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IN THE SUPREME COURT OF THE UNITED STATES

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LINCOLN PROPERTY COMPANY, ET AL., :

Petitioners, :

v. : No. 04-712

CHRISTOPHER ROCHE, ET UX. :

- - - - - x

Washington, D.C.

Tuesday, October 11, 2005

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of the Petitioners.

GREGORY P. JOSEPH, ESQ., New York, N.Y.; on behalf of the Respondents.

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P R O C E E D I N G S

[11:05 a.m.]

CHIEF JUSTICE ROBERTS: We'll now hear argument in Lincoln Property v. Roche.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK
ON BEHALF OF PETITIONERS

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

This is a routine diversity case that went seriously awry in the court of appeals. The original defendants in -- named in the complaint, Petitioners State of Wisconsin Investment Board, which I'll refer to as SWIB, and Lincoln Property Company, are completely proper and diverse parties.

SWIB owned the apartment complex, and Lincoln managed it through agents. The Fourth Circuit, nonetheless, embarked on a search for affiliates of Lincoln that it thought would be more appropriate party defendants, what the court deemed, quote, "real parties in interest."

The Fourth Circuit's holdings are fundamentally flawed, in two respects. First, because the named defendants are proper parties, the court erred in holding that Lincoln had not carried

1 its burden of proof by failing to establish that
2 some non-named putative defendants might possibly
3 destroy complete diversity, and that the remedy for
4 such a possibility was dismissal of the action from
5 Federal court. Second, the court erroneously
6 engrafted a, quote, "very close nexus" requirement
7 onto the test for require -- for determining the
8 citizenship of a limited partnership.

9 Now, with respect to the first issue, a
10 number of black-letter legal principles govern a
11 court's consideration of non-named parties.

12 Let's start with the statutory text. The
13 diversity statute, at section 1332(a), talks about
14 civil actions, and a "civil action" is defined as
15 the naming of a plaintiff and a defendant. A civil
16 action does not encompass those that are not named
17 in the lawsuit. That language is tracked in the
18 removal statute, section 1441(a), which also speaks
19 of civil actions, and in -- mirrored in 1441(b),
20 which says that a defendant may remove, where it is
21 properly joined and served.

22 JUSTICE SOUTER: Well, I thought (b)
23 simply enacted a special necessary condition when
24 you had a local defendant. I thought it was not an
25 eligibility provision. I thought it was a

1 limitation provision.

2 MR. FREDERICK: It is, Justice Souter, but
3 what -- my argument is that that language, properly
4 joined and served, simply tracks the civil-action
5 requirement under the original diversity statute, as
6 well as the removal provision of 1441(a). But what
7 the court --

8 JUSTICE SOUTER: Well, it's consistent
9 with it, but I -- it seems to me that it's a bit of
10 a stretch to say that anyone who is properly joined
11 and served, at least in a formal sense, is,
12 therefore, the only person who may be considered in
13 a -- in a diversity inquiry.

14 MR. FREDERICK: What the court of appeals
15 did, and where we think it got off track, was it
16 took the -- to -- the phrase "parties in interest,"
17 and it -- and it took cases from this Court that
18 have used the phrase "real parties in interest" to
19 determine what are proper party plaintiffs, and it
20 used that concept on the defendant's side of the
21 ledger. And none of the cases from this Court talk
22 about "real parties in interest" as being
23 defendants. The explanation given by the court for
24 doing it on the plaintiff's side is to ensure that a
25 defendant is not going to be subjected to multiple

1 suits. But there are many purposes --

2 CHIEF JUSTICE ROBERTS: So, I take it your
3 answer to Justice Souter is yes. In other words, if
4 the mistake that the court made was relying on
5 1441(b), it was a similar mistake for you, in your
6 opening brief, to put such weight on that language
7 in 1441(b).

8 MR. FREDERICK: Our position, Your Honor,
9 is that the phrase "parties in interest" -- we were
10 seeking to find out where the court could have
11 applied that phraseology on the defendant's side.
12 And the only place that we could find, in the
13 statutes or the rules, was in 1441(b) and the
14 explanation for removal, that we were not a "proper
15 party in interest." And that's why we focused on that.

16 JUSTICE GINSBURG: Mr. Frederick, what
17 about cases where a plaintiff sues two defendants --
18 one is diverse, and the other is not diverse -- and
19 there is a motion by the defendants to dismiss for
20 want of diversity? The plaintiff then says, "Oh,
21 but only one of those defendants is the 'real-party
22 whatever,' and I can drop the other one, because the
23 other one is not the 'real party in interest'?"
24 Now, that's a situation where courts, even if this
25 court has never had that problem, have said, "If the

1 second defendant, the non-diverse defendant, is a
2 'real party,' you can't get rid of the case that
3 way, but if it's not -- if it's not, you can keep
4 the -- just drop it and keep the case going against
5 the 'real party in interest.'" There are such
6 cases.

7 MR. FREDERICK: There are, Justice
8 Ginsburg. And the analysis goes to whether or not -
9 - how far along in the proceeding the litigation has
10 occurred before the plaintiff makes that choice. Of
11 course, a plaintiff can voluntarily drop defendants,
12 without any consequences, and the courts have fairly
13 uniformly held that it -- that it is no
14 jurisdictional bar for a plaintiff to drop a non-
15 diverse defendant in order to ensure that diversity
16 would be present. Had this complaint been brought
17 in Federal court, there is no doubt that the court
18 would have had original jurisdiction, because, on
19 the face of the complaint, the two named defendants
20 were completely diverse.

21 JUSTICE GINSBURG: Ah, but the plaintiff
22 said, "This is a complicated real estate business,
23 and I want to discover whether there is -- whether
24 the 'true defendant' is a Virginia citizen, as I
25 am." So, on the face of it, it looks like there's

1 complete diversity, but, in fact, the diverse
2 defendant is hiding the "real party." I think
3 that's the position that the plaintiff was taking.

4 MR. FREDERICK: And that position is
5 incorrect, both as a factual matter and as a legal
6 matter. As a factual matter, Lincoln is a
7 completely proper party. Its name is on the lease.

8 It was the employer of Mr. Roche, who was one of
9 the plaintiffs in the suit. It issued the mold
10 policies that are at issue in the case. All of its
11 advertising is alleged to have been fraudulent in
12 the original complaint. And it was the director and
13 manager of the agents whose acts were alleged to
14 have been negligent here. There's --

15 JUSTICE GINSBURG: The plaintiff --

16 MR. FREDERICK: -- no question --

17 JUSTICE GINSBURG: -- the plaintiff points
18 to two offices of the defendant, who's -- the
19 defendant is described by defendant as a Texas
20 corporation -- but there was one witness -- Chaney,
21 was it? -- who said that Lincoln is not a
22 corporation. It is a partnership. No corporate
23 board.

