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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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