SUPREME COURT OF THE UNITED STATES

No. 91–904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC., PETITIONER *v.* CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 14, 1993]

JUSTICE O'CONNOR, concurring.

I join all of the Court's opinion, except for the statement that petitioner cannot "rel[y] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante*, at 44. The Court's reasoning is generally consistent with my own views about retroactive withdrawal liability, which I explained in *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 228–236 (1986) (O'CONNOR, J., concurring), and which I need not restate at length here. In essence, my position is that the "imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility." *Id.*, at 229.

The Court does not hold otherwise. Rather, it reasons that, although "the withdrawal liability assessed against Concrete Pipe may amount to more . . . than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe," this possibility "was exactly what Concrete Pipe accepted when it joined the Plan." *Ante*, at 36. I agree that a withdrawing employer can be held responsible for its statutory "share" of unfunded vested benefits if the employer should have anticipated
the prospect of withdrawal liability when it joined the plan. In such a case, the "basis in the employer's conduct that would make it rational to treat the

employees' expectations of benefits under the plan as the employer's responsibility" would be the very act of joining the plan.

I am not sure that petitioner did in fact "accept" the prospect of withdrawal liability when it joined the Construction Laborers Pension Trust in 1976. As of that date, Congress had not yet promulgated the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA); the kind of "withdrawal liability" imposed on petitioner did not yet exist. Although the Employee Retirement Income Security Act of 1974 (ERISA) was in effect, and did create a contingent liability for the employer that withdrew from a multiemployer defined benefit plan, such liability was limited to 30% of the employer's net worth. See 29 U. S. C. §§1364, 1362(b)(2) (1976 ed.). Petitioner's withdrawal liability under the MPPAA amounts to *46%* of its net worth. See *ante*, at 43. In addition, the Construction Laborers Pension Trust apparently is a hybrid "Taft-Hartley" plan, which provides for fixed employee benefits *and* fixed employer contributions. It remains an open question whether hybrid Taft-Hartley plans are indeed "defined benefit" rather than "defined contribution" plans, and therefore subject to withdrawal liability. See *Connolly*, *supra*, at 230, 232–235 (O'CONNOR, J., concurring). We do not decide that question today. See *ante*, at 3, 40, n. 27.

But petitioner has not argued that its withdrawal liability, even if otherwise permissible, cannot exceed the 30% cap that was in effect in 1976. Nor has petitioner claimed that the Construction Laborers Pension Trust is a defined contribution plan. In short, petitioner has failed to adduce the two features of this case that might have demonstrated why it did not "accept" the prospect of full withdrawal liability when it joined the Construction Laborers Pension Trust. I therefore agree with the Court's result as well as most of its reasoning.

I cannot, however, agree that petitioner is precluded from "rely[ing] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante*, at 44. The Court seizes upon a passing reference in petitioner's brief, see *ante*, at 44, n. 28, to justify issuing this unnecessary statement about a difficult issue that the parties essentially have ignored. I would not decide without adversary briefing and argument whether ERISA's 30% cap might prevent retroactive withdrawal liability above 30% of the employer's net worth for an employer that joined a multiemployer plan after the passage of ERISA but before the passage of the MPPAA. I also note that the Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because "pension plans [have] long been subject to federal regulation." *Ante*, at 43. Surely the employer that joined a multiemployer plan before *ERISA* had been promulgated—before Congress had made employers liable for unfunded benefits—might have a strong constitutional challenge to retroactive withdrawal liability. The issue is not presented here—again, petitioner joined the Construction Laborers Pension Trust *after* the passage of ERISA—and the Court does not address it. It remains to be resolved in a future case.