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IN THE SUPREME COURT OF THE UNITED STATES

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AMERICOLD REALTY TRUST, :

Petitioner : No. 14-1382

v. :

CONAGRA FOODS, INC., ET AL. :

- - - - - x

Washington, D.C.
Tuesday, January 19, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

MICHAEL D. POSPISIL, ESQ., Kansas City, Mo.; on behalf of Petitioner.

JOHN M. DUGGAN, ESQ., Overland Park, Kan.; on behalf of Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 14-1382, Americold Realty Trust v. ConAgra Foods.

Mr. Pospisil.

ORAL ARGUMENT OF MICHAEL D. POSPISIL

ON BEHALF OF THE PETITIONER

MR. POSPISIL: Thank you, Mr. Chief Justice, and may it please the Court:

The issue before the Court today is whose citizenship -- citizenship controls for purposes of diversity when a trust is a named party to a lawsuit.

We believe, based upon over 200 years of jurisprudence from this Court, the answer is the trustees. We believe a bright-line rule is appropriate in this case, that in a lawsuit involving a trust, just as with a trustee, the trustee should be the party of interest. And we should compare it to the --

JUSTICE GINSBURG: Why should we get to that question if, when this case began, even if you looked only to the citizenship of the trustees, there was no complete diversity?

MR. POSPISIL: Your Honor, that -- that is correct.

1 However, we do argue -- and we argued in the
2 Tenth Circuit; it was briefed -- upon whether or not we
3 could dismiss the -- the -- the spoiling nondiverse
4 parties. That issue was briefed under Evergreen case,
5 and it was briefed before the Tenth Circuit; however,
6 the Tenth Circuit did not address that issue.

7 Respondents bring it up in their brief now;
8 however, our position is that this Court should address
9 the issue that's taken, that it granted cert on, and
10 send that issue back to the Tenth Circuit for review.

11 What the Tenth Circuit held here, the issue
12 that we appealed on, was to look at the beneficiaries as
13 opposed to the trustees. And we would submit to you
14 that that's just not supportable under common law, and
15 it provides results in an unworkable test that is going
16 to create more confusion than looking at the trustees.

17 JUSTICE SCALIA: At common law, the trustees
18 could sue, couldn't they?

19 MR. POSPISIL: They could, Your Honor.

20 JUSTICE SCALIA: And these trustees could
21 not sue, could -- can they?

22 MR. POSPISIL: They cannot, Your Honor.

23 JUSTICE SCALIA: Because of a new creature
24 created by Maryland law.

25 MR. POSPISIL: That's correct,

1 Justice Scalia. Maryland law has created a statutory
2 trust, a real estate investment trust.

3 However, our position is that just because
4 that trust can sue and be sued as an entity, that does
5 not change the analysis. There still has to be somebody
6 we look to, some real people that we look to to
7 determine whose citizenship controls.

8 JUSTICE ALITO: Well, this new entity is
9 called a trust, but why is it more like a traditional
10 trust than it is like another unincorporated, artificial
11 entity, like an L.L.C.?

12 MR. POSPISIL: Your Honor, it's more -- it's
13 like a trust because there are two attributes that a
14 trust have, that have historically had. There is a
15 separation between legal ownership, and beneficial or
16 equitable ownership. We have it in this case.

17 If you look at Maryland law, they define
18 REIT as an unincorporated business trust in which
19 property is acquired, held, managed, administered,
20 controlled, invested, or disposed of for the benefit and
21 profit of any person who may become a shareholder. That
22 distinguishes between legal ownership and equitable
23 ownership.

24 The next step we look at is that the common
25 law, when that's the situation, when you have a trust,

1 you look and see did the trustees have the customary
2 power to control, to manage, and to oversee the assets.

3 Also including to control --

4 JUSTICE SCALIA: So who -- who owns -- who
5 owns these assets under Maryland law? Is it the
6 trustees, or is it this -- this new corporation-type
7 entity?

8 MR. POSPISIL: Your Honor --

9 JUSTICE SCALIA: That's the entity that can
10 sue, and I assume that that's the entity that owns the
11 property.

12 MR. POSPISIL: It can be both, Your Honor.
13 Under Maryland law --

14 JUSTICE SCALIA: And -- and the trustees are
15 sort of in the position of managers --

16 MR. POSPISIL: Your --

17 JUSTICE SCALIA: -- just -- just as though
18 you -- you hired a -- a CEO.

19 MR. POSPISIL: I would disagree, Your Honor.
20 Under Maryland law, the assets of a real estate
21 investment trust can be held by the trustees, or the
22 trust in its entity.

23 Again, I don't think that makes the --
24 changes the analysis at all. It -- it's still what
25 citizenship we would look to.

1 Trustees --

2 JUSTICE SCALIA: It can be owned by the
3 entity?

4 MR. POSPISIL: It can be.

5 JUSTICE SCALIA: Or -- or the trustees.

6 MR. POSPISIL: That's correct, Your Honor.

7 CHIEF JUSTICE ROBERTS: You mean in -- in
8 one case, or you can have a different type of trust?

9 MR. POSPISIL: In one case.

10 CHIEF JUSTICE ROBERTS: In one case.

11 MR. POSPISIL: In one case, Your Honor.

12 And I will say this, Justice Scalia, that no
13 statute in the country that we have found has ever held
14 that the legal ownership goes in the name of a trust
15 beneficiary. The ownership is always in the name of the
16 trust or the trustees. It is never held in the name of
17 the beneficiaries.

18 And we think that is controlling here for
19 the reason that -- Navarro is pretty clear on this.
20 When you have a trustee that has absolute control, you
21 don't look at the beneficiaries. If the -- if the
22 trustee has absolute control and legal ownership of
23 trust assets, that's where you look to. That was
24 exactly what happened in Navarro.

