

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AMERICOLD REALTY TRUST,                   :

4                   Petitioner                   :   No. 14-1382

5                   v.                   :

6   CONAGRA FOODS, INC., ET AL.                   :

7   - - - - - x

8                   Washington, D.C.

9                   Tuesday, January 19, 2016

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11                   The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States

13   at 11:04 a.m.

14   APPEARANCES:

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

16       of Petitioner.

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

18       Respondents.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

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

6 Mr. Pospisil.

7 ORAL ARGUMENT OF MICHAEL D. POSPISIL

8 ON BEHALF OF THE PETITIONER

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

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

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

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

24 MR. POSPISIL: Your Honor, that -- that is  
25 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, Bouligny, 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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