UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Case No. 1:20-cr-77
	)	
Plaintiff,	)	Judge Timothy S. Black
	)	
v.	)	**DEFENDANT LARRY**
	)	**HOUSEHOLDER'S OPPOSITION TO**
LARRY HOUSEHOLDER,	)	**GOVERNMENT'S MOTION TO LIMIT**
	)	**IRRELEVANT AND INADMISSIBLE**
Defendant.	)	**EXPERT TESTIMONY**

I. INTRODUCTION

"Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects." *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014).

Despite providing notice that it will call at least five experts at trial, who will testify to a plethora of things, the government objects to Defendant Larry Householder calling one expert who will testify about 501(c)(4) entities—the central feature of this criminal case. Most of the government's critiques of Householder's expert make little sense. For example, he will not give opinion testimony about Householder's intent. And the remainder of the government's critiques are ill supported. At bottom, the government's dislike of Householder's expert's opinions is not a reason to exclude them.

The Court should deny the government's motion to exclude. (Doc. 129).

II. BACKGROUND

The government provided notice to the defendants that it intends to call at least five expert witnesses at trial. (Doc. 131-1). One will testify about the energy markets in Ohio, two will testify about 501(c)(4) organizations (with one testifying about campaign finance more

generally), one will testify about ballot campaigns, and the last will testify about the structure of different corporate entities. (*See* Docs. 131-2 to 131-6).

Defendant Larry Householder provided notice that he would call one expert at trial: Caleb Burns. (Doc. 129-1). Mr. Burns, who the government does not contest is qualified to give these opinions, will opine regarding three subjects:

1. Federal law governing 501(c)(4) activities.
2. Officeholder alignment with 501(c)(4) organizations; and
3. Background on federal "leadership" PACs and private support for an officeholder's legislative aspirations.

(*Id.*). This testimony is relevant and helpful to the jury. That the government does not like Mr. Burns's opinions is not a basis for exclusion. Nor do any of the government's other argument have any merit.

The Court should deny the government's motion to exclude. (Doc. 129).

III. LEGAL STANDARD

The admission of expert testimony is governed by Federal Rule of Evidence 702, which codified the Supreme Court's holding in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). The rule says a qualified witness may testify in the form of an opinion if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Under this standard, the Court's role is to determine whether the expert's testimony "both rests on a reliable foundation and is relevant to the task at hand" and whether the expert is qualified. *Daubert*, 509 U.S. at 597. If an expert's testimony is within "the range where

experts might reasonably differ," the jury, not the judge, should be the one to "decide among the conflicting views of different experts." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. This is why the "rejection of expert testimony is the exception, rather than the rule." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008) (citation omitted).

IV. ARGUMENT

A. Mr. Burns's testimony does not intrude upon the province of the Court.

"It is impermissible to delegate" the responsibility of deciding the law of the case "to a jury through the submission of testimony on controlling legal principles." *United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984). But expert testimony on legal principles is permissible "to help the jury determine a fact in issue." *United States v. Monus*, 128 F.3d 376, 386 (6th Cir. 1997) (citing *United States v. DeClue*, 899 F.2d 1465, 1473 (6th Cir. 1990)). For this reason, in a tax case, an IRS agent may give expert opinion testimony that an event triggers tax liability: the agent's testimony "did not give legal opinion that necessarily determined the guilt of defendant or instructed the jury on controlling legal principles. He merely gave his opinion as to whether particular payments under assumed circumstances would be taxable." *Id.*; *see also United States v. Offill*, 666 F.3d 168, 177 (4th Cir. 2011) ("Such testimony would be admissible even though the hypothetical questioned mirrored the defendant's conduct, subject of course to the limitations that the witness not testify as to the defendant's 'intent,' as precluded by Rule 704(b)."). In other words, the Sixth Circuit has "generally excluded expert testimony for stating a 'legal conclusion' *only* when the witness explicitly testifies, in 'specialized' legal terminology, that a defendant

violated (or did not violate) the law." *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 317 (6th Cir. 2019).

Mr. Burns's testimony fits within these guidelines. He will provide "background on the federal laws that govern the political activities of a 501(c)(4) organization." (Doc. 129-1 at 3593).[1] The government agrees that an expert may testify about this "regulatory scheme to provide context for the jury." (Doc. 129 at 3585). In fact, the government has proffered multiple expert witnesses who will also provide this "context." (*See* Doc. 131-3 at 3651) (Dr. Wood's expert report, which "provide[s] important context and background about the American system of campaign finance, the features and operation of political spending, and the regulation of political spending"); (Doc. 131-5 at 3667) (Mr. Walker's expert report, which "provide[s] helpful background information and context about social welfare entities registered under 26 U.S.C. § 501(c)(4))"). If the government's experts can provide this background, so can the defense's expert.