25 JUSTICE SCALIA: That was a trustee who had

1 the authority to sue, right, in the trustee's own name?

2 MR. POSPISIL: That is correct, Your Honor.

3 And that -- that is what happened --

4 JUSTICE SCALIA: And that's not the case
5 here.

6 MR. POSPISIL: That is what happened in
7 Navarro.

8 However, the trust in Navarro was a
9 Massachusetts trust, and it could have sued in its own
10 name as well.

11 And the way that Navarro was framed by the
12 lower court when they decided the opinion was the
13 district court held that, for purposes of a business
14 trust, we look to the citizenship of the beneficiaries.
15 This Court --

16 JUSTICE GINSBURG: But didn't -- didn't --
17 Carden treated Navarro as a case where the suit was
18 against the individual members, the individual trustees,
19 trustees as individuals, not the trust.

20 MR. POSPISIL: That's correct, Your Honor.

21 JUSTICE GINSBURG: So I thought Carden was
22 trying -- was set up -- if you're a corporation, that's
23 one thing. If you're any other kind of association, we
24 look to the members, the shareholders. I mean the --
25 the limited partners as well as the partners. Just

1 drawing a clear line between corporations on one side,
2 all other associations, and -- with the -- with the
3 added notion that, if Congress wants to make it
4 different, Congress can do that.

5 MR. POSPISIL: Your Honor, we believe what
6 Carden did is Carden tells us if you're not a
7 corporation, if you're another entity but not a
8 corporation, we need to look behind the curtain, so to
9 speak, and look to somebody else to see whose
10 citizenship controls.

11 Carden did not involve a trust, didn't
12 involve -- did not involve trustees, and did not involve
13 trust assets or trust beneficiaries. That's why Navarro
14 did not control in Carden, and why Carden does not
15 control in this case.

16 Carden tells us the first step we have to do
17 is we have to look through the trust. We have to look
18 to somebody. Carden dealt with a partnership. And in
19 terms of a partnership, relying on a long line of cases,
20 Carden said that for partnerships, we look at all the
21 members.

22 Well, there are no members in a trust.
23 There are no members. At common law, a partnership was
24 owned by members. They had a legal ownership of that
25 partnership and the assets.

1 That just didn't exist at -- at common law
2 with trusts.

3 JUSTICE SOTOMAYOR: Well, this is not a
4 traditional trust, because this is shareholders and not
5 beneficiaries.

6 MR. POSPISIL: Your Honor --

7 JUSTICE SOTOMAYOR: It -- it's a very
8 different sort of concept. So now you're asking us to
9 come and place trustee law above our general rule, that
10 you're either a corporation or you're not.

11 MR. POSPISIL: Justice Sotomayor --

12 JUSTICE SOTOMAYOR: And only the corporation
13 can have a place of business or an -- a place of
14 incorporation.

15 MR. POSPISIL: Your Honor, we -- we admit
16 that the nomenclature is "shareholder." That's what's
17 used in the Real Estate Investment Trust Act in
18 Maryland.

19 However, that's not to be equated with
20 another business entity. It's a shareholder is what
21 they are called, but still they are the beneficial
22 owners. The -- the -- the definition I read to you of a
23 REIT under Maryland law makes clear that the
24 shareholders own -- that the trustees own the property
25 for the benefit -- or the trust, for the benefit of the

1 shareholders.

2 JUSTICE SOTOMAYOR: I thought the
3 shareholders owned the property. They had the legal
4 interest in the law.

5 MR. POSPISIL: No, Your Honor. No. It's
6 either the trust or the trustees under Maryland law.

7 So Carden gets us halfway. The next thing
8 we need to do is look at Navarro, and Navarro tells us
9 if it's management and customary to control these
10 assets, we look to the trustees.

11 I would tell the Court that the trustees in
12 this case are very identical to the power of the
13 trustees in the Navarro case. If you look at our
14 petition for writ, and the appeal, on the page of the
15 appendix, page 60, that's the amended statement of trust
16 for Americold Realty Trust.

17 In Section 5.1 on page 60, it defines the
18 board of trustees and what their powers are. "Under
19 this Trust" -- this is a quote -- "the business and
20 affairs of the Trust shall be managed under the
21 direction of the board of trustees, and the board shall
22 have full, exclusive, and absolute power, control, and
23 authority over any and all property of the Trust. The
24 board may take any action as, in its sole judgment and
25 discretion, is necessary or appropriate to conduct the

1 business and affairs of the Trust."

2 That is almost identical to the language
3 used to describe the trustees in Navarro. Importantly,
4 in Navarro -- this is a quote from Navarro as well --
5 "The Court has never analogized express trust to
6 business entities for purposes of diversity
7 jurisdiction." Navarro realized that they were
8 separate.

9 And Carden realized that it was separate,
10 too. In Carden, this Court specifically held that the
11 real party in interest test that was adopted and used
12 for Navarro was unique because it was the common law's
13 dealings with trustees, which just didn't exist in
14 Carden.

15 JUSTICE GINSBURG: I thought that the
16 distinction in Carden was quite plain, that Carden was a
17 case against the individual trustees, not against the
18 trust. Carden did say that.

19 MR. POSPISIL: Carden distinguished Navarro;
20 that's correct, Your Honor. That is correct.

21 JUSTICE GINSBURG: On the ground that the
22 suit there was against the individual trustees, not the
23 trust.

24 MR. POSPISIL: That's correct. However,
25 Carden did not decide that issue because, again, the

1 trust was not at -- there was not a trust issue in
2 Carden. However, if you look at Navarro, what Navarro
3 did is even though the trustees were the named parties,
4 Navarro Court went ahead and looked, and said let's look
5 at not only the trustees and what their power is, but
6 let's look at the beneficiaries. Shall we look at them
7 as well? There's 9,500 of those.