24 MR. FREDERICK: Well, Mr. Chaney's
25 testimony has to be viewed in contact -- in context,

1 Justice Ginsburg. He was not called as a 30(b)(6)
2 witness as a corporate -- for a corporate form and
3 structure. The testimony that was being elicited
4 was to see whether Lincoln had other entities and
5 ownership of properties in Virginia so that they
6 could attempt to prove that there was a problem that
7 the parent company, Lincoln Property Company, knew
8 about. There was a high degree of imprecision in
9 the deposition questions, and it's fairly clear, I
10 think, that the lawyer and the witness did not
11 understand what each other were talking about. Yet
12 in the discovery process, not a single question was
13 presented that would get at the organizational
14 structure of Lincoln. There was not any attempt to
15 get behind the management documents between SWIB and
16 Lincoln Property. It was one very small snippet of
17 a deposition which has been taken out of context
18 and, we would submit, blown out of proportion by the
19 Respondents in their submissions in this case.

20 JUSTICE GINSBURG: Well, they thought they
21 got closer with a witness named Franzen, who was a
22 Virginia resident, and who also described Lincoln as
23 a partnership, and himself as a partner.

24 MR. FREDERICK: Well, Justice Ginsburg, as
25 the Real Estate Roundtable brief demonstrates, and

1 is unrebutted, the real-estate industry operates
2 through many very complicated structures for
3 perfectly legitimate finance and tax-related
4 reasons. And Mr. Franzen is a partner in some
5 deals, but the testimony that was provided in a
6 declaration -- and it is appended to our reply brief
7 -- demonstrates that Mr. Franzen was not a partner
8 in any deal that had anything to do with the
9 Westfield Village Apartments.

10 But what the court of appeals did was, it
11 erected a burden of proof that said that the
12 defendant has to prove a negative, that there is not
13 some affiliate corporation out there that is a
14 citizen of the Commonwealth that would be existing
15 to destroy diversity. And that type of burden, to
16 prove a negative, has never been authorized in this
17 Court's cases. Rather, what this Court's cases have
18 held is that, as the masters of their complaint,
19 plaintiffs have an opportunity to plead whichever
20 defendants they want to try to prove their
21 allegations against. If they want to try to prove
22 Federal claims, this Court has held that that kind
23 of case can be removed. If it wants to plead around
24 Federal claims, this Court's cases have said that
25 that would be respected, as well.

1 CHIEF JUSTICE ROBERTS: Mr. Frederick,
2 earlier you made the point that Lincoln was a proper
3 "real party in interest." I take it that's not
4 critical to your position. Your argument would be
5 the same if they weren't a real party in interest,
6 wouldn't it?

7 MR. FREDERICK: Well, we don't think,
8 Justice -- Mr. Chief Justice, that the "real party
9 in interest" analysis even applies on the
10 defendant's side, but it is -- it would not apply
11 to this extent. It's not for the courts, once they
12 have a proper defendant, to be searching outside the
13 record for possible jurisdictional spoilers once
14 jurisdiction has been established. And this court's
15 cases --

16 CHIEF JUSTICE ROBERTS: But if they -- if
17 they don't have a proper defendant, they should do
18 that?

19 MR. FREDERICK: If they do -- if there is
20 no proper defendant, then I think --

21 CHIEF JUSTICE ROBERTS: I presume, then --

22 MR. FREDERICK: That's correct. It --

23 CHIEF JUSTICE ROBERTS: -- that the
24 plaintiff loses, not that you get to have the court
25 find the proper defendant for the plaintiff.

1 MR. FREDERICK: That's correct. It would
2 be a 12(b)(6) motion to dismiss, where there is no
3 defendant who would be liable to the plaintiff.

4 But what the court of appeals did here
5 was, it imposed an obligation on the defendants
6 that, in effect, confuses the obligations that are
7 in Federal Rule of Civil Procedure 19, which looks
8 at whether there are necessary or indispensable
9 parties. And what the court did was, in effect, to
10 take an unnamed affiliated entity to Lincoln and
11 treat it as the --

12 JUSTICE STEVENS: Mr. Frederick --

13 MR. FREDERICK: -- functional equivalent
14 of an --

15 JUSTICE STEVENS: -- will you just clarify
16 one thing for me? Did the defendant ever take the
17 position in this litigation, in discovery or
18 anywhere along the line, that they sued their own
19 defendant?

20 MR. FREDERICK: No. In fact, in their
21 answer, Justice Stevens, they admitted that they
22 were the manager of the apartment, that they had run
23 it through their agents. They acknowledged that it
24 was their policies that were in effect. There
25 wouldn't have been a basis that would have survived

1 rule 11 that would have given Lincoln Property
2 Company a basis on which not to defend the lawsuit.

3 And so, to that extent, we think it's quite clear
4 that they are a proper party defendant.

5 We've always taken the position that if we
6 are found liable, we would pay a judgment. The
7 issue is that we don't think we're liable, because
8 we think that the allegations in the complaint are
9 completely baseless. And that's what the district
10 court found when it held, on summary judgment, that
11 there was not a dispute of fact as to the core
12 allegations of the complaint.

13 Returning to the point I was trying to
14 make about rule 19, there is a mechanism for the
15 courts to consider whether there are indispensable
16 parties. And what the court did here was to take a
17 rule 19 kind of inquiry -- Is a non-named defendant
18 really an indispensable party, such that dismissal
19 of the action is warranted? -- and to engraft that
20 onto a jurisdictional inquiry. But the reason why
21 we have the Rules of Civil Procedure is, of course,
22 to follow them. And what the Fourth Circuit did
23 here was, it took that kind of analysis, but it
24 didn't follow the standards that the courts have set
25 out for applying rule 19 properly.

1 JUSTICE GINSBURG: Well, plaintiff
2 certainly wouldn't want to say there's an
3 indispensable party missing, I take it, because then
4 that would put the plaintiff out of court. The
5 plaintiff is arguing that there's another defendant
6 who should be in here.

7 MR. FREDERICK: And, Justice Ginsburg,
8 they never sought to name or join that other
9 possible defendant. They never brought a joinder
10 motion. They never even conducted discovery as to
11 whether or not there was another possible defendant
12 that might be affiliated. And their theory of
13 liability made it unnecessary, because their theory
14 of liability was that Lincoln Property Company, the
15 parent, is responsible for all the acts of its
16 agents. And had they really wanted to be in Federal
17 court, they could have found plenty of Virginia
18 citizens that they could have sued. They could have
19 sued the plumber, they could have sued the installer
20 of a -- heating and air-conditioning equipment, they
21 could have sued the general contractors. There are
22 a lot of people they could have sued if they were
23 that intent on staying in Federal court. But,
24 instead, they made a tactical choice to sue the
25 deepest pockets. And the deepest pockets happened

1 to be out-of-State citizens that have a right under
2 the statutes to remove the case.

3 JUSTICE GINSBURG: And because you
4 represent the removing defendant, it is true, is it
5 not, that the removing defendant has the burden of
6 showing that proper diversity exists?

7 MR. FREDERICK: And we readily satisfied
8 that, both on the face of the complaint, which
9 identified Lincoln Property Company as a Texas
10 corporation, and in the remand notice, which
11 identified its principal place of business as Texas.
12 Even the court of appeals had no problem calling it
13 a "Texas parent," because the corporation documents,
14 which are part of the record, amply demonstrated
15 that Lincoln Property Company is, in fact, a Texas
16 corporation and satisfies those requisites under the
17 diversity jurisdiction provision.