The government does not explain how Mr. Burns's testimony would intrude upon the province of this Court. Instead, because "the legal regime is complex," "expert testimony on legal issues is permissible [because it] would assist in explaining legal concepts, and [so long as] opinions are not inconsistent with the instructions to be given by the Court." *United States v. Lundergan*, No. 5:18-CR-00106-GFVT, 2019 WL 3804239, at *3 (E.D. Ky. Aug. 13, 2019) (cleaned up). Without explanation, the government contends that "expert testimony may not attempt to explain the law in these areas.[2]" (Doc. 129 at 3586). But because of the complexity of campaign finance regulations and the regulations governing 501(c)(4) entities, Mr. Burns may

[1] All page number references are to the page identification number generated by the Court's electronic filing system.

[2] It is not clear what "areas" the government is referring to.

testify about those regulations and those legal concepts. Indeed, given the centrality of a 501(c)(4) entity to the government's allegations, it would be difficult for Householder to present a defense without calling an expert "to explain the intricate regulatory landscape and how [ ] practitioners function within it." *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011).

The government has not shown how Mr. Burns's testimony would intrude upon the provision of the Court.

B. Mr. Burns may testify that officeholders may be aligned with 501(c)(4) organizations and that private support for an officeholder's leadership aspirations is common.

On the one hand, the government asks the Court to exclude Mr. Burns's testimony about 501(c)(4)s and PACs because the "defendants are not charged with violating campaign finance laws," (Doc. 129 at 3586), while on the other, it asks the Court to admit its expert testimony about "Super PACs, 572 groups, and 501(c)(4) entities" and "how these entities may receive unlimited contributions both in amount and type." (Doc. 131-3 at 3651). The government cannot have its cake and eat it too. It cannot ask the Court to exclude Mr. Burns's testimony because the defendants are not charged with violating campaign finance laws and then introduce a host of expert opinion testimony about campaign finance laws.

The government's other arguments are equally misplaced.

1. Mr. Burns may testify about how officeholders can be aligned with 501(c)(4) entities.[3] (*See* Doc. 129-1 at 3593-94) ("Mr. Burns will explain how officeholders can be aligned with 501(c)(4) organizations. That is, [officeholders and 501(c)(4) organizations] will work collaboratively to achieve their mutual goals."). The government has premised much of its

[3] The government does not explicitly challenge Mr. Burns's ability to testify on this point. It only challenges whether Mr. Burns may provide examples about how other prominent political figures are aligned the 501(c)(4) organizations. (*See* Doc. 129 at 3586-90). Nevertheless, out of an abundance of caution, we respond to this point.

indictment on Householder's alleged "control" of Generation Now, a 501(c)(4) entity, and the fact that allegedly "Generation Now is the Speaker's (c)(4)." (*See* Indictment ¶ 63) (Doc. 22). Householder is entitled to rebut this evidence with his expert's testimony about how officeholders can be aligned with 501(c)(4) entities. After all, the government will no doubt portray this evidence as unusual and/or illicit. So, Mr. Burns's testimony about officeholder alignment with 501(c)(4)s is relevant.

For similar reasons, Mr. Burns should be permitted to explain that part of the basis for his opinions on officeholder alignment with 501(c)(4)s is premised on real world examples. (*See* Doc. 129-1 at 3594). Experts are permitted to testify about "complex concepts" involving specialized legal regimes. *See United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011); *accord Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 509 (2d Cir. 1977) ("Testimony concerning the ordinary practices of those engaged in the securities business is admissible under the same theory as testimony concerning the ordinary practices of physicians or concerning other trade customs: to enable the jury to evaluate the conduct of the parties against the standards of ordinary practice in the industry."); *William F. Shea, LLC v. Bonutti Rsch., Inc.*, No. 2:10-CV-00615-GLF, 2013 WL 2378549, at *2 (S.D. Ohio May 30, 2013) ("Testimony that goes to customary practices is admissible to assist the jury in comparing conduct against the 'standards of ordinary practice' of the industry."). To this end, experts are permitted to testify about "the ordinary practices and procedures" of a specialized industry to explain those practices to the jury. *Offill*, 666 F.3d at 174 (affirming district court's ruling permitting the government's experts "to talk about the functioning of the securities markets, the ordinary practices and procedures, the rationale behind those policies and procedures and the regulations that apply").[4] That is exactly what Mr. Burns

[4] The government cited *Offill* in its motion. (Doc. 129 at 3585).

will testify about: the ordinary practices and procedures of how politicians and 501(c)(4)s work together.

This is all the more relevant because the government seeks to vilify Householder's alleged alignment with Generation Now. As we explained above, the government spent much of its charging documents "showing Householder's direct involvement and connection with Generation Now." (Compl. ¶ 65) (Doc. 5). Mr. Burns's testimony about specific examples of officeholder alignment with 501(c)(4)s—about customary practices—is thus plain and simple rebuttal testimony to refute the government's institutions that Householder's alleged alignment is unusual or illicit.