8 And the Court specifically said that is
9 irrelevant. We do not look at the 9,500 beneficiaries
10 of this trust. So the Court didn't have a trust as a
11 party in front of it, but it went ahead and took the
12 next step to say, look, who do we need to look at? Do
13 we need to look at the beneficiary owners, or the
14 trustees?

15 And that same analysis applies here. And it
16 doesn't matter if the Trust is the named party or the
17 trustees. The decision is still going to be the same.
18 A decision has to be made at who you look to.

19 We would submit --

20 JUSTICE KAGAN: I thought that one of the
21 virtues of Carden was that it just set up very
22 categorical, bright-line rule. Everything that's an
23 artificial legal entity that's not a corporation ought
24 to be treated in the same way. Doesn't matter what you
25 call yourself; you can put trust in the title, or not

1 put trust in the title. If you're an artificial legal
2 entity that is not a corporation, that's subject to the
3 rule of Carden.

4 And there's something, too, just doing that
5 in that bright-line, categorical way, so that we don't
6 have to look at the thousands of different variations
7 among legal entities and decide which fits in which box.

8 MR. POSPISIL: Your Honor, Carden dealt with
9 a partnership that had members. Again, there are no
10 members in a trust. So if we export the language used
11 in Carden to say you have to go -- look at the members
12 because they're who you really look at, well, the
13 closest thing to a member of a trust is going to be the
14 trustees; it's not going to be the beneficiary.

15 Let's look back at common law. When a
16 partnership -- before they could sue or be sued in their
17 own name, a partnership always had to have -- the
18 members of that partnership had to bring the cause of
19 action.

20 Now let's look at the common law for a trust
21 before a trust could be sued or sue in its own name. In
22 those circumstances, the trustees were in charge of the
23 litigation. It was the trustees that brought that
24 lawsuit.

25 So to the extent that Carden sheds any light

1 on what is a member and what is not a member for the
2 trust, we submit that the most analogous thing is that
3 the trustee is the equivalent to a member for a
4 partnership. The problem with the Tenth Circuit's rule
5 looking at all the beneficiaries, that's going to be a
6 problem that is so unworkable that in certain
7 circumstances you're not even going to be able to tell
8 who is a beneficiary.

9 For example, some trusts, like a charitable
10 trust, don't even have beneficiaries identified.

11 JUSTICE GINSBURG: Why should it matter as
12 long as it's not a corporation?

13 MR. POSPISIL: Because, Your Honor, again,
14 we go impact to how trusts have been treated separately
15 and distinctly, as a historical matter, for hundreds of
16 years. A trust has never been held to be equal to a
17 business entity.

18 There are basically three different
19 categories: There's a corporation; there's an
20 unassociated -- unincorporated association, excuse me;
21 and there are trusts. And they are different.

22 But the beneficiary analysis used by the
23 Tenth Circuit, again, not only it would be hard to
24 identify who some beneficiaries are, but we have
25 sometimes -- look at Navarro. There were 9,500

1 beneficiaries in that trust. As -- as one of the amicus
2 points out --

3 JUSTICE SCALIA: How many are there in this
4 one?

5 MR. POSPISIL: There are between 100 and
6 200, Your Honor.

7 JUSTICE SCALIA: Is that -- you know, how --
8 how many are -- are there normally in these special
9 Maryland trusts?

10 MR. POSPISIL: To be a Real Estate
11 Investment Trust for purposes of Federal taxation
12 benefits, it's got to be at least at 100.

13 JUSTICE SCALIA: At least a hundred.

14 MR. POSPISIL: At least 100.

15 JUSTICE SCALIA: Do you know of any that --
16 that are more than a thousand?

17 MR. POSPISIL: Oh, yes.

18 JUSTICE SCALIA: Really?

19 MR. POSPISIL: Yes, Your Honor. If you look
20 at the amicus that was filed by NAREIT, they point out
21 that there are some publicly traded REITs that have tens
22 of millions of shareholders or beneficiaries. And
23 they're not only all across the country; they're all
24 across the world.

25 And so a lot of these shares of REITs are

1 also traded on a daily basis. So you can have a
2 beneficiary of a Real Estate Investment Trust that 10:00
3 o'clock this morning I could be a beneficiary, 10:15 I'm
4 not; I sold my interest. How are you ever going to
5 identify who the beneficiaries are at any given time?

6 This Court has made clear, specifically for
7 jurisdictional purposes, that we need a simple test that
8 courts can use that says we don't need to look behind --
9 dig down deep in the weeds. Let's just look at the
10 case, figure out who do we look to. And the proper way
11 to do that is the trustees.

12 In this case, there's five trustees. It's
13 very easy to find out who those trustees are. All you
14 have to do is go to the Maryland -- excuse me --
15 Maryland Secretary of State, and you can look up and
16 find the Declaration of Trust and you're going to see
17 who those five individuals are. There's no place, ever,
18 to look, prior to extensive discovery, which is going to
19 be time-consuming, to find out who the beneficiaries
20 are. That's just --

21 JUSTICE GINSBURG: Well, why should -- I
22 mean, it -- it is the person who's invoking diversity
23 jurisdiction has to show the diversity, and if they
24 can't, then you sue in State court.