18 The -- instead, what the Fourth Circuit
19 has done is to erect a standardless forum that will
20 increase litigation over jurisdiction by inviting
21 courts to make inquiry about parties and entities
22 that are not named in the lawsuit, solely for the
23 purpose of determining whether or not there are
24 jurisdictional spoilers.

25 CHIEF JUSTICE ROBERTS: What -- I know you

1 contend that's not the case, but let's say there is
2 a in-State subsidiary that's completely responsible
3 for all the challenged actions, and the in-State
4 plaintiff sues an -- only the out-of-State parent.
5 What happens in that case?

6 MR. FREDERICK: Well, what the ninth
7 circuit, in a -- in an opinion by then-Judge Kennedy
8 that we have cited, called Simpson -- said you
9 respect the plaintiff's allegations. If the
10 plaintiff wants to sue the parent, and the parent is
11 an out-of-State corporation, the plaintiff is the
12 master of the complaint. And, in the Simpson case,
13 the Ninth Circuit held that it was completely proper
14 to remain in Federal court, even though it was
15 obvious to all that there was a subsidiary that was
16 an in-State subsidiary that, if it had been sued,
17 would be non-diverse. So, we think that's the
18 proper answer, Mr. Chief Justice.

19 Now, if I could turn to the second issue
20 that we have prevented -- presented, that concerns
21 how one would treat EQR, which is the management
22 agent of Lincoln Property Company. We read the
23 Fourth Circuit's opinion as engrafting onto this
24 Court's test in the Carden case an additional
25 requirement that, in addition to the citizens of --

1 JUSTICE GINSBURG: Mr. Frederick, would
2 you clarify one thing for me? I don't know how we
3 even get to the second question, about partnership.

4 If you're right that Lincoln is a corporation --
5 it's a Texas corporation, with its principal place
6 of business in Texas, end of case; it's the only
7 named defendant -- so, how do we get to something
8 about a partnership?

9 MR. FREDERICK: If you agree with us on
10 question one, Justice Ginsburg, reversal is the
11 appropriate disposition, and the Court need not
12 reach question two.

13 We would submit, however, that, because
14 the error is so egregious and leads to the
15 difficulties that have been outlined by the Real
16 Estate Roundtable for nationwide business entities,
17 that the Court certainly ought to say that this was
18 error, as well, or at least to vacate that part of
19 the judgment, as well. And the reason is, in the
20 Carden case, what the Court held was that the --

21 JUSTICE GINSBURG: Well, I don't
22 understand it. We wouldn't vacate the judgment in
23 part. If we reversed, --

24 MR. FREDERICK: No, but you --

25 JUSTICE GINSBURG: -- that's the end of

1 it.

2 MR. FREDERICK: -- expressed disapproval
3 with this very-close-nexus standard by which the
4 Fourth Circuit attempted to engraft onto the normal
5 citizenship rules for a limited partnership the
6 notion that its citizenship could be deemed, if its
7 activities had a very close nexus with the State --
8 and I'm referring now to the passage, Justice
9 Ginsburg, that's at pages 16(a) to 17(a) of the
10 petition appendix. There are four page -- four
11 sentences on those two pages that capture the error
12 of the Fourth Circuit. And, just below the bottom,
13 it says -- it says, "The real party in interest owns
14 land and operates a substantial part of its business
15 in Virginia, thus establishing a very close nexus
16 with the Commonwealth."

17 JUSTICE GINSBURG: Yes, but, Mr.
18 Frederick, before that -- you know, read back -- the
19 court -- the Fourth Circuit has said, "It appears
20 that the real and substantial party in interest is
21 this Virginia subsidiary, be it a partnership, be it
22 a corporation."

23 So, it's -- the thing about nexus is not
24 self-standing. The court is positing that there is
25 a Virginia corporation or a Virginia partnership in

1 the picture, and then says, "And given that, not
2 only is it -- is it a Virginia entity, but it's got
3 this close nexus because of -- it's operating
4 substantially there, as well."

5 MR. FREDERICK: Well, all of the evidence,
6 Justice Ginsburg, in the record was that EQR was a
7 Delaware limited partnership, where it was
8 registered, composed of a Texas corporation as its
9 general partner, and a limited partner that had two
10 partners that were, themselves, Texas corporations.

11 So, the evidence in the record established that
12 EQR, which was the entity the Fourth Circuit was
13 alluding to here, was, in fact, a Texas citizen, and
14 its attempt to confuse the record by suggesting that
15 there was a way to look at the citizenship of that
16 entity through its, quote, "very close nexus with
17 the State," we submit, is also in error.

18 JUSTICE STEVENS: Am I correct, though,
19 this entity we're talking about is not a party to
20 the case?

21 MR. FREDERICK: That's correct.

22 JUSTICE STEVENS: So --

23 MR. FREDERICK: That's correct, Justice
24 Stevens, and that's where we think that the Fourth
25 Circuit went off.

1 I'd just like to make one more point
2 before saving the remainder of my time for rebuttal,
3 and that is that if the Fourth Circuit was correct,
4 SWIB is a critical party here, which the respondents
5 never deny. It is the owner of the apartment
6 building. It is a completely proper defendant for
7 the acts of negligence in -- and other wrongdoings
8 that they allege. But they never mention that party
9 in their brief. So, if the Fourth Circuit is
10 correct that Lincoln, the parent, really is nominal
11 under this Court's decisions, its citizenship should
12 be completely disregarded. That was the holding of
13 this Court in Walden versus Skinner in 1879. On the
14 other hand, if a Lincoln affiliate at that stage in
15 the litigation is a proper defendant, but non-
16 diverse, the Fourth Circuit should have dismissed
17 it, under Horn versus Lockhart, which was decided in
18 1873.

19 If the Court has no further questions,
20 thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, Mr.
22 Frederick.

23 Mr. Joseph.

24 ORAL ARGUMENT OF GREGORY P. JOSEPH
25 ON BEHALF OF RESPONDENTS

1 MR. JOSEPH: Mr. Chief Justice, and may it
2 please the Court:

3 The judgment of the Fourth Circuit should
4 be affirmed for two reasons, one of which responds
5 to a question that the Chief Justice asked, and that
6 is that Lincoln Property Company was not a real
7 party to the controversy.

8 JUSTICE O'CONNOR: Was what?

9 MR. JOSEPH: Was not a real party to the
10 controversy.

11 JUSTICE GINSBURG: Then why did you name
12 it, in the complaint, as the defendant?

13 MR. JOSEPH: Trial counsel named it,
14 because that was the understanding that he had. It
15 turned out, as Lincoln proved on remand, that it had
16 abandoned the apartment management business in 1991.
17 And that's at page 239 of the joint appendix.

18 JUSTICE GINSBURG: Then you'll be left
19 without -- if you've named the wrong defendant,
20 then you have a suit against no defendant. It seems
21 to me you are automatically dismissed. You didn't
22 substitute another defendant.

23 MR. JOSEPH: You're correct, Your Honor,
24 and that's because Lincoln said that it was the
25 manager. Lincoln, in its answer, paragraphs 13,

1 paragraph 36, paragraph 5, said that it was the real
2 party in interest, when, in fact, it was not. And
3 that's what's led to the problem that we find
4 ourselves in, because when you have a non-real party
5 to the controversy, jurisdiction is determined by
6 the salient jurisdictional --

7 JUSTICE BREYER: I've never heard of that.

8 JUSTICE O'CONNOR: Well --

9 JUSTICE BREYER: I thought, if you sue A,
10 and then it turns out A doesn't own the building,
11 well, then you've got to sue B.

