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 THOMAS, concurring in part and concurring in the judgment.

I join all of the Court's opinion except Part III-B-1—the portion of the opinion in which the Court grapples with the trustee presumption in 29 U. S. C. §1401(a)(3)(A). The Court finds the presumption "incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor." *Ante*, at 22. And because, in the Court's view, "there would be a substantial question of procedural fairness under the Due Process Clause" if employers had to show that sponsors' findings were unreasonable or clearly erroneous, *ante*, at 23, the Court proceeds to interpret the statute as if it required an unconstrained evidentiary hearing into "any factual issue" concerning the employer's withdrawal liability, *ante*, at 27.

Until today, §1401(a)(3)(A) provided:

> "For purposes of any [arbitration] proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title *is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.*" (Emphasis added.)

Now the statute provides, in effect, that "any factual determination made by a plan sponsor shall be rejected by the arbitrator if the party contesting the determination shows by a preponderance of the evidence that the determination was erroneous." There is no meaningful presumption of correctness and no examination for reasonableness or clear error. I decline to participate in this redrafting of a federal law.

As I see it, there are three missteps in the analysis. First, the Court believes the statutory text is "incomprehensib[le]," *ante*, at 22, because it refers to three different, and mutually inconsistent, "degree[s] of certainty," *ante*, at 19, or of "probability," *ante*, at 22. This is incorrect—in large part because the Court overlooks the grammatical structure of the statute. Section 1401(a)(3)(A) sets up no parallelism between the phrase "by a preponderance of the evidence," which establishes the standard of proof for the arbitration proceeding, and the critical terms "unreasonable" and "clearly erroneous." "*[B]y* a preponderance of the evidence" is an adverbial phrase that modifies the "show[ing]" required of the employer. "Unreasonable" and "clearly erroneous," on the other hand, are predicate adjectives used to describe what it is the employer must show.

The incoherence identified by the Court follows from the assumption that Congress has "confus[ed]" burdens of proof with standards of review. *Ante*, at 20. The Court believes that the terms "clearly erroneous" and "unreasonable" must signify standards of review. *Ante*, at 19–20. Standards of proof and standards of review are entirely unrelated concepts (as the Court intimates, see *ante*, at 19–22). The Court's reading leads to the conclusion that §1401(a)(3)(A) is "meaningless," *ante*, at 22, because the statute (as so interpreted) "defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-

matched," *ante*, at 21.[1]

The Court's preoccupation with standards of review is understandable, at least with respect to "clearly erroneous," a term with an established legal usage. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–575 (1985); Fed. Rule Civ. Proc. 52(a). But such a reading is not compelled. As used in this statutory provision, "unreasonable" and "clearly erroneous" cannot signify standards applicable to the review of prior findings, since the arbitrator himself is undeniably a factfinder, not an appellate tribunal. See

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[1]Regrettably, the Court compounds and further muddles the textual difficulty by suggesting that in some sense, "preponderance of the evidence," "unreasonable," and "clearly erroneous" are comparable—that they all refer to relative "degree[s] of certainty." *Ante*, at 19. There is, in fact, no basis for comparing any particular standard of proof with any particular standard of review. An appellate tribunal could be required to determine whether it was "clearly erroneous" to find a disputed fact "by a preponderance of the evidence," or it could ask whether any "reasonable" factfinder could have found "probable cause" to believe, or "clear and convincing evidence" supporting, the fact in question. See, *e. g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 252 (1986) ("If the defendant in a . . . civil case moves for summary judgment or for a directed verdict . . . , [the inquiry is] whether *reasonable jurors* could find *by a preponderance of the evidence* that the plaintiff is entitled to a verdict") (emphasis added); *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether [a] *rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*") (emphasis added). Any combination of evidentiary and review standards is possible.

§1401(c) (establishing a presumption of correctness for "the findings of fact made by the arbitrator"). That the arbitrator is to undertake his examination "by a preponderance of the evidence" explicitly establishes his role as factfinder; appellate review does not occur "by" a taking of "evidence." The Court sees the arbitrator as a "hybrid," who acts as both a trier of fact and a reviewer of facts found. *Ante*, at 20–21. But the presumption of correctness that applies to the plan sponsor's determinations does not make the arbitrator a "reviewing body," *ante*, at 21, any more than the presumption of innocence in a criminal trial renders the jury a reviewer, rather than a trier, of fact.

The way out of the conundrum is apparent. The terms "unreasonable" and "clearly erroneous" must refer to what are, in effect, *elements* of the employer's claim in the arbitration proceeding. To prevail in its action before the arbitrator, in other words, the employer must show by a preponderance of the evidence, first, that the plan sponsor has made a determination under one of the relevant provisions and, second, that that determination was either unreasonable or clearly erroneous. This construction requires us to put aside the technical definition of "clearly erroneous" and focus on the literal meaning of the phrase. "Clear" error can simply mean an obvious, plain, gross, significant, or manifest error or miscalculation. See Black's Law Dictionary 250 (6th ed. 1990). That may not be the most natural reading (for a court, that is) of this legal term of art, but if we do not drop the assumption that "clearly erroneous" must be a reference to the *Bessemer City* standard of review, we cannot avoid the incoherence that has trapped the majority. The term "unreasonable," of course, is even more readily construed to refer to something other than a standard of review, since it can hardly be thought to have a sharply defined meaning that is limited to the context of appellate

review. There is, for example, nothing unusual about requiring a party to show as an element of a substantive claim that something—an interstate carrier's filed rate, for example, see *Reiter* v. *Cooper*, 507 U. S. ___ (1993)—is "unreasonable." Section 1401(a)(3)(A) is thus susceptible of a reading that gives it a coherent meaning.