25 MR. POSPISIL: That -- that's an option,

1 Your Honor. However, the purpose of a diversity
2 jurisdiction is to get a neutral playing ground for --
3 for companies and for businesses of all types to have an
4 unworkable test that, at the front end, would make it
5 almost impossible for a litigant to even make that
6 decision --

7 JUSTICE KAGAN: But that's true of
8 partnerships; it's true of LLCs; it's true of a wide
9 variety of legal entities.

10 MR. POSPISIL: That's true, Your Honor. And
11 partnerships are controlled specifically by Carden.
12 However, I would submit that there's not going to be as
13 many partners as there's going to be trustees and
14 beneficiaries, potentially, for -- especially for a Real
15 Estate Investment Trust.

16 CHIEF JUSTICE ROBERTS: Does it -- is it a
17 pertinent consideration in terms of the impact on
18 Federal jurisdiction? I mean, this is standard,
19 run-of-the-mill commercial dispute about a commercial
20 accident. And adopting one position would limit the
21 number of times that such disputes would be brought in
22 Federal court. The other one will expand it. Is
23 that -- I mean, does Americold really feel that it's not
24 going to get a fair shake in the Kansas courts in this
25 case?

1 MR. POSPISIL: Yes, Your Honor. They --
2 they believe, like a lot of businesses do, that they
3 have more neutrality in a level playing ground in a
4 Federal court, not only in Kansas, but all across the
5 country. Wherever -- Americold has 175 different
6 locations, with -- with deep -- cold storage; excuse me.
7 They're all across the country. They can be sued
8 anywhere.

9 And under the rule the Tenth Circuit has put
10 forth, they're never going to be able to go to Federal
11 court. It's just never going to happen. It's almost
12 going to be a near impossibility.

13 JUSTICE SCALIA: Well, maybe that's a
14 problem for -- for Congress as -- as the problem of
15 corporations was. You know, Congress adopted a special
16 rule for corporations, and maybe it ought to adopt a
17 special rule for real estate investment trusts.

18 MR. POSPISIL: Congress always could, Your
19 Honor. However, I don't think they have to in this
20 case, because I think this Court's opinion in Navarro,
21 coupled with Carden, provide the answer.

22 JUSTICE SOTOMAYOR: Do you have any
23 definition of what the common law trust was? I'll --
24 I'll give you the ones I understand, and you tell me how
25 you don't.

1 I thought in a common law trust, the
2 trustees had legal title. They owned the assets. They
3 could be sued individually, and -- and they could sue in
4 their own names.

5 In this REIT, as I understand it, the assets
6 are in the name of the Trust, not in the name of the
7 individual trustees, and it is the Trust that sues or
8 can be sued, not the individual trustees.

9 Am I wrong about those --

10 MR. POSPISIL: You are wrong in the second
11 point, Your Honor.

12 JUSTICE SOTOMAYOR: All right --

13 MR. POSPISIL: Yeah.

14 JUSTICE SOTOMAYOR: -- so go -- I'm right on
15 the first part.

16 MR. POSPISIL: Yes. The -- the -- the point
17 that -- that you're incorrect is under Maryland law with
18 this statute, the property of a trust can be held in the
19 name of the trust itself, or the trustees.

20 JUSTICE SOTOMAYOR: Do you have a section
21 for that? I'm going to look it up, so.

22 MR. POSPISIL: Okay.

23 JUSTICE SOTOMAYOR: Because that's not how I
24 originally understood things, but -- that's all right --

25 MR. POSPISIL: Okay.

1 JUSTICE SOTOMAYOR: -- you can give it to me
2 on rebuttal.

3 MR. POSPISIL: Justice Sotomayor, it's the
4 Maryland Code of Corporations and Associations Section
5 8-301(12). And that provision -- it's also on page 14
6 of our reply brief, the yellow brief. And that statute,
7 that provision says: "A REIT may hold and dispose of
8 legal title to property either, quote, in the name of
9 the trust or in the name of the trustees."

10 JUSTICE SOTOMAYOR: Thank you.

11 MR. POSPISIL: So we -- we believe the
12 proper test is -- is a combination between Navarro and
13 Carden and we should look at the trustees and it doesn't
14 matter whether or not the real estate investment trust
15 can sue on its own behalf or has to sue through the
16 trustees. It's all clear that the beneficiaries of the
17 trust never have legal ownership; so, therefore, we
18 should never look to them.

19 If the Court has any other questions,
20 otherwise I'll remain my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Duggan.

23 ORAL ARGUMENT OF JOHN M. DUGGAN

24 ON BEHALF OF THE RESPONDENTS

25 MR. DUGGAN: Mr. Chief Justice, and may it

1 please the Court:

2 We urge the Court to adopt and reaffirm its
3 bright-line ruling announced in Carden that artificial
4 entity associations sued or suing in their own names
5 must measure their diversity citizenship by all of their
6 members, which would include those persons who own a
7 beneficial interest in the entity.

8 In this case, that would be the shareholder
9 members of a REIT who are in perfect accord with the
10 limited partners' ownership interest in Carden.

11 CHIEF JUSTICE ROBERTS: Would you describe
12 beneficiaries as a member -- member of a trust? I mean,
13 as you articulate it. I think what's different than
14 this, and Carden sort of gets you past the trust. But
15 you then have to still make a choice: Okay. We're not
16 going to look at the trust. Do we look at the trustees
17 or the beneficiaries? And I -- I don't know if I'd call
18 beneficiaries members of a trust.

19 MR. DUGGAN: Mr. Chief Justice, I think it's
20 important to understand that there is a very significant
21 distinction between a shareholder of a REIT and a
22 beneficiary of a common law traditional trust.