12 MR. JOSEPH: Your Honor, that is --

13 JUSTICE BREYER: And you didn't sue B.

14 MR. JOSEPH: We didn't sue B. We didn't
15 know B existed.

16 JUSTICE BREYER: Well, that's too bad,
17 that, unfortunately, if you don't know who owns the
18 building, it's going to be hard for you to bring the
19 lawsuit. But we had, I thought, like, pages and
20 pages of discovery rules and -- I've never heard,
21 before, of a lawyer who has a -- you know, in this
22 kind of situation, can't find out who owns a
23 building there. There are records, there are all
24 kinds of things.

25 MR. JOSEPH: Your Honor, Lincoln

1 represented to the public and to the court that it
2 was, in fact, the manager. Discovery was, in fact,
3 served that would have adduced this information.
4 This issue came up in the reply brief, so it's not
5 addressed in our brief, but if any of your clerks
6 would care to look at the Fourth Circuit's
7 supplemental appendix, it --

8 JUSTICE BREYER: I've looked through the
9 appendix, actually. I read the joint appendix,
10 insofar as the opinion cited it. And it cited, in
11 the opinion, several -- five factors -- and I guess
12 there are no others, though you can bring them out
13 if there were -- that supported you. And the only
14 two that seemed to say that it had something to do -
15 - that seemed to have anything at all to do with
16 suggesting that there was no diversity -- was Mr.
17 Fred Chaney, which said that it was a partnership
18 and not a company. I read that. That didn't seem
19 to me to be what he said. And then somebody called
20 Mr. LeBeau, who said that Franzen is a senior vice
21 president and -- a Virginia resident -- and partner
22 in Lincoln Property. So, I looked up that, and it
23 was on, like, page 273 and, I think, 173 there. And
24 they asked Mr. LeBeau, and he says, "Lincoln
25 operates through many different structures, and I

1 don't know what they were using here." Am I right -

2 -

3 MR. JOSEPH: Your Honor --

4 JUSTICE BREYER: -- or did I misread it?

5 MR. JOSEPH: -- you read that absolutely
6 correctly. There --

7 JUSTICE BREYER: All right. So --

8 MR. JOSEPH: -- are other --

9 JUSTICE BREYER: -- what is the evidence?

10 MR. JOSEPH: There are -- there is other
11 evidence on that issue, which I believe is a
12 distinct issue, but let me address that issue. In
13 lawyer-prepared documents that were submitted
14 specifically to rule 26(a)(1) disclosures and the --
15 and the supplemental interrogatory answers, which
16 we've cited in our brief, it was lawyers that
17 identified Mr. Franzen as a senior vice president
18 and partner of Lincoln Property Company, raising an
19 issue --

20 JUSTICE BREYER: Where is it in the
21 appendix? It said that he -- you sue person X, and
22 I take it the reason that you won this case in the
23 Fourth Circuit -- which was surprising to me -- was
24 that a person called Mr. Franzen, who is a resident
25 of Virginia, was a partner of the defendant. Now, I

1 would like -- and, indeed, it was a partnership of
2 which he was a partner. So, if a Virginia resident
3 is a partner of the defendant, which is a
4 partnership, then maybe you were right.

5 So, I'm interested in: What is the
6 evidence that Mr. Franzen was a partner of the
7 defendant, which is a partnership?

8 MR. JOSEPH: On page 179 of the joint
9 appendix, Your Honor, in Lincoln's supplemental
10 answers to interrogatories, Mr. Franzen is
11 identified in this affirmation as a senior vice
12 president and partner of Lincoln Property Company.
13 As I said, there are two issues. What is Lincoln's
14 characterization?

15 On the next page, page 181, in the
16 supplemental initial disclosures, Mr. Franzen is
17 again, in the middle of the page, identified as a
18 partner of Lincoln Property Company.

19 JUSTICE BREYER: What page --

20 MR. JOSEPH: I'm sorry, that --

21 JUSTICE BREYER: -- is that? Is that a --

22 MR. JOSEPH: -- that was joint appendix,
23 page 181.

24 JUSTICE BREYER: Well, that's better than
25 what is in the opinion. What is it? 181.

1 MR. JOSEPH: 181, Your Honor. The prior
2 one was 179. There was --

3 JUSTICE GINSBURG: And how about joint
4 appendix 239 and 275, both of which say that Franzen
5 was not a partner in any entity responsible for
6 managing the apartments in question?

7 MR. JOSEPH: Your Honor, that evidence was
8 also in the record. The Fourth Circuit was not
9 comfortable that Mr. Franzen was being entirely
10 candid by not identifying which partnerships, in
11 fact, he was involved in. And I would note, Your
12 Honor, that this paragraph does not identify any
13 entity that actually managed the apartment building.

14 JUSTICE O'CONNOR: Well, Mr. Joseph, I --

15 MR. JOSEPH: Yes, Your Honor.

16 JUSTICE O'CONNOR: -- I thought we had to
17 decide whether an unnamed private party should be
18 considered for jurisdictional purposes.

19 MR. JOSEPH: Correct.

20 JUSTICE O'CONNOR: And do you have any
21 case supporting that proposition?

22 MR. JOSEPH: Yes, Your Honor. I'd cite
23 two cases, in particular, for a real-party-to-the-
24 controversy defendant, where his citizenship is
25 disregarded, even though he's named: Barney versus

1 City of Baltimore, 73 U.S. 580, and Little against
2 Giles, 118 U.S. 596.

3 JUSTICE SOUTER: But the -- it sounds to
4 me -- if I understood your answer correctly, you're
5 talking about cases in which the named party
6 citizenship is disregarded.

7 MR. JOSEPH: Correct, Your Honor.

8 JUSTICE SOUTER: Where the question is,
9 Should an unnamed party citizenship "be" regarded?

10 MR. JOSEPH: Absolutely, Your Honor. And
11 that is the issue that we find in the Fourth
12 Circuit. The Fourth Circuit found that Lincoln
13 Property Company was a nominal defendant.

14 JUSTICE GINSBURG: Then there's no
15 defendant.

16 MR. JOSEPH: Your Honor, they defended the
17 case. And we'd submit that, on the basis of Barney
18 and Little, that what one does -- on the basis of
19 the State Highway Commission case, when you have
20 someone who is serving as a surrogate for another,
21 you look to the jurisdictional characteristics of
22 the other; otherwise, he can, by coming in to
23 defend, obtain a Federal forum to which he is
24 otherwise not entitled.

25 JUSTICE SOUTER: Yeah, but he didn't come

1 in to defend; you pulled him in to defend.

2 MR. JOSEPH: It --

3 JUSTICE SOUTER: And the problem that I
4 have with your position is, I don't know of anything
5 in the record that indicates that he wasn't ready to
6 defend, that he wouldn't have -- or it wasn't ready
7 to defend, that it wouldn't have paid the judgment,
8 that you could have -- could not have gotten, from
9 the party you named, all the relief that you were
10 asking for.