This interpretation also conforms neatly with the very similar language and structure of the actuarial presumption in §1401(a)(3)(B), which the Court today finds unproblematic. See *ante*, at 29–33. That presumption provides that the actuary's determination of unfunded vested benefits will be presumed correct unless the employer shows "by a preponderance of the evidence" that the actuarial assumptions and methods were "unreasonable" or that the actuary made a "significant error." The Court offers no persuasive explanation as to why this presumption does not suffer from the same incoherence. In addition, my reading of the term "clearly erroneous" in §1401(a)(3)(A) renders it virtually indistinguishable from the term "significant error" in §1401(a)(3)(B).

The second false step in the Court's analysis is the use of the rule of construction applied in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). *Ante*, at 26–27. This rule, which requires a court to adopt a reasonable alternative interpretation of a statute when necessary to avoid serious constitutional problems, does not provide authority to construe the statute in a way that "is plainly contrary to the intent of Congress." *DeBartolo*, *supra*, at 575. The rule "cannot be stretched beyond the point at which [the alternative] construction remains `*fairly* possible.'" *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 481 (1989) (KENNEDY, J., concurring in judgment) (emphasis in original) (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)). "And it should not be given too broad a scope lest a whole new range of

Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it." *Public Citizen*, *supra*, at 481. Here it is plain, in my view, that Congress intended to shield the plan sponsor's factual determinations behind a presumption of correctness and intended that withdrawing employers would have to show something more than simple error. The Court's construction is plainly contrary to this intent and is not "fairly possible" under the terms of the statute. Rather than a reasonable alternative reading, therefore, the interpretation adopted by the Court today is effectively a declaration that the statute as written is unconstitutional.

Which leads to my final, and perhaps most fundamental, disagreement with the Court. Before a court can appropriately invoke the *Crowell*/*DeBartolo* rule of construction, it must have a significantly higher degree of confidence that the statutory provision would be unconstitutional should the problematic interpretation be adopted. The potential due process problem troubling the Court is the supposed lack of a neutral or "impartial" arbitration hearing. *Ante*, at 23. This potential is based on an "assumption" about a "risk" or "possibility" of trustee bias, *ante*, at 13, 15—bias that, if it existed, might be "preserve[d]" during the arbitration proceeding by the presumption of correctness. *Ante*, at 17. Petitioner has not established that the trustees were biased in fact. And whatever structural bias may flow from the trustees' fiduciary obligations or from the fact that the trustees are appointed by interested parties, see *ante*, at 12–14, will likely be nullified by the elaborately detailed criteria that channel and cabin their exercise of discretion. See 29 U. S. C. §§1381–1399 (1988 ed. and Supp. III). Such bias may be checked, in particular, by the requirement of consistency that governs the trustees' choice of a method for calculating liability. See *Keith Fulton & Sons, Inc.* v. *New England*

Teamsters & Trucking Industry Pension Fund, Inc., 762 F. 2d 1137, 1142 (CA1 1985) (en banc). And the very fiduciary duty the trustees owe to the fund should simultaneously prevent them from imposing excessive withdrawal liability that will discourage other employers from joining the fund in the future. *Id.*, at 1142–1143. The Court does not consider these countervailing forces.

But even if there is a real risk that structural bias may distort the trustees' factual determinations, I am inclined to believe that the arbitration proceeding—presumption and all—provides adequate process for the employer. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976) (adequacy of specific procedures involves consideration of private and public interests and risk of erroneous deprivation). This conclusion rests principally on the nature of the particular statutory determinations to which the presumption applies (those described in §§1381–1399 and 1405). Many of these determinations, such as the mathematical computations the trustees must perform under §§1386, 1388, and 1391, involve little or no discretion. As a result, the employer will have correspondingly little difficulty proving the existence of any significant error made by the trustees (either inadvertently or because of bias). The same can be said of withdrawal-date determinations under §§1381 and 1383, especially where all the information relevant to the determination is better known to the employer than to the trustees.

To me, the public interest is plain on the face of the statute: Congress did not want withdrawing employers to avoid their obligations by engaging in a lengthy arbitration over relatively insignificant errors. At the same time, the employer's interest in correcting miscalculations that are significant is adequately protected by the opportunity for arbitration afforded by §1401.

For these reasons, I concur only in the Court's

judgment that the application of §1401(a)(3)(A) "did not deprive Concrete Pipe of its right to procedural due process." *Ante*, at 28–29.