23 As set forth in the appendix to the
24 petition, page 79, which is the Declaration of Trust for
25 Americold, the actual shareholders have personal

1 property interest in the shares. They do not have any
2 interest in the property of the trust entity, and they
3 have no right to compel any partition, division,
4 dividend, or distribution of the trust property.

5 And that makes them uniquely different than
6 a common law beneficiary who actually has an equitable
7 ownership interest in the trust property.

8 Under common law traditions, the trustee
9 holds the legal title to the asset but only for the
10 benefit of those persons who are named as beneficiaries.
11 And those beneficiaries have equitable rights in the
12 property that's legally nominally in the name of the
13 trustee.

14 Here the shareholder members, as we describe
15 them, only have an interest in the personal property of
16 a certificate of ownership, very much like the limited
17 partners in Carden.

18 In Carden the limited partners didn't have
19 an ownership interest in the assets of the entity. It
20 had a certificate of ownership as a limited partner.

21 In those two instances, Mr. Chief Justice,
22 this limited partner in Carden and the trustee member,
23 or the beneficiary member in this case, are virtually
24 identical. They do two things: They invest money in an
25 artificial entity and receive a certificate of

1 ownership, and they periodically vote on important
2 matters that affect the entity.

3 They are, in most instances, virtually
4 identical.

5 So in my view -- and I think this case rests
6 upon defining a clear rule, a clear rule that says when
7 you have an artificial entity, we're going to measure by
8 those persons that I consider to be the beneficial
9 owners.

10 And I'll tell you why that's important:
11 Because that is consonant with the rule announced by
12 this Court in Chapman, Great Southern, Bouligny, and
13 Carden.

14 Chapman v. Barney, the doctrinal wall case,
15 those persons that were deemed to be members were the
16 persons that were the stock owners of the joint stock
17 company under New York law.

18 In Great Southern, again a limited
19 partnership case, were those persons that had an
20 economic interest in the entity.

21 And the same rule applied in Carden.

22 If we are to adopt Americold's position in
23 this case and now suggest that the board of trustees
24 that do not have an economic ownership interest in the
25 entity itself controls, we're going to open the

1 floodgates of uncertainty for the under -- for the lower
2 courts.

3 And I'll tell you why.

4 The Court has never explicitly addressed a
5 limited liability company, and they're common throughout
6 the United States. Limited liability companies can call
7 their boards of managers boards of trustees. And in
8 certain instances under those uniform laws, both the
9 general partnership law and the LLC law, managers can
10 hold property in trust for the entity just like the
11 trustees in this case can hold property in trust for the
12 entity.

13 At the end of the day, if we're going to now
14 say it's the board of managers that are called trustees
15 that we look to, everyone's going to analogize in the
16 circuits that haven't decided the LLC question: I'm
17 much more like the board of managers in Americold and
18 much different than the limited partners in Carden. And
19 it's going to create uncertainty.

20 Our rule, the bright-line rule, is very
21 clear. When an artificial entity is sued or being -- or
22 suing in its own name, we look to the members, which in
23 this case constitutes those persons that own the
24 beneficial interest in the entity, the shareholder
25 members, just like this Court did in Chapman, Great

1 Southern, Bouligny, and Carden.

2 And I think it's important to understand in
3 our view Navarro never decided the question: Did in
4 fact a trust constitute an entity and who the members of
5 the entity were?

6 Navarro stands for the limited proposition,
7 as suggested by Justice Ginsburg, that in fact we look
8 to those persons that had a right to sue.

9 JUSTICE GINSBURG: And in this case you
10 couldn't sue the trustees individually, right?

11 MR. DUGGAN: That is correct. In this case,
12 under Maryland law, the trustees, even if they are the
13 owners of the property in trust for the entity, still
14 have no authority under the statute to bring suit nor do
15 they have the ability to be sued.

16 The entity itself, Americold Realty Trust,
17 has admitted in this Court and in the Tenth Circuit that
18 it is the successor in interest to the corporation that
19 my client's, ConAgra Foods, entered in to a contract
20 with. I had no choice but to sue the entity. When the
21 entity is sued, the doctrinal wall of Chapman v. Barney
22 is in play: Are you a corporation or are you an
23 artificial association?

24 In this case they're an association. We
25 measure by those persons that have an ownership interest

1 in the artificial entity, the shareholder members, not
2 the board of managers.

3 JUSTICE KAGAN: Mr. Duggan, do you think
4 it's possible that we took a bit of a wrong turn in --
5 in Carden? In other words, that, in fact, all of these
6 entities should be treated like corporations and that
7 the strongest arguments on the other side, you know, are
8 really those arguments. And those arguments fly in the
9 face of Carden but that -- but they're really arguments
10 about why -- why not treat these just like a
11 corporation?

12 MR. DUGGAN: Well, Justice Kagan, I agree,
13 and I think the Court said in Carden that our decision
14 is precedent bound and perhaps even unresponsive to
15 policy considerations, but it is indeed Congress's
16 prerogative to change the law.

17 And indeed, Congress has spoken. Congress
18 spoke in 2005, and Congress said, we've legislated
19 against this backdrop of Chapman v. Barney, Great
20 Southern, Boulogny, Carden, and Navarro, and we reached
21 the decision --

22 JUSTICE GINSBURG: If we -- if we made the
23 law in the first place, why should we say, well, we made
24 it, but we're not going to fix it? Let Congress fix it.

25 MR. DUGGAN: Well, because I think Congress

1 has fixed it, and Congress has recognized, specifically
2 with class action lawsuits, that they would treat
3 associations the same as corporations if they are named
4 as a party in a class action lawsuit in the 2005
5 amendments to Section 1332.