11 MR. JOSEPH: Your Honor, it was definitely
12 a party to the controversy. We believe that the
13 point of the "real party to the controversy"
14 doctrine is that every party doesn't fall in that
15 category, and that is what the focus --

16 JUSTICE SOUTER: Okay. But so far as the
17 Fourth Circuit -- tell me if I'm wrong here -- it
18 sounds to me that the Fourth Circuit took the
19 following position, that for purposes of determining
20 diversity, it is not enough to name a principal who
21 may be liable for the acts of subsidiaries, without
22 naming the subsidiary, or, if you name a -- I'm
23 mixing up principal and corporation --

24 MR. JOSEPH: Understood.

25 JUSTICE SOUTER: -- principal and --

1 corporate parent and subsidiary, or principal and
2 business agent. And I don't know of any rule to the
3 effect that, for diversity purposes, a plaintiff
4 simply cannot choose to sue the parent, or to sue
5 the principal.

6 MR. JOSEPH: Your Honor, the facts, as
7 you've stated them, I believe, are not the facts in
8 this record.

9 JUSTICE SOUTER: Okay. Where would I be
10 wrong?

11 MR. JOSEPH: And let me explain. It's
12 certainly true that Lincoln identifies, at page 96
13 of the cert petition appendix, a chart of entities
14 that are salient. The most notable omission from
15 the chart is the relationship of any of those
16 entities to Lincoln. There is no evidence as to
17 what -- how attenuated that was or what the
18 relationship is, what indemnities existed, or
19 whether Lincoln actually had an interest in this
20 outcome. They now rely on an agency theory. That
21 isn't how the case was defended.

22 JUSTICE GINSBURG: But you named Lincoln
23 as the defendant. And I'm looking at your second
24 amended complaint, which says, "Lincoln," on
25 information and belief, "is a corporation with its

1 headquarters in Dallas, and it is the developer and
2 manager of the property." That's what you alleged
3 in your complaint. You allege that Lincoln was the
4 manager -- Lincoln, whose Texas corporation was the
5 manager of the property in question. Now, would you
6 -- you're saying that that was wrong, and you should
7 have sued somebody else, and the Court should cure
8 that for you? That's -- it's really bizarre.

9 MR. JOSEPH: Well, let me try to make it
10 less bizarre, Your Honor. What we're saying is, for
11 example, if I had a dispute with John Smith, the
12 son, who's not diverse, but I accidentally sue John
13 Smith, the father, who is diverse, and he comes in -
14 - he removes, and he comes in to defend, on the
15 merits, that he is not a real party to that
16 controversy, and that his citizenship, under the
17 opinions of this Court, would be measured by that of
18 the son to determine whether or not a Federal forum
19 is appropriate --

20 JUSTICE SCALIA: He's a real party if you
21 sued him.

22 MR. JOSEPH: Your Honor --

23 JUSTICE SCALIA: Just because you're going
24 to lose doesn't mean that he's not a real party.

25 MR. JOSEPH: It's one thing --

1 JUSTICE SCALIA: It seems to me anybody
2 you sue is a real party.

3 MR. JOSEPH: Your Honor, that cannot be
4 the case, or the "real party to the controversy"
5 case means that every defendant is a real party.
6 And it's true, in this sense, that --

7 JUSTICE GINSBURG: But they -- let me stop
8 you on that "real party," because, as has been
9 pointed out, the "real party in interest" concept,
10 as a procedural matter, comes out of rule 17, and
11 it's talking about plaintiffs, that suits have to be
12 brought in the name of the real party so that the
13 defendant isn't in a situation where he's sued one
14 day by plaintiff A, and is not home free when
15 plaintiff B comes in with the identical complaint.
16 So, it was originally designed with, Who is the
17 proper party, the assignee or the assignor? That's
18 what real party -- that's what the concept is
19 familiarly about. Who is the proper plaintiff, not
20 defendant?

21 MR. JOSEPH: Your Honor, it's certainly
22 true that rule 17 only deals with plaintiffs. But
23 in the cases we've cited, including two I just cited
24 today, it applies to defendants, as well, because
25 rule 17 doesn't confine the limits. In Navarro, the

1 Court said that it articulates the same principles,
2 but it's not completely congruent with the "real
3 party to the controversy" test.

4 JUSTICE GINSBURG: Rule 17 is about
5 joinder of parties; it's not about jurisdiction.

6 MR. JOSEPH: Exactly right. And we're
7 talking about the jurisdiction of the court under
8 the "real party to the controversy" test.

9 JUSTICE GINSBURG: So, that's -- it's
10 something different. It's a -- it's a whole other
11 animal, because "real party in interest," as used in
12 the Federal rules, is a device -- is a joinder
13 device, is in the joinder rules. Now you're saying,
14 "Ah, but there's some other real-party concept out
15 there that has to do with jurisdiction."

16 MR. JOSEPH: Yes, Your Honor. And I
17 believe the Court's opinion, in Carden, identified
18 "real party to the controversy" doctrine in a recent
19 example. I believe it was mentioned again in the
20 Grupo Dataflux opinion. The concept is that the
21 real parties to the controversy must be before the
22 court.

23 And to respond to Justice Scalia's --

24 JUSTICE GINSBURG: I thought Carden was
25 about: In a partnership, does every partner's

1 citizenship count?

2 MR. JOSEPH: Correct. And in -- it
3 identified --

4 JUSTICE GINSBURG: There wasn't any
5 question that -- that it was the right or the --
6 that the defendant was a wrong defendant or that --

7 MR. JOSEPH: The language I'm referring
8 to, in Carden, was in distinguishing the dissenting
9 opinion, in saying that if, in fact, the question
10 were, Which of the parties before the court should
11 be considered, for jurisdictional purposes? it would
12 be the real parties to the controversy.

13 JUSTICE BREYER: But to get the real
14 parties before the court, you have to sue them.

15 MR. JOSEPH: That's correct.

16 JUSTICE BREYER: And, apparently, you
17 didn't sue the right people until you replied to me.
18 Then I took your argument, because it seemed like
19 seven arguments, mixed up, and I took that argument
20 to be the following. I'm -- I, the plaintiff, sued
21 a defendant, who is called the Lincoln Property
22 Company. Now, I grant you, there is some evidence
23 that that defendant, the one I sued, is a Texas
24 corporation. One, they showed us the certificate of
25 incorporation, or they got a sworn statement. Two,

1 in my complaint, I said that's what he was.

2 However, there is some evidence the other
3 way. On page 179 and 181, we have a person named
4 Mr. Franzen who says, "I am the senior president, vice
5 president, partner for defendant Lincoln Property
6 Company," in which case, if that's your argument,
7 you're telling us -- is that your argument, that
8 there is some evidence the real defendant, whom I
9 sued, is not a corporation, despite the apparent
10 evidence to the contrary?