What's more, this testimony about customary practices is especially relevant given the government's bribery allegations. The Supreme Court has time and again admonished federal prosecutors for using broadly written federal laws to "set standards of disclosure and good government for local and state officials." *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (cleaned up). The Court has been especially protective of political contributions. That is why, as the Sixth Circuit has explained, "[n]ot every campaign contribution, we recognize, is a bribe in sheep's clothing. ***Without anything more***, a jury could not reasonably infer that a campaign contribution is a bribe solely because a public official accepts a contribution and later takes an action that benefits a donor." *United States v. Terry*, 707 F.3d 607, 615 (6th Cir. 2013). Thus, "there must be *something* that moves permissible campaign actions over the line to criminal extortion and solicitation." *United States v. Inman*, 39 F.4th 357, 368 (6th Cir. 2022). The jury should therefore learn what is permissible—what is ordinary—in order to judge whether Householder's (and the other defendants') actions amounted to "something more" to turn ordinary campaign actions into a crime.

2. Mr. Burns is not providing opinion testimony on Householder's intent. All agree that an expert—whether retained by the defense or the government—may not opine on the defendant's mental state. *See* Fed. R. Evid. 704(b); *United States v. Warshak*, 631 F.3d 266, 324 (6th Cir. 2010). Nevertheless, an expert may "stat[e] opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue." *United States v. Volkman*, 797 F.3d 377, 388 (6th Cir. 2015) (quoting *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994)). Despite the government's contentions otherwise, nowhere in Mr. Burns's report does he purport to opine on Householder's intent. Instead, he simply describes that he will provide testimony on "[f]ederal law governing 501(c)(4) activities," "[o]fficeholder alignment with 501(c)(4) organizations," and "[b]ackground on federal 'leadership' PACs and private support for an officeholder's legislative leadership aspirations." (Doc. 129-1 at 3593-94). These subject areas do not come close to giving an opinion on Householder's mental state. Instead, as the Sixth Circuit permits, this testimony simply provides the jury with information from which it can draw inferences as to the ultimate issue.

The government's cases are inapposite. In those cases, the defendant sought to admit evidence (either through expert testimony or otherwise) about industry practices to "establish[ ] Defendant's state of mind." *United States v. Reed*, No. CV 15-100, 2016 WL 6946983, at *25 (E.D. La. Nov. 28, 2016), *aff'd*, 908 F.3d 102 (5th Cir. 2018); *United States v. Rodriguez*, No. CR 2:11-0296 WBS EFB, 2016 WL 5847008, at *1 (E.D. Cal. Oct. 5, 2016) ("Rodriguez claims he was following prevailing mortgage industry practices in allegedly submitting false loan information, but at no point in his opposition does he claim that he believed that the allegedly

false information was in fact true."). To be clear, Householder does not seek to use Mr. Burns's testimony to provide testimony about his state of mind.

To the contrary, Householder seeks to use Mr. Burns's to provide background information—context—to the jury about complex structures (campaign finance and politicians interactions with 501(c)(4)) that the jury has little knowledge, just as the government seeks to provide background information about a host of subjects.

3. Nor does Mr. Burns's testimony amount to an improper selective prosecution defense. As we explained, Mr. Burns's testimony is largely rebuttal testimony to rebut the government's inferences about Householder's alleged alignment with Generation Now. And, just like the government seeks to do, his testimony provides important context to the jury.

C. Mr. Burns may testify about federal "leadership" PACs and private support for an officeholder's legislative leadership aspirations.

Householder provided notice to the government that Mr. Burns would testify about "[b]ackground on federal 'leadership' PACs and private support for an officeholder's legislative leadership aspirations." (Doc. 129-1 at 3594). The government challenges only the former (federal leadership PACs) not the latter (private support for an officeholder's legislative leadership aspirations). The government erroneously contends that testimony about leadership PACs is irrelevant.

True, none of the defendants had or operated a federal leadership PAC during the time period at issue in the Indictment. But testimony about leadership PACs is relevant to how Generation Now was used during the 2018 election cycle. During that election, the government alleges that the defendants built a list of House candidates ("Team Householder") to support and that Generation Now used political contributions help elect these candidates. (Indictment ¶¶ 90-

91) (Doc. 22). These candidates then, according to the government, voted for Householder in the Ohio House speaker election in early 2019. (*Id.* ¶ 96).

In other words, Generation Now functioned as a kind of leadership PAC. Mr. Burns explains that an "officeholder would establish a leadership PAC and raise funds from private sources to then contribute the funds to colleagues who, presumably, would vote for the officeholder in the legislature's leadership elections (e.g., for positions like Majority Leader or Speaker of the House)." (Doc. 129-1 at 3594). That is how the government alleges Generation Now functioned during the 2018 election cycle. To be sure, the government may cross-examine Mr. Burns and point out that Generation Now is not a federal leadership PAC, but this goes to the weight of Mr. Burns's testimony, "not its admissibility." *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 337 F. Supp. 3d 728, 746 (S.D. Ohio 2015).

The Court should reject the government's challenge to Mr. Burns's testimony.

V. CONCLUSION

For these reasons, the Court should deny the government's motion to exclude Mr. Burns.

Dated: October 17, 2022

Respectfully submitted,

/s/ Steven L. Bradley

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CERTIFICATE OF SERVICE

I certify that the foregoing was electronically filed on October 17, 2022. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Steven L. Bradley
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