6 And they specifically said, if you are an
7 unincorporated association, we're going to look to your
8 place of incorporation and your principal place of
9 business for purposes of diversity jurisdiction in class
10 action lawsuits. But they did not say if -- with regard
11 to every other garden variety commercial dispute like
12 the one we have here today, that that rule would apply.

13 And Congress is capable of speaking.
14 They've spoken post Carden in 2005. And they've made it
15 clear that those doctrinal walls of Chapman v. Barney
16 should remain in play as announced by this Court but
17 with the limited exception of class action lawsuits.

18 So if the court took a wrong turn in Carden,
19 Congress has affirmed it only to the extent that it has
20 announced a rule that applies to associations for policy
21 reasons in class action cases.

22 JUSTICE BREYER: The problem, just from the
23 point of view of the common sense of it, is you have an
24 organization that has, A, the organization; B, the
25 trustees; and C, the shareholders.

1 So applying Carden, what you would say --
2 and Navarro: If you sue the trustees, you look to their
3 citizenship. But if you sue the trust itself, you don't
4 look to the citizenship of the trust; you don't look to
5 the citizenship of the trustees. You go beyond that and
6 look to the citizenship of the members.

7 I mean, that seems odd. Why do you look to
8 the members or the shareholders, or the -- or the
9 beneficiaries where you sue the trust itself but you
10 don't in the identical situation where the law of the
11 State allows you to sue the trustees? I mean, that
12 seems such a sport, such a -- a fluke.

13 MR. DUGGAN: But it is the sport that's
14 played even with regard to limited partnerships,
15 Justice Breyer, because in the instance where in a
16 limited partnership a general partner who is managing
17 the affairs of the entity breaches a duty to a third
18 party and the entity itself also is responsible for a
19 breach of duty, a party can sue both the general partner
20 and the artificial entity. And if the general partner
21 happens to be an individual, you measure by his natural
22 citizenship and you measure the entity by virtue of who
23 the members are.

24 And people make tactical reasons every day
25 in the United States about who to sue and who not to

1 sue. In some instances, they may choose to sue the
2 general partner because they want to get into Federal
3 court and they don't want to sue the entity, but they'll
4 take their risks on suing only one of the parties that's
5 liable, or they may sue all of them. But they have to
6 satisfy the rules applicable to each one of those
7 particular parties that may be responsible.

8 I think the other thing that's important
9 here is that the -- the argument suggested by the
10 Petitioner is that we look to the control test, a test
11 of those persons that are in control, and this Court has
12 implicitly and expressly rejected that test.
13 Specifically, the Court rejected it in Carden. But more
14 implicitly, if you look at the Chapman v. Barney case,
15 Barney was a plaintiff in the case, brought the suit as
16 president of the New York Stock Company, and he had the
17 absolute right under New York law to control the
18 litigation and bring the claim.

19 But the Court never looked to the control of
20 the litigation by Barney as a reason why it should
21 measure the citizenship of the entity. It looked to all
22 the owner members of the company. And this Court --

23 JUSTICE KENNEDY: Is it the Petitioner's
24 position that the Real Estate Investment Trust is more
25 like a trust than an LLC, than a limited partnership?

1 MR. DUGGAN: I think it's made that
2 suggestion to the Court, but in our --

3 JUSTICE KENNEDY: And -- and if that is
4 their position, what would your response be?

5 MR. DUGGAN: Our response would be --

6 JUSTICE KENNEDY: Why -- why is an REIT more
7 like a limited partner than it is a common law trust?

8 MR. DUGGAN: There's two primary reasons,
9 Justice Kennedy. The first one is, this is an
10 artificial entity. And the entity can hold the assets,
11 and it's managed by a board of trustees, some of whom
12 may or may not hold the assets of the entity in trust.
13 But that's no different than a -- a general partner of a
14 limited partnership. They can hold assets --

15 JUSTICE KENNEDY: Well, it seems to me
16 that's a wash because what you describe is a common law
17 trust as well, so I'm --

18 MR. DUGGAN: Precisely.

19 JUSTICE KENNEDY: That sounds like a wash.

20 MR. DUGGAN: In my view, the one market
21 distinction between their assertion here and a common
22 law trust is this isn't a common law trust. It is an
23 artificial entity. And if in fact their trustees can
24 hold assets for the entity, then maybe they are acting
25 as trustees and maybe they can bring certain claims.

1 But our bright-line rule is this.

2 JUSTICE KENNEDY: What -- a common law trust
3 exists in nature? That's the common law?

4 MR. DUGGAN: Well --

5 JUSTICE KENNEDY: But it's not an artificial
6 entity.

7 MR. DUGGAN: It's not an artificial entity.

8 JUSTICE KENNEDY: Because we know it and
9 love it so well or what?

10 MR. DUGGAN: Well, it's been around since
11 the Middle Ages, as I understand the brief of Winston
12 Wong, the amicus in the case. And from that vantage
13 point, common law trust entities have never been
14 recognized as entity status with capacity to sue and be
15 sued as an entity. The trustees who are the legal
16 nominal owners of the assets bring the claim. That's a
17 significant distinction. But just as importantly, the
18 beneficiary shareholders of a REIT have no equitable
19 interest in the assets of the artificial entity because
20 the very Trust declaration itself provides it's merely
21 personal property. They are so much like the limited
22 partners in Carden that it's striking.

23 But just as importantly, I think, back to
24 the point I was making, the Court expressly rejected the
25 control test in Carden and said, quote, "real persons to

1 controversy test" and, quote, "which parties have
2 control over the subject of the litigation" have never
3 guided our reasoning with regard to who are the citizens
4 of an artificial entity. And in fact they can't point
5 to one single case by this Court where this Court has
6 ignored the citizenship of the beneficial owners of an
7 entity and instead substituted in a board of managers.