11 MR. JOSEPH: Your Honor --

12 JUSTICE BREYER: Rather, it is a partner,
13 and Mr. Franzen is a partner in it. Is that your
14 argument?

15 MR. JOSEPH: We did argue, and we do
16 argue, that the Fourth Circuit could reasonably
17 conclude, on burden-of-proof grounds, that it was
18 not satisfied that the Texas corporation was a
19 corporate entity. But the argument that I've been
20 using --

21 JUSTICE BREYER: Do you want to make that
22 argument here, or are you going to give up on that
23 argument?

24 MR. JOSEPH: Your Honor, we're not
25 abandoning the argument, only because if you look at

1 the corporate entity, itself, from the joint
2 appendix, 243, it began as Lincoln Property number
3 one. If we then look at the yellow brief, in the
4 addendum, we have thousands of Lincoln entities. We
5 have no doubt there is a corporation that is a Texas
6 entity.

7 Now, our argument today is that that
8 entity could not step in the shoes of another
9 potentially non-diverse entity without at least
10 identifying who the -- what the jurisdictional
11 characteristics of that entity were. Agency was not
12 argued. Agency was not argued below. Lincoln said
13 it was the manager. The district court found, in
14 three opinions, Lincoln was the manager. The
15 plaintiffs thought they were suing the entity
16 managing the premises. Lincoln was not that entity.
17 It had abandoned that business.

18 JUSTICE SCALIA: Well, if they said they
19 were, then it seems to me -- why don't you just hold
20 them to it?

21 MR. JOSEPH: Your Honor, it was not the
22 plaintiff's choice.

23 JUSTICE SCALIA: I mean, it seems very odd
24 that they -- they say, "We were," and you say, "Oh,
25 no, you weren't."

1 [Laughter.]

2 MR. JOSEPH: Your Honor --

3 JUSTICE SCALIA: "We shouldn't have sued
4 you." Why don't you just take them at their word
5 and sue them?

6 MR. JOSEPH: There were significant
7 tactical advantages to Lincoln, whatever its
8 relationship with these entities, in being in
9 Federal court. The plaintiff preferred a State-
10 court venue where there was no Daubert and there was
11 no summary judgment permissible on the basis of
12 affidavits and deposition testimony.

13 JUSTICE O'CONNOR: But it isn't up to the
14 court of appeals to make some kind of roving inquiry
15 of who would have been a better defendant. It just
16 seems to me the Fourth Circuit rule is totally
17 unworkable and unprecedented. I don't see how you
18 can possibly overcome that, because the plaintiff is
19 the master of its complaint, and it can decide who
20 to sue. And Lincoln was sued as a corporation, and
21 I don't see what business it is of a court to say,
22 "Oh, it should have been somebody else."

23 MR. JOSEPH: Let me attempt to articulate
24 a proposition, Your Honor, and that is that when
25 jurisdiction is challenged, the party asserting

1 jurisdiction, seeking the Federal forum, has to
2 defend it by proving diversity of citizenship, and
3 that means when its "real party to the controversy"
4 status is challenged, it has to adduce sufficient
5 evidence that it is, indeed, the real party to the
6 controversy.

7 JUSTICE O'CONNOR: Well, you can move, as
8 a party to the case, to dismiss somebody who's sued
9 for some reason, but that isn't what happened here.

10 MR. JOSEPH: It is not what happened here.

11 And I would submit to you it is not what happened
12 here, because of a lack of candor on the part of the
13 defendant. Ordinarily, one would expect the
14 defendant to say, "Not me." In fact, this defendant
15 proceeded to litigate --

16 JUSTICE SCALIA: Well, what if they did?
17 Suppose they did say, "Not me," and you proceeded
18 with your lawsuit.

19 MR. JOSEPH: They'd --

20 JUSTICE SCALIA: Okay? What would happen?

21 MR. JOSEPH: Your --

22 JUSTICE SCALIA: They would win the
23 judgment. Would they be the real party in that
24 controversy?

25 MR. JOSEPH: And that --

1 JUSTICE SCALIA: Of course they would be.
2 Because you sued them. Even if they're innocent --
3 are you saying all innocent parties are not parties
4 to the controversy?

5 MR. JOSEPH: By no means --

6 JUSTICE SCALIA: I don't think so.

7 MR. JOSEPH: -- Your Honor. And that was
8 -- that was a part of your first question, which I
9 want to respond to. Anybody who is a non-real party
10 to the controversy finds jurisdiction in the Federal
11 court to be able to establish that it is not the
12 party. But when it defends, by standing in the
13 shoes as a surrogate for another in order to obtain
14 a Federal forum, the jurisdictional characteristics
15 of that party are not germane. It is the
16 jurisdictional characteristics of the party in whose
17 shoes it stands.

18 JUSTICE GINSBURG: But we don't know --

19 MR. JOSEPH: That is --

20 JUSTICE GINSBURG: -- who that party is.

21 Let's go back to your -- when you started
22 this case, you said that you would, on discovery --
23 this is what you said in -- at the time of your
24 initial complaint -- determine if there is an
25 additional defendant, or defendants, who should be

1 named as parties. What discovery did you pursue to
2 find out if there was an additional defendant, or
3 defendants, who should be named as parties?

4 MR. JOSEPH: Interrogatory number 3 in the
5 Fourth Circuit supplemental appendix, at page 35,
6 inquires about any person, which is defined to
7 include any corporate affiliate, that has any
8 knowledge of the tenancy of the plaintiffs. The
9 objections are not in the record. Again, this
10 issue came up in the yellow brief, but they did not
11 reply to that.

12 JUSTICE SCALIA: Has any knowledge of --

13 MR. JOSEPH: Documents --

14 JUSTICE SCALIA: -- the what of --

15 MR. JOSEPH: Of the tenancy of the --

16 JUSTICE SCALIA: Oh.

17 MR. JOSEPH: -- lease relationship of the
18 Roches in the Westfield Village Apartment --

19 JUSTICE STEVENS: Mr. Joseph, can I ask
20 you to go back to the beginning for a second?

21 MR. JOSEPH: Yes, sir.

22 JUSTICE STEVENS: They filed a reply
23 brief. There are a lot of disputes about the facts.
24 Do you concede that the Lincoln Property Company
25 that you sued is a Texas corporation?

1 MR. JOSEPH: Your Honor, we acknowledge
2 there is a Texas corporation. We sued the Texas --

3 JUSTICE STEVENS: Do you acknowledge that
4 the corporation that you sued, Lincoln Property
5 Company, is a Texas corporation?

6 MR. JOSEPH: Your Honor, we do not, in the
7 sense that we accept the Fourth Circuit's
8 determination that the burden of proof to clarify
9 that entity's status, and the germane entity status
10 --

11 JUSTICE STEVENS: I understood them to be
12 arguing, in essence, that there's some other entity
13 that really is the real party in interest.

14 MR. JOSEPH: That is correct, Your Honor.

15 JUSTICE STEVENS: But you dispute, as a
16 matter of fact, that Lincoln Property Company is a
17 Texas corporation?

18 MR. JOSEPH: Your Honor, what we say is
19 that the Fourth Circuit found that there was
20 insufficient --

21 JUSTICE STEVENS: I'm asking you a --

22 MR. JOSEPH: -- proof of that point.

23 JUSTICE STEVENS: -- very simple "yes" or
24 "no" question.

25 MR. JOSEPH: Your Honor, we do not -- we

1 do not walk away from the Fourth Circuit's
2 conclusion, so we -- we know there is a Texas
3 corporation. We don't know that that is --

4 JUSTICE STEVENS: Is this corporation a
5 Texas corporation? The one you sued.

6 MR. JOSEPH: We so alleged, and they said
7 yes. So --

8 JUSTICE STEVENS: So, you say yes, it is.

9 MR. JOSEPH: It is. But whether or not
10 that is the entity, we can't be sure of, because --

11 JUSTICE BREYER: No, I'd like the -- these
12 are very expensive, this litigation. You're all the
13 way in the Supreme Court. It's costing people a lot
14 of money. And if there is a legal issue here, I'd
15 like to find out what it is.

