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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. :

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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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