8 And indeed, if that were the holding of the
9 Court today, the Court would be reversing itself from
10 hundreds of years of precedent where it -- it chose in
11 Chapman, Great Southern, Boulogny, and Carden to look to
12 the ownership of the members and the artificial entity.

13 One final point with regard to difficulty in
14 measuring these entities.

15 It was suggested that there might be
16 thousands of members of a REIT. Well, that very well
17 could be true. But there also could be thousands of
18 limited partners in these sophisticated limited
19 partnerships that are being used for real estate
20 transactions. Just because there are a lot of owners of
21 an artificial entity association doesn't seem to weigh
22 heavily enough to create the ambiguity that you would
23 under --

24 JUSTICE BREYER: Look -- look at the other
25 odd thing in writing this opinion your way. You say,

1 well, this isn't really like a trust. I mean, it is
2 sort of a trust, but there are important differences.
3 They can sue and be sued. The trust itself can hold the
4 property, and the beneficiaries do not have an equitable
5 interest. And because they don't have an equitable
6 interest, it's more like a private association or,
7 et cetera, in Carden.

8 But, of course, that means that we look to
9 their interest. We look to their property. We're
10 basically having them as part of the necessary parties
11 because they have a property interest, the very people
12 we just said that this is a different kind of
13 organization because they lack an equitable interest in
14 the property.

15 MR. DUGGAN: But that's no different than
16 what we do in limited partnerships under Carden. We
17 simply look at the limited partners for purposes of
18 measuring diversity. They're only important to the
19 extent that they're required for measuring.

20 The final point is, there was an argument
21 that said, well, you know, REITs are publicly traded and
22 that is true. But the NAREIT brief, the amicus brief
23 points out that nearly 80 percent of all REITs ought to
24 be corporations. And most publicly traded REITs are
25 corporations. And indeed, Maryland REITs can choose the

1 corporate form of incorporation, and they would be
2 measured simply by the principal place of business and
3 their state of incorporation.

4 Just because a few REITs choose to be
5 associations doesn't seem to justify creating
6 uncertainty in the doctrinal wall framework that's been
7 announced by the Court and now have people trying to
8 analogize to a board of managers instead of the owner
9 beneficial members.

10 I have nothing further unless there's more
11 questions from the Court.

12 CHIEF JUSTICE ROBERTS: I just have one
13 question on the Safeway and Kraft business. In the
14 Tenth Circuit, you can -- you advised the court that you
15 thought they were dispensable, nondiverse parties, but
16 they hadn't appealed. And before this Court, you agreed
17 to dismiss another dispensable, nondiverse party. And
18 then your brief comes in and you say, well, I've changed
19 my mind. They're not dispensable. It -- I wonder why.
20 It seems a bit of sharp practice.

21 MR. DUGGAN: Well, I think -- I think, Mr.
22 Chief Justice, that if in fact that's a question that
23 still remains if you affirm -- or if you reverse and say
24 that we measure by the trustees, it should be remanded
25 to the Tenth Circuit for them to make a determination.

1 In the first instance, it was raised by the Petitioners
2 for the first time, as I understand it, in their merits
3 brief that Kraft and Safeway were properly dismissed.

4 We improvidently took the wrong position in
5 front of the Tenth Circuit, and we don't think Newman
6 Green supports that position. And I think the Court can
7 review Newman Green and look at it and say, well,
8 really, are they dispensable parties or not?

9 And I think, quite frankly, if in fact the
10 Court adopts a ruling here that says we measure by the
11 board of managers instead of the owner members, then it
12 would be appropriate to remand back to the Tenth
13 Circuit, not only to decide the case on the merits,
14 which they didn't decide, but also to make a
15 determination as to whether Kraft and Safeway really
16 truly are dispensable or not.

17 CHIEF JUSTICE ROBERTS: So just extend the
18 litigation even further than it's --

19 MR. DUGGAN: Unfortunately, perhaps.

20 CHIEF JUSTICE ROBERTS: Okay. Thank you,
21 counsel.

22 MR. DUGGAN: Thank you so much.

23 CHIEF JUSTICE ROBERTS: Mr. Pospisil, you
24 have eleven minutes remaining.

25 REBUTTAL ARGUMENT OF MICHAEL D. POSPISIL

1 ON BEHALF OF THE PETITIONER

2 MR. POSPISIL: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 I'd like to start off by addressing
5 Justice Breyer's comment about gamesmanship. You're
6 absolutely right. What difference does it make if the
7 Trust is sued or the Trustee is sued? We're still
8 looking at Trust assets. It doesn't make --

9 JUSTICE BREYER: His point really is that
10 this is sort of like a trust but not very much. And
11 indeed, the key point, to me, is that the shareholders
12 here have no beneficial interest in the property.

13 MR. POSPISIL: And that's the second
14 argument I wanted to make, Your Honor. There are two
15 statutes, two statutory cites that I want to give to the
16 Court, and one of them I read already. Under Maryland
17 Code of Corporations and Associations 8-101(c), the
18 definition of REIT is as follows: "An unincorporated
19 business trust in which property is acquired, held,
20 managed, administered, controlled, invested, or disposed
21 of for the benefit and profit of any person who may
22 become a shareholder."

23 Second provision: Missouri -- or Maryland
24 Code of Corporations and Associations, 1-101(e): The
25 definition of a business trust is "a REIT engaged in

1 business in which property is acquired, held, and
2 managed for the benefit of shareholders."