16 I have exactly the same question Justice
17 Stevens had, which is where I started. Do you agree
18 that the company you sued, called Lincoln Property,
19 is a Texas corporation, yes or no?

20 MR. JOSEPH: Yes, Your Honor, we'll --

21 JUSTICE BREYER: All right.

22 MR. JOSEPH: -- acknowledge that for this
23 argument.

24 JUSTICE BREYER: Then that's out -- fine,
25 that's out of the case.

1 The next question is -- of course you
2 could sue a real company, called Lincoln Property or
3 Jolly Fisherman, and it could turn out that that
4 real company is a front, that it has no real
5 existence, its -- all its papers and everything to
6 do with it is signed by a totally separate
7 corporation. Are you saying that's what happened
8 here? And if that's what happened here, which is
9 the real corporation and people in interest?

10 MR. JOSEPH: It is -- the burden-of-proof
11 failure that the Fourth Circuit found was that we
12 could not --

13 JUSTICE BREYER: I'm not talking about
14 burden-of-proof failure.

15 MR. JOSEPH: We don't --

16 JUSTICE BREYER: I'm asking you, Who is
17 the real corporation or person in interest that
18 Lincoln Property is a kind of sham or front for?

19 MR. JOSEPH: We do not have the answer to
20 that question. And that was the Fourth Circuit's
21 conclusion. We know that EQR is a part of that.
22 And that's why -- they put in an affidavit that said
23 that EQR was the only affiliate of Lincoln involved
24 in the management --

25 JUSTICE BREYER: Okay. Then you think --

1 MR. JOSEPH: -- and that's why we --

2 JUSTICE BREYER: I'm getting there. I'm
3 not arguing with you. I'm getting there. Then you
4 think that whoever it is that they are the front for
5 has -- is a Virginia resident. Is that what you
6 think?

7 MR. JOSEPH: What we think, Your Honor, is
8 that they did not prove that that was not the case,
9 and the burden of proof to sustain jurisdiction was
10 theirs.

11 JUSTICE BREYER: Might be a Virginia
12 resident.

13 MR. JOSEPH: Correct. We don't know --

14 JUSTICE BREYER: Might be.

15 MR. JOSEPH: -- who it is.

16 JUSTICE BREYER: You think there is a real
17 party there that might be a Virginia resident. And
18 do you have any idea whatsoever of what that real
19 party is called?

20 MR. JOSEPH: We do not, Your Honor.

21 JUSTICE BREYER: And what's the evidence
22 that there is a Virginia resident, in there?

23 MR. JOSEPH: That is the burden-of-proof
24 failure that the Fourth Circuit found. But the Real
25 Estate Roundtable brief, at page 11, identifies the

1 fact that it's very common to have a special-purpose
2 entity that is property-specific, which gives
3 further rise to that inference. But it is a failure
4 of a burden of proof that was ultimately found by
5 the Fourth Circuit. And because of the failure of
6 the burden of proof, we're not in a position to
7 identify the party. Had --

8 JUSTICE SOUTER: But the failure of the
9 burden of proof is apparently a function of the
10 Fourth Circuit's assumption that if you sue the
11 parent, you have a duty to negate the possibility of
12 suing any subsidiary; or if you sue the principal,
13 you have an obligation to negate the possibility of
14 suing any agent. And I don't see where that comes,
15 except out of the sky somewhere.

16 MR. JOSEPH: Justice Souter, I believe, in
17 fairness to the Fourth Circuit, on page 16(a) of the
18 petition appendix, they said that they found Lincoln
19 to be a nominal defendant, not a real party to the
20 controversy. In that case, the relevance of the
21 subsidiary or other entity was to determine the
22 jurisdictional characteristics. And that is the
23 reason why the Fourth Circuit found a failure of the
24 burden of proof, because they could not identify, at
25 the time of that hearing, who was the appropriate

1 subsidiary and what the jurisdictional
2 characteristics were.

3 JUSTICE SOUTER: So, everything turned on
4 the nominal-party finding.

5 MR. JOSEPH: Yes, Your Honor.

6 JUSTICE SOUTER: On the nominal-party
7 assumption.

8 MR. JOSEPH: Correct. There's no dispute
9 that if Lincoln were a real party to the
10 controversy, they don't have to join every other
11 real party to the controversy.

12 JUSTICE SOUTER: But if the Fourth Circuit
13 is wrong on nominal party, that's the end of the
14 case for your side.

15 MR. JOSEPH: Not quite, Your Honor,
16 because there's still the burden-of-proof issue.

17 JUSTICE SOUTER: No, but the burden-of-
18 proof issue, as you've just answered my question,
19 does not arise until the Fourth Circuit finds that
20 Lincoln is a nominal party. And if, in fact, that
21 conclusion is incorrect, then there's no burden-of-
22 proof issue that has -- or no burden of proof that
23 has not been satisfied.

24 MR. JOSEPH: That is correct only if Your
25 Honor makes that determination based on matters that

1 were before the Fourth Circuit. There are a series
2 of affidavits they rely on that were submitted after
3 the Fourth Circuit's determination which may affect
4 the determination as to whether or not Lincoln is a
5 real party to the controversy.

6 Specifically, in the blue brief, in
7 footnote 9, and in the yellow brief, in footnote 15,
8 they've adduced additional evidence. The Fourth
9 Circuit was ruling at a point in time as to what the
10 burden of proof was.

11 JUSTICE GINSBURG: Mr. Joseph, do I take
12 it that the essence of your position is that a
13 removing defendant, if that removing party is a
14 corporation, must disclose all affiliates that may
15 have been involved in the -- in the occurrence that
16 the plaintiff might have, but failed, to name as a
17 defendant, that a defendant -- although, on the
18 surface, there's complete diversity, a defendant
19 corporation must, in order to remove, identify all
20 subsidiaries and affiliates who might have been
21 sued, as well?

22 MR. JOSEPH: No, Your Honor, that's not
23 our position. And the reason that's not our
24 position is that, at the time of removal, every
25 defendant that is, on the face of the complaint,

1 diverse has the ability to remove in order to defend
2 on the grounds that it is innocent -- the innocence
3 grounds. But if it then steps, instead, to defend
4 the merits on behalf of another in order to invoke a
5 Federal forum -- instead of saying, "Not me," which
6 it could have done, but did not do -- had it said,
7 "Not me," then the plaintiff would have known that
8 it should be looking at other entities. In fact, it
9 said nothing of the sort.

