

No. 23-1098

In The
Supreme Court of the United States

THOMAS COLE,

Petitioner,

v.

FOXMAR, INC., d/b/a EDUCATION
AND TRAINING RESOURCES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR REHEARING

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
PETITION FOR REHEARING	1
REASONS FOR GRANTING REHEARING.....	1
I. <i>Trebelhorn</i> further entrenched the split among courts with respect to the issue presented	2
II. The Senate hearings on Boeing's broken safety culture demonstrate the issues presented in the petition are of significant public importance and in need of immediate review	5
a. Summary of the Senate hearings.....	5
b. Relevance to the petition	10
CONCLUSION	13
CERTIFICATE OF COUNSEL	14

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases:	
<i>Adeli v. Silverstar Auto., Inc.,</i> 960 F.3d 452 (8th Cir. 2020)	4
<i>BMW of N. Am., Inc. v. Gore,</i> 517 U.S. 559 (1996)	4
<i>Hentzel v. Singer Co.,</i> 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (Ct. App. 1982)	11
<i>Trebelhorn v. Prime Wimbledon SPE, LLC,</i> 372 Or. 27, 544 P.3d 342 (2024)	1-4, 11
<i>TXO Prod. Corp. v. Alliance Res. Corp.,</i> 509 U.S. 443 (1993)	1, 3, 4, 11
<i>U.S. E.E.O.C. v. W&O, Inc.,</i> 213 F.3d 600 (11th Cir. 2000)	4
Statutes and Other Authorities:	
<i>Blumenthal Delivers Opening Statement at Hearing on Boeing's Broken Safety Culture</i> , Press Release (April 17, 2024), https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-opening-statement-at-hearing-on-boeings-broken-safety-culture	7-9

Cited Authorities

	<i>Page</i>
<i>Boeing's problems could soon become your problem</i> , Bryan Mena, CNN (March 15, 2024), https://www.cnn.com/2024/03/15/economy/boeing-airfares-economy/index.html	9
<i>Examining Boeing's Broken Safety Culture: Firsthand Accounts</i> , Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations (April 17, 2024), https://www.hsgac.senate.gov/subcommittees/investigations/hearings/examining-boeings-broken-safety-culture-firsthand-accounts/	5
FAA Organization Designation Authorization (ODA) Expert Panel Report, Senate Committee on Commerce, Science, and Transportation (April 17, 2024), https://www.commerce.senate.gov/2024/4/faa-organization-designation-authorization-oda-expert-panel-report	5, 6
<i>Opening Statement of Javier de Luis</i> , Committee on Commerce, Science, and Transportation (April 17, 2024), https://www.commerce.senate.gov/services/files/B13F8D2B-B531-499E-B28B-49ECECDFE75	7

Cited Authorities

	<i>Page</i>
<i>Opening Statement of Ranking Member Ron Johnson</i> , “Examining Boeing’s Broken Safety Culture: Firsthand Accounts” (April 17, 2024), https://www.hsgac.senate.gov/wp-content/uploads/2024.04.17-Ranking-Member-Ron-Johnson-Opening-Statement.pdf	8, 9
<i>Opening Statement of Senator Maria Cantwell</i> , Senate Committee on Commerce, Science, and Transportation, Hearing on FAA Organization Designation Authorization (ODA) Expert Panel Report (April 17, 2024), https://www.commerce.senate.gov/services/files/D6543600-9B6A-4BD5-BFB4-8A8B5353235D	7, 9
<i>Statement of Edward F. Pierson</i> , Senate Permanent Subcommittee on Investigations (April 17, 2024), https://www.hsgac.senate.gov/wp-content/uploads/Pierson-Testimony-24.04.17.pdf	8
U.S. Department of Labor, Occupational Safety and Health Administration: Whistleblower Protection Program, https://www.whistleblowers.gov/whistleblower-retaliation-rights	11
<i>Written Testimony of Sam Salehpour</i> , Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations (April 17, 2024), https://www.hsgac.senate.gov/wp-content/uploads/Salehpour-Testimony-24.04.17.pdf	7, 8

PETITION FOR REHEARING

Petitioner Thomas Cole respectfully petitions for rehearing of the order denying certiorari in this case.

REASONS FOR GRANTING REHEARING

The petition for a writ of certiorari presents the unresolved issue of whether potential harm to others should be considered when reviewing the reasonableness of a punitive damages award under the Due Process Clause. A current split exists with the vast majority of courts failing to consider potential harm to others, and only the Eighth, Tenth, and Eleventh Circuits applying the potential harm to others standard used by this Court in *TXO*. This Court recognized in *Philip Morris* that this issue has not yet been resolved. For the following reasons, two substantial grounds not previously presented further demonstrate the grave importance of the issue presented.

