JUDGE KAREN HENDERSON MAY NOT BELIEVE HOLDING THE PRESIDENCY IS A PROFESSIONAL BENEFIT

After much delay, the DC Circuit upheld the conviction of former cop Thomas Robertson, finding that he corruptly obstructed the vote certification on January 6 because he used otherwise unlawful means in obstructing the vote certification.

I won't spend too much time unpacking it because it will be (and a related opinion already has been) appealed.

Florence Pan, writing the majority opinion for the second straight opinion upholding the application of 18 USC 1512(c)(2) to January 6, found that there was sufficient evidence to find that Robertson had "corruptly" obstructed the vote certification, based on his otherwise felonious conduct.

Karen Henderson ruled that instead, Pan's earlier opinion upholding 1512(c)(2) — or rather, Justin Walker's concurrence — is binding as to the standard for "corruptly," which wasn't before the court in that ruling.

But then having said Walker was binding, Henderson instead reinterpreted and significantly narrowed his standard requiring personal benefit that Walker espoused.

Here's how Pan described Henderson's gymnastics.

> The dissent claims that we are bound by Judge Walker's view that "corruptly" in § 1512(c)(2) requires the defendant to act with the intent of obtaining an unlawful benefit for himself or another. See Dissenting Op. 8–15. But in applying that standard, Judge Walker reasoned

> that the indictments at issue in Fischer should be upheld, stating that "it might be enough for the Government to prove that a defendant used illegal means (like assaulting police officers) with the intent to procure a benefit (the presidency) for another person (Donald Trump)." Fischer, 64 F.4th at 361 (Walker, J., concurring in part and concurring in the judgment). The dissent does not explain why that reasoning, in an opinion that the dissent believes is binding, does not dictate affirmance in this case.
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> Instead, the dissent contends that we must overturn the jury's verdict in this case because "[t]here is no evidence in the record suggesting Robertson obstructed the election certification proceeding in order to obtain an unlawful benefit for himself or someone else." Dissenting Op. 33. That is incorrect. Robertson believed that the election was "rigged"; announced that he refused to be "disenfranchised"; and declared that he was "prepared to start" an "open armed rebellion." S.A. 110, 190. That evidence was plainly sufficient to support a finding that Robertson intended to secure the unlawful benefit of installing the loser of the presidential election, Donald J. Trump, as its winner. See Fischer, 64 F.4th at 361 (Walker, J., concurring in part and concurring in the judgment); see also id. at 356 n.5 (reasoning that "the beneficiary of an unlawful benefit need not be the defendant or his friends" and § 1512(c)(2) could apply to a defendant "trying to secure the presidency for Donald Trump").
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> To shore up its assessment of the evidence, the dissent states in a footnote that "[t]he 'unlawful benefit' the defendant seeks must be financial,

> professional or exculpatory." Dissenting Op. 34 n.18. But Judge Walker's concurring decision in Fischer, which the dissent believes is binding, see id. at 1, did not endorse such a limited definition. See Fischer, 64 F.4th at 356 n.5 (Walker, J., concurring in part and concurring in the judgment). And Judge Walker himself emphasized that, even were the requisite "benefit" so limited, the defendants' conduct "may have been an attempt to help Donald Trump unlawfully secure a professional advantage — the presidency," so would likely suffice. Id. The dissent's position, in any event, ignores the fact that it can be "corrupt" to obstruct an official proceeding for the purpose of gaining a personal, social, or political favor. See United States v. Brenson, 104 F.3d 1267, 1273–81 (11th Cir. 1997) (affirming defendant's conviction under 18 U.S.C. § 1503 where he disclosed details of a grand jury investigation to its target in order to get a date with the target's daughter).

In her opinion, Henderson seems to suggest that securing the presidency corruptly for Trump wouldn't necessarily be a professional benefit for Trump.

> 18 The "unlawful benefit" the defendant seeks must be financial, professional or exculpatory. See, e.g., Marinello, 138 S. Ct. at 1105 (avoiding taxes); Aguilar, 515 U.S. at 595 (concealing wrongdoing through illegal disclosure of wiretap); North, 910 F.2d at 851 (fabricating false testimony and destroying documents); see also Corruptly (def. 2), Black's Law Dictionary (11th ed. 2019) ("corruptly usu[ally] indicates a wrongful desire for pecuniary gain or other advantage"). Acquittal is thus required if, as I view

> the evidence, Robertson merely intended to protest the outcome of the election or his (perceived) disenfranchisement or to make some other political point. The majority mistakenly insists that my view conflicts with Judge Walker's Fischer opinion. Maj. Op. 37–38.
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> On the contrary, Judge Walker did not decide how broadly to construe the "unlawful benefit" requirement. He merely stated that he was "not so sure" that the sought-after benefit must be "financial, professional, or exculpatory." Fischer, 15 64 F.4th at 356 n.5 (Walker, J., concurring in part) (citation omitted). And even if this panel agreed with Judge Walker's suggestion that the office of the President "may" qualify as "a professional benefit," see id., we would remain free to conclude that there was no evidence presented at trial to show that Robertson intended—either alone or collectively—to procure that benefit. [my emphasis]

None of this matters.

The underlying Fischer decision has already been appealed. This will be appealed.

The biggest takeaway is that self-imagined conservatives keep reaching well beyond the decision before them to try to carve up obstruction in such a way that stealing an election is not corrupt.