NO. 17-891

In the Supreme Court of the United States

RICK BOBERTZ, ET AL.,

Petitioners,

–v–

CUSHMAN & WAKEFIELD
OF CALIFORNIA, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of California

SUPPLEMENTAL BRIEF OF PETITIONERS

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This supplemental brief, filed pursuant to Supreme Court Rule 15.8, is to bring to the Court's attention *Matter of Target Corporation* ("*Target*"), ___ P.3d ___, 2017 WL 6629116, at *1 (Kan. Ct. App. Dec. 29, 2017). *Target* reinforces why it is extremely important and a theme of national concern that this Court resolve the inter-state conflict as to whether real estate appraisals must cohere to the Uniform Standards of Professional Appraisal Practice (USPAP) standards.

ARGUMENT

In *Target*, the Kansas appeals court reiterated that, "Kansas law requires all appraisals to be prepared in accordance with USPAP standards." *Target*, 2017 WL 6629116, at *3. This is in stark contrast to the way that USPAP standards were treated under California law, here. The California courts below did not require adherence to USPAP standards.

I. THE CALIFORNIA COURT RATIFIED AN ABOVE-MARKET LEASE THAT WAS BASED ON A NON-ARM'S LENGTH TRANSACTION, WHICH IS PROHIBITED UNDER USPAP STANDARDS

Cushman & Wakefield of California, Inc., ("Cushman") and Craig Tilson ("Tilson" and together with Cushman, "Respondents") conducted an appraisal and determined market value based upon an above-market lease with a non-arm's length transaction.

Specifically, in 2006, Cushman knowingly used a sale-leaseback rent to derive a $22.5 million market value for the property underlying the real estate securities offering. Cushman admitted that that the value of $22.5 million was derived using an "above-market lease," stating:

> The lender specifically requested that the property be appraised as an investment property, assuming the existence of a long term, yet unsigned and above-market lease. (emphasis added)[1]

Under USPAP, market value[2] cannot be determined in this manner.[3]

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[1] Cushman's Answer to Petitioners' Petition for Review by the California Supreme Court, p. 4, August 7, 2016.

[2] USPAP, 2006 edition, p. 194 ("Market value means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

1. buyer and seller are typically motivated;
2. both parties are well informed or well advised and acting in what they consider their own best interests;
3. a reasonable time is allowed for exposure in the open market;
4. payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
5. the price represents the normal consideration for the property sold unaffected by special or creative financing

II. The California Court Ratified an 170% One-Year Increase in the Appraised Value of the Underlying Property from $8.3 Million to $22.5 Million, Without Making a Credibility Determination for the Drastic One-Year Valuation Increase, Which Is Prohibited Under USPAP Standards

Cushman claimed it produced a "Market Value As Is" appraisal valuing the property at $22.5 million. However, in discovery, Petitioners learned that the property had sold for $8.3 million the prior year and that the new lease and sale were created in a related-party, sale-leaseback transaction. The appraisal listed the $8.3 million prior sale, but did not explain the logic of a 170% increase in value to $22.5 million in 17 months. Cushman purported to justify this increase through the use of an extraordinary assumption, but such a usage requires a credibility cross-check.[4] The California court did not conduct the required cross-check analysis, (App.4a, fn. 2), which violates USPAP standards. Only by failing to apply obligatory USPAP

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or sales concessions granted by anyone associated with the sale.").

[3] USPAP, 2006 edition, STATEMENT ON APPRAISAL STANDARDS NO. 10 (SMT-10), p. 106 ("In the event a client requests use of non-market based factors . . . the result is more in character with an investment value . . . When an assignment includes client-specified marketing, sale, or acquisition conditions that are distinct from typical market conditions, it is misleading to label the result a market value opinion.").

[4] USPAP, 2006 edition, p. 19 ("An extraordinary assumption may be used in an assignment only if it is required to properly develop credible opinions and conclusions.").

rules, was the California court able to conclude that Cushman did not produce "an excessive or otherwise improper valuation." (App.4a, fn. 2).