First, the Supreme Court of Oregon recently issued a decision in *Trebelhorn v. Prime Wimbledon SPE, LLC* that further entrenched the split among courts. The Supreme Court of Oregon is a highly influential court in the realm of punitive damages, and its decision in *Trebelhorn* has solidified the incorrect standard currently applied by lower courts. Going further than decisions before it, *Trebelhorn* not only failed to apply the proper standard or consider the potential harm to others, it expressly rejected consideration of potential harm to others for purposes of punitive damages. This, in conjunction with the case law cited in the petition, demonstrates the unresolved issue requires immediate consideration by this Court.

Second, two Senate hearings were recently held on the retaliatory scheme of Boeing, one of the country's most prominent and successful companies, immediately after the petition was filed in this case. The Senate hearings focused precisely on the type of retaliatory scheme at issue in the petition and the need for further deterrence of such conduct. These hearings signal the issue is at the forefront of public concern and safety. The petition provides this Court with the opportunity to remedy the current lack of deterrence of retaliatory schemes under the law by addressing the unresolved issue of potential harm to others with respect to punitive damages.

For these reasons and those set forth in the petition, now is the opportune time for this Court to grant certiorari and address the unresolved issue of potential harm to others. This issue has been unresolved for thirty years, has a split among courts, and risks harm to the legal system and the nation the longer it goes unaddressed.

I. *Trebelhorn* further entrenched the split among courts with respect to the issue presented.

The Supreme Court of Oregon recently issued a decision in *Trebelhorn v. Prime Wimbledon SPE, LLC.*, 372 Or. 27, 544 P.3d 342 (2024). The decision in *Trebelhorn* illustrates, more clearly than any case before it, the split among courts as to whether potential harm to others should be considered when reviewing the reasonableness of a punitive damages award under the Due Process Clause. *Id.* at 352-53, 359; and Petition for a Writ of Certiorari (“Petition”), 10-15. The court in *Trebelhorn* expressly rejected the consideration of potential harm to others and in so doing furthered the split among courts,

with the majority of courts failing to apply the correct standard, and only the Eighth, Tenth, and Eleventh Circuits considering the potential harm to others as directed by this Court in *TXO*. *Id.*; and Petition, 10-15.

In issuing its decision, the court in *Trebelhorn* declined to consider the potential harm to others in spite of substantial evidence that potential harm was likely without deterrence. *Id.* at 352-53, 359. Remarkably, the court acknowledged the plaintiff's injury was the result of a financially motivated scheme and "repeated pattern" by the defendants of "consciously reject[ing] needed repairs" to "structurally compromised stairs, balconies, and elevated walkways" that "*posed a risk of serious physical injury if not death to the tenants and others using the complex.*" *Id.* at 352-53, 359 (emphasis added). The court further conceded "the jury could find that defendants' tortious conduct put at risk many hundreds of people who lived in the apartment complex over the years, in addition to those who visited . . . [and] that defendants *continued to reject performing other needed repairs for more than a year after plaintiff's injury, leading to a second injury.*" *Id.* (emphasis added). Moreover, "defendants covered up defects to make the structures appear safe to current and prospective tenants even though they knew that the defects actually posed an unreasonable 'life safety' risk." *Id.* at 353.

Notwithstanding the evidence that potential harm to others was likely to occur without deterrence, the court in *Trebelhorn* interpreted *TXO* to limit consideration of potential harm so "that the ratio takes into account only the potential harm to the plaintiff." *Id.* at 359 (emphasis in the original). This, despite this Court's direction to the

contrary in *TXO* that “[i]t is appropriate to consider . . . the possible harm to other victims that might have resulted if similar future behavior were not deterred.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993).

The analysis in *Trebelhorn* reveals the logical fallacy of courts failing to consider the potential harm to others. The defendants’ unlawful conduct “posed a risk of serious physical injury if not death to the tenants and others using the complex,” yet the court refused to consider that potential harm in its determination of the reasonableness of the punitive damages award. *Id.* at 352-53. This is patently illogical. The potential harm to the other tenants is precisely the harm punitive damages are designed to protect against.

As the Eighth, Tenth, and Eleventh Circuits have correctly held, this Court’s decision in *TXO* holds that such potential harm to others must be considered where there is substantial evidence the unlawful conduct would continue and cause further harm if not deterred. Petition, 10-15, 24-26; *see also TXO*, 509 U.S. 460 (emphasizing “*the harm likely to result from the defendant’s conduct . . .*”) (emphasis in original); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996) (emphasizing “*the harm likely to result from defendant’s conduct . . .*”) (emphasis in original); *Adeli v. Silverstar Auto., Inc.*, 960 F.3d 452, 462 (8th Cir. 2020) (“There must be some *reasonable likelihood* that the potential harm cited by the plaintiff might have actually occurred.”) (emphasis added); and *U.S. E.E.O.C. v. W&O, Inc.*, 213 F.3d 600, 617, n. 7 (11th Cir. 2000) (“Testimony showed that W&O had applied the policy to other women and would likely have continued to apply it in the future without this lawsuit.”). To ignore such harm goes against

the principle tenets of punitive damages and undermines the ability of the legal system to deter dangerous conduct. The issue necessitates immediate review by this Court to correct the failure of the vast majority of courts to consider the potential harm to others.

