IV.

Finally, Fattah and Vederman contend that regardless of whether Count One must be dismissed in its entirety, Count One's bribery allegations must be dismissed because the acts that Fattah allegedly promised to perform for Vederman were not "official acts" as defined by 18 U.S.C. § 201(a)(3). As discussed above, the indictment charges in relevant part that Vederman directly or indirectly gave money to Fattah to secure Vederman's nomination or appointment as an ambassador or a position on a United States trade commission. It also alleges that Vederman directly or indirectly gave money to Fattah to obtain a position on the Congressman's staff for Vederman's girlfriend. According to the indictment, Fattah lobbied another elected official as well as various executive branch officials, including the President of the United States, for the appointment of Vederman to one or the other of the positions

Vederman sought. This effort was unsuccessful. Fattah, however, did hire Vederman's girlfriend.

Violations of 18 U.S.C. § 201, which criminalizes bribery of public officials and witnesses, constitute "racketeering activity" under RICO. 18 U.S.C. § 1961(1). Under § 201(b), it is unlawful to

(1) directly or indirectly, corruptly give[], offer[] or promise[] anything of value to any public official or person who has been selected to be a public official, or offer[] or promise[] any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent --

(A) to influence any official act

Id. § 201(b)(1). Section 201(b)(2), meanwhile, bars any "public official or person selected to be a public official" from "directly or indirectly, corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act." Id. § 201(b)(2). An "official act" is defined by § 201 as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." Id. § 201(a)(3). It is

not in dispute that Fattah is a "public official" within the meaning of the statute.

The court has not found any decision which provides an all-encompassing definition as to what is included within the term "official act." See United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999); United States v. Ozcelik, 527 F.3d 88 (3d Cir. 2008). We do know, for example, that an official act does not have to be "prescribed by statute" or even "by a written rule or regulation." United States v. Birdsall, 233 U.S. 223, 231 (1914). More specifically, the intercession of a Congressman with other federal officials, or with foreign government officials, on behalf of a corporation in return for a gratuity or bribe is an official act. United States v. Jefferson, 674 F.3d 332, 341 (4th Cir. 2012); United States v. Biaggi, 853 F.2d 89, 97-99 (2d Cir. 1988). A public official's hiring decisions have also been determined to constitute official acts for purposes of an honest services fraud prosecution. United States v. Dimora, 750 F.3d 619, 627 (6th Cir. 2009), cert. denied, 135 S. Ct. 223 (2014). Furthermore, the failure of the public official to deliver results does not remove a payment to him or her as one to influence an official act. See United States v. Ring, 706 F.3d 460, 470 (D.C. Cir. 2013).

Whatever conduct falls outside the term "official act," the effort of a Congressman, as a result of a payment, to persuade the Executive Branch, including the President of the United States, to nominate or appoint a person to a high federal office and the agreement of a Congressman, as a result of a payment, to hire a person to work on the Congressman's staff are clearly "official acts" as defined under in 18 U.S.C. § 201(a)(3). The conduct alleged here constitutes actions in matters "which may by law be brought before a public official in such official's official capacity, or in such official's place of trust or profit." See 18 U.S.C. § 201(a)(3). The arguments by Fattah and Vederman to the contrary are without merit.