10 JUSTICE GINSBURG: But defendant never
11 took the position, "Not me."

12 MR. JOSEPH: That is the --

13 JUSTICE GINSBURG: Defendant said --

14 MR. JOSEPH: -- entire issue.

15 JUSTICE GINSBURG: -- "Yes, we are the
16 responsible party."

17 MR. JOSEPH: Your Honor, that is correct.

18 And they clearly were a party to the controversy.
19 But if they were not the real party to the
20 controversy, they managed, perhaps, to acquire a
21 Federal forum by virtue of stepping into the shoes
22 of the subsidiaries. And that is the argument, that
23 if they are not the real party to the controversy
24 because they're litigating the merits on behalf of
25 another, it's the jurisdictional characteristics of

1 the other that are germane, and that's the burden-
2 of-proof failure.

3 The "real party to the controversy"
4 doctrine is not a new doctrine to this Court. It
5 goes back to at least 1809, Brown against Strode. I
6 mean, the -- it is a fundamental doctrine. And as
7 Justice Ginsburg pointed out, it goes back as far,
8 perhaps, as 1789, to the assignee clause in the
9 Judiciary Act, in section --

10 JUSTICE GINSBURG: Yes, but I also --

11 JUSTICE STEVENS: May I ask --

12 JUSTICE GINSBURG: -- pointed out it's --

13 JUSTICE STEVENS: -- this question? Did
14 you engage in discovery trying to determine who the
15 real party in interest was?

16 MR. JOSEPH: Trial -- I wasn't trial
17 counsel, Your Honor. Trial counsel did, in the
18 Fourth Circuit supplemental appendix, at pages 35 to
19 38, make inquiries.

20 JUSTICE STEVENS: Well, did he -- did he
21 do a thorough job of trying to find out who the real
22 party in interest --

23 MR. JOSEPH: No, and -- they did not --
24 and I --

25 JUSTICE STEVENS: Wouldn't it be his

1 burden, if he thought it was the wrong person?

2 MR. JOSEPH: Your Honor, he didn't think
3 it was the wrong person. He was being told it was
4 the right person, and shouldn't be faulted for lack
5 of diligence in accepting the representations that
6 they had the right person.

7 JUSTICE STEVENS: Yeah, but if you accept
8 the representation, then they sued the right people.

9 MR. JOSEPH: But, Your Honor, it only
10 turned out at the end that, in fact, that was not
11 correct. And these matters snuck in through
12 discovery, in the course of --

13 JUSTICE STEVENS: It would seem to me --

14 MR. JOSEPH: -- discovery that was a
15 merits discovery.

16 JUSTICE STEVENS: -- if there was a
17 dispute about this, it ought to -- there ought to
18 have been extensive discovery before you got to the
19 court of appeals.

20 MR. JOSEPH: Your Honor, there was --
21 there were discovery requests served. There was not
22 discovery forthcoming on the issue of affiliates.

23 CHIEF JUSTICE ROBERTS: Well, you had no -
24 - I mean, you had no real reason to do it. You had
25 somebody there who accepted responsibility, in the

1 sense that they were willing to defend on the
2 merits, right?

3 MR. JOSEPH: That's correct, Mr. Chief
4 Justice, which is the reason --

5 CHIEF JUSTICE ROBERTS: And it's only
6 because you lost that you now question whether or
7 not they should have accepted -- you're saying they
8 shouldn't have accepted responsibility, and
9 shouldn't have defended on the merits.

10 MR. JOSEPH: There is no doubt, Your
11 Honor, this is a Hail Mary pass, because the court
12 had made clear what its decision was going to be.
13 But Hail Mary passes connect. And the question is
14 whether or not a real party to the controversy was,
15 in fact, litigating. And we believe that it was
16 not. And that -- we basically come to the argument
17 that limited jurisdiction means the limits must be
18 respected. "Real party to the controversy" doctrine
19 is an established limit. There are federalism
20 issues involved, and we submit that the fourth
21 circuit's judgments should be affirmed, because we
22 did not have the real party to the controversy.

23 Thank you very much, Your Honors.

24 CHIEF JUSTICE ROBERTS: Thank you, Mr.
25 Joseph.

1 Mr. Frederick, you have nine minutes
2 remaining.

3 REBUTTAL ARGUMENT OF DAVID C. FREDERICK
4 ON BEHALF OF PETITIONERS

5 MR. FREDERICK: I would waive, but for the
6 clarification of two points in the record.

7 Number one, we take umbrage at being
8 accused of a lack of candor in this Court.
9 Paragraph 22 of their complaint says, and I'll
10 quote, "All the defendants, acting through Lincoln
11 and/or their obligations as owners of the property
12 through the lease and acting by and through their
13 agents, were responsible for one or more acts of
14 common law and/or statutory negligent conduct with
15 respect to Roche's apartment, including, but not
16 limited to," a long laundry list.

17 When the parent is sued for the acts of
18 its agents, and the parent comes forward and says,
19 "We will accept the responsibility for our agents,"
20 there's no cause to be accused of a lack of candor
21 simply because there's no effort later to identify
22 who those agents are.

23 JUSTICE BREYER: But I guess what he's
24 saying -- I'm trying to put the -- as good a light
25 on it as I can -- it's a -- that if, in fact -- if a

1 big real-estate developer, which is a corporation --
2 what they do is, they organize a lot of deals, and
3 their deals would take the form of hundreds and
4 hundreds of limited partnerships, which are owned
5 buildings in various States. And I think he's
6 saying, "Well, for diversity purposes, we should
7 consider the citizenship of the parent corporation
8 to be the citizenship of the limited partnership
9 that happens to have control of the building that
10 we're complaining about."

11 MR. FREDERICK: And Lincoln had control.
12 It was acting through agents. That's undisputed.
13 But the lease says Lincoln Property Company is the
14 party, as agent, for the owner, SWIB. Lincoln
15 Property Company set the policies for the mold.
16 Lincoln Property Company hired Mr. Roche as an
17 employee. Lincoln Property Company directed the
18 actions of all of the people involved in this. And
19 so, there's not -- there's not any basis on which
20 Lincoln Property could come -- Company could say,
21 "We are not responsible." And when this was --

22 JUSTICE BREYER: No, he thinks --

23 MR. FREDERICK: -- put to us --

24 JUSTICE BREYER: -- you are responsible,
25 but he thinks you ought to have the citizenship of

1 the intermediate entities that own, or manage
2 directly, the building.

3 MR. FREDERICK: There would be no
4 authority from this Court to so hold. And there --
5 the interrogatory that he points to, interrogatory
6 number 3, reads as follows, "Identify every person,
7 other than your attorneys, who is aware of the facts
8 and circumstances surrounding Mr. Roche's lease at
9 Westfield Village Apartments and repeat in detail
10 the substance of such person's knowledge."

11 Now, from that interrogatory, we are
12 supposed to infer that there are -- a question about
13 the citizenship of the affiliated entities through
14 which Lincoln is operating. We put forward all of
15 the names of the people that we could identify who
16 had some knowledge about this. But I would submit
17 to you that a response, as he is suggesting here in
18 this Court, is not a reasonable one.

19 Finally, with respect to Mr. Franzen, the
20 fact that his title may say "partner" surely cannot
21 transform the corporation documents that say that
22 Lincoln Property Company is a corporation in the
23 State of Texas.

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you, Mr.

1 Frederick.

2 The case is submitted.

3 [Whereupon, at 11:57 a.m., the case in the
4 above-entitled matter was submitted.]

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