III. THE CALIFORNIA COURT ALLOWED CUSHMAN TO CONCEAL CONFLICTS OF INTEREST, WHICH IS PROHIBITED UNDER USPAP STANDARDS

The California courts below held that an appraiser is not required to disclose conflicts of interest with buyers when the appraiser has: (a) been "selected" by the buyer to conduct the appraisal; (b) a "history of working" with a buyer; (c) accepted comparable market data from the buyer and included it in the appraisal; and, (d) permitted the buyer to be "involved in the appraisal effort because it wanted a sufficiently high valuation to justify the loan it was hoping to receive." (App.23a-25a). Under USPAP, Cushman and Tilson were obligated to disclose conflicts of interest, including the significant assistance the buyer provided, under these scenarios.[5] These acts also violated USPAP independence requirements.[6]

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[5] Statement On Appraisal Standards No. 10 (SMT-10), USPAP, 2006 edition, p. 101 ("Failure to disclose in the appraiser's certification any present or prospective relationships with a party involved with the assignment or the subject of the assignment violates Standards Rule 2-3."); *see also* Rule Standard 2-2, USPAP, 2006 edition, p. 25 ("When any portion of the work involves significant real property appraisal assistance, the appraiser must describe the extent of that assistance. The signing appraiser must also state the name(s) of those providing the significant real property appraisal assistance in the certification, in accordance with SR 2-3.").

[6] Ethics Rule, USPAP, 2006 edition, p. 7 ("An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.").

IV. *TARGET* REINFORCES WHY SUPREME COURT REVIEW IS NECESSARY TO SETTLE THE CONFLICTING WAYS THAT STATES TREAT REAL ESTATE APPRAISALS, AS IT SEVERELY IMPACTS INTER-STATE COMMERCE AND THE ENTIRE AMERICAN ECONOMY

Had the California courts below adhered to USPAP standards and treated these issues the way that Kansas requires, as articulated in *Target*, the outcome of this case would have been fundamentally different. Petitioners would have prevailed on their claims that Cushman and Tilson fraudulently inflated the value of the property in order to induce their investment into the securities offering. With USPAP standards being honored and mandatory, Cushman and Tilson would not have been able to get away with using the materially defective and misleading $22.5 million appraisal of the property at issue to induce Petitioners into purchasing real estate securities. More importantly, the rift between the way that the California courts below and other jurisdictions treat USPAP standards portends havoc on the American economy.

For example, here, the California court understood the transaction to be a "securities offering," (App.3a.), and securities offeror Griffin Capital (Griffin) had offices in California, Illinois, and Connecticut. Griffin used its California office for this security offering to reach buyers in Illinois and Nebraska. The ruling by the California courts below signals to securities offerors to open satellite offices in California for offerings based on fraudulent appraisals.

USPAP standards were implemented through Congressional legislation as a reaction to significant economic crashes that devastated our economy,[7] and as tools to combat against appraisal fraud.[8] *Target* shows how the California courts below threaten to cause another similar crash and how the stability of real estate securities offerings in this country hang in the balance. Under the rule of law created by the California courts below, so long as the offeror of the security conducts its business in California, the offeror can incorporate fraudulent appraisals for properties located in other states. All told, the rule created by the lower courts here could severely and detrimentally impact inter-state commerce.

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[7] *Cf. Joliet Contractors Assoc. v. NLRB*, 193 F.2d 833, 841 (7th Cir. 1952) ("It is equally free from doubt that Congress intended that such practices should be eradicated."); *Frankford Hosp. v. Blue Cross of Greater Phila.*, 417 F.Supp. 1104, 1110 (E.D. Pa. 1976) ("The exception must have been aimed at particular known practices in the insurance industry which Congress intended to outlaw irregardless of any efforts undertaken by the state to eliminate them through regulation."); *Nat'l Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 705 (D.C. Cir. 1973) (stating that "To us, this means that Congress, at the time, felt that different practices in different industries or even similar practices in different industries would often warrant varying treatment by the commission."); *Green v. Nuveen Advisory Corp.*, 295 F.3d 738, 742-43 (7th Cir. 2002) ("By passing § 36(b), it attempted to diminish the risk of adviser self-dealing under the predominant industry practice, not to fundamentally revise the system itself.").

[8] Banking Law Enforcement Act of 1990, 136 Cong. Rec. H 5995, 5995 ("In almost every one of these real estate deals, which brought down many if not most of these thrifts, an overinflated or fraudulent appraisal was a crucial element.").

CONCLUSION

This Court should grant certiorari to resolve the issue.

Respectfully submitted,

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