3 JUSTICE BREYER: And then you say in the
4 section shareholders shall have no interest in the
5 property of the trust.

6 MR. POSPISIL: Your Honor, if -- if
7 anything, that -- that distinction makes this even
8 further removed. Why -- why would those shareholders,
9 if they have no interest whatsoever, why would we ever
10 even look to them? That makes even more sense --

11 JUSTICE BREYER: I don't know. I didn't
12 write -- I didn't write Section 6; your client did.

13 (Laughter.)

14 JUSTICE BREYER: That's what it says, so how
15 are we supposed to take that?

16 MR. POSPISIL: Your Honor, I -- I would say
17 that the statute obviously is -- is what controls here.
18 I mean, because we want to have a rule that's across the
19 board for all trusts. And if you look at the statute of
20 Maryland, the statute language I just said definitely
21 creates an equitable interest in shareholders -- bless
22 you -- for a Real Estate Investment Trust.

23 There is another point that Respondents
24 made; I'd like to point out, is that they said there is
25 no case in which this Court has looked to anything other

1 than beneficiaries when you're involved in a case with a
2 trust. I would submit there -- there's two responses to
3 that.

4 Number one, there is a case that we cited in
5 our brief. It's called Thomas v. The Board of Trustees
6 of the Ohio State University. In that case, the Board
7 itself was sued in its own name. It was the party. It
8 was allowed to be sued by the Ohio laws. It was a case
9 that involved adverse possession with some property
10 that -- that the -- the students and the university
11 owned. There was an issue of jurisdiction, whether or
12 not there was diversity.

13 The court looked, not to who the
14 beneficiaries of that board of trustees were; the court
15 looked to the trustees that sat on that board. That's
16 who they looked to. They weren't a party to that
17 action. The court nowhere looked at the beneficiaries.
18 You're not going to see that -- that language at all in
19 that case.

20 And the second case, this Court --

21 JUSTICE SCALIA: I -- I don't -- who --
22 who -- who was the party? Who was the defendant in that
23 case?

24 MR. POSPISIL: It was Board of Trustees of
25 the Ohio State University.

1 JUSTICE SCALIA: You say the trustees were
2 not a party?

3 MR. POSPISIL: That's correct. The board
4 itself --

5 JUSTICE SCALIA: You separate the board of
6 trustees from the -- from the trustees?

7 MR. POSPISIL: No. The -- the board of
8 trustees, it would be like the equivalent of a trust.
9 You look at the trust. Okay, well, who do you look to?
10 Do you look to who the beneficiaries of that are, or do
11 you look at who controls them?

12 And what the court did in that case is they
13 looked to who controlled -- looked to the members of
14 that board.

15 JUSTICE SCALIA: Is -- is that standard with
16 -- with common law trusts? Can you sue either the
17 trustees or the board of trustees?

18 MR. POSPISIL: Your Honor, when I say "board
19 of trustees," I'm talking -- that was a unit. That was
20 a specific entity. It was called the board of trustees.
21 It was an entity that was created under Ohio law.

22 JUSTICE SCALIA: When you have a bunch of
23 trustees, aren't they normally referred to as the board
24 of trustees?

25 MR. POSPISIL: That's true, Your Honor.

1 However, this was a specific provision under Ohio law
2 that allowed that entity itself to be sued or sue in its
3 own name. And what the court did is it looked behind
4 the curtain --

5 JUSTICE SCALIA: There's a special statute
6 that -- that allowed the board of trustees --

7 MR. POSPISIL: That's correct, Your Honor;
8 that's correct.

9 Another case, more recently, where the court
10 did, in fact, look to something beyond the
11 beneficiaries, is Navarro, of course. Navarro did look
12 at the beneficiaries. It said we're going to look at
13 the beneficiaries, but that's not going to control.

14 And I realize that a trust was not the named
15 party there, but the court -- it would -- it would have
16 been superfluous for this Court to even look at the
17 beneficiaries if that was not an issue.

18 The court knew that it's going to be
19 trustees or the beneficiaries. And they specifically
20 said, the 9,500 beneficiaries, we don't look at.

21 We believe the same rule should apply here.

22 If the Court has no other questions, we --

23 JUSTICE BREYER: Yes. I do have one.

24 MR. POSPISIL: Yes.

25 JUSTICE BREYER: Suppose I wanted a list.

1 I -- I wanted a list, a synthesis of which Bogert or --
2 or Scott on trusts has as the characteristic of the
3 traditional common law trusts. And then I'd like, over
4 in the other column, the characteristics of your
5 organization.

6 MR. POSPISIL: Okay.

7 JUSTICE BREYER: And now what do I read? I
8 -- I don't think you can list them now. Is there
9 something I can read just to get an idea of that?

10 MR. POSPISIL: Yeah.

11 JUSTICE BREYER: Maybe they are identical.
12 Are you going to say they're --

13 MR. POSPISIL: They are -- they are
14 identical. And I can lay them out for you.

15 Let's go on the left side. The left side,
16 you're going to have traditional trusts. You're going
17 to have a separation between legal ownership and
18 equitable ownership.

19 Let's look on the right side. Let's look at
20 a real estate investment trust under Maryland law. You
21 have legal ownership, which is either in the name of the
22 trustees or the trust, and you also have equitable
23 ownership, and then shareholders.

24 And I'll go back to those two statutes that
25 I -- that I cited to you earlier, Your Honor.

1 So those were the attributes that exist in a
2 common law trust, and they're also the attributes that
3 exist with a Maryland real estate investment trust.

4 If the Court has no other further questions,
5 we would request that the Court reverse the Tenth
6 Circuit.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.

9 (Whereupon, at 11:47 a.m., the case in the
10 above-entitled matter was submitted.)

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