II. The Senate hearings on Boeing's broken safety culture demonstrate the issues presented in the petition are of significant public importance and in need of immediate review.

On April 17, 2024, the Senate held two hearings regarding the pattern of retaliation by Boeing and the related risks to public safety. The following evidence and findings presented at those hearings further support the arguments made in the petition that retaliatory schemes are particularly reprehensible and in need of deterrence under the law, and that consideration of potential harm to others is essential for punitive damages to deter such conduct.

a. Summary of the Senate hearings

On April 17, 2024, the Senate held two separate hearings on Boeing's pattern of employment retaliations and safety violations. *See Examining Boeing's Broken Safety Culture: Firsthand Accounts*, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations (April 17, 2024), <https://www.hsgac.senate.gov/subcommittees/investigations/hearings/examining-boeings-broken-safety-culture-firsthand-accounts/>; and *FAA Organization Designation Authorization (ODA) Expert Panel Report*, Senate Committee on Commerce, Science, and Transportation

(April 17, 2024), <https://www.commerce.senate.gov/2024/4/faa-organization-designation-authorization-oda-expert-panel-report>.

Senator Blumenthal summarized the purpose of the Broken Safety Culture hearing as follows:

Our purpose today is to hear from whistleblowers who have personal, eyewitness, factual stories to tell about Boeing putting profits ahead of safety, putting stock price ahead of quality, production speed ahead of responsibility.

...

Boeing is at a moment of reckoning. It's a moment many years in the making. It is a moment that results not from one incident or one flight or one plane or one plan. It reached the public consciousness after the death of 346 people. 346 innocent travelers in 2018 and 2019, that led Boeing to promise that it would overhaul its safety practices and culture. That promise proved empty. We know it was empty because of incidents that have occurred since then, most recently the Alaska Airlines panel blowout. And we know it was empty because the FAA itself audited Boeing's production and manufacturing, and in March, concluded, 'noncompliance issue in Boeing's manufacturing process, control, parts handling, and storage, and product control,' were prevalent.

...

To create a genuine and comprehensive culture of safety, Boeing must create workplace conditions where everyone feels comfortable reporting quality and safety concerns Boeing's culture must be one where employees are encouraged to speak up.

Blumenthal Delivers Opening Statement at Hearing on Boeing's Broken Safety Culture, Press Release (April 17, 2024), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-opening-statement-at-hearing-on-boeings-broken-safety-culture>, ¶¶ 10, 13, 19.

Testimony at the hearings focused on Boeing's pattern of retaliations against employees reporting safety issues, verified by whistleblowers and 250 employees interviewed by the FAA expert panel. *See Written Testimony of Sam Salehpour*, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations (April 17, 2024), <https://www.hsgac.senate.gov/wp-content/uploads/Salehpour-Testimony-24.04.17.pdf>, p. 2, ¶ 2; *Opening Statement of Javier de Luis*, Committee on Commerce, Science, and Transportation (April 17, 2024), <https://www.commerce.senate.gov/services/files/B13F8D2B-B531-499E-B28B-49ECECDFFE75>, p. 1, ¶ 4, p. 2, ¶ 3; and *Opening Statement of Senator Maria Cantwell*, Senate Committee on Commerce, Science, and Transportation, Hearing on FAA Organization Designation Authorization (ODA) Expert Panel Report (April 17, 2024), <https://www.commerce.senate.gov/services/files/D6543600-9B6A-4BD5-BFB4-8A8B5353235D>, p. 2, ¶ 2.

These retaliations were part of a “broader pattern of Boeing ignoring and suppressing safety and quality issues,” *id.*, and putting “profits ahead of safety.” *Blumenthal Delivers Opening Statement at Hearing on Boeing’s Broken Safety Culture*, Press Release (April 17, 2024), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-opening-statement-at-hearing-on-boeings-broken-safety-culture>, ¶ 10. “[T]he dangerous manufacturing conditions that led to the two 737 MAX disasters and the Alaska Airlines accident, continue to exist, putting the public at risk.” *Statement of Edward F. Pierson*, Senate Permanent Subcommittee on Investigations (April 17, 2024), <https://www.hsgac.senate.gov/wp-content/uploads/Pierson-Testimony-24.04.17.pdf>, p. 1, ¶ 3. Following the deadly crashes in 2018-19, Boeing “promise[d] that it would overhaul its safety practices and culture” but failed to do so. *Blumenthal Delivers Opening Statement at Hearing on Boeing’s Broken Safety Culture*, Press Release (April 17, 2024), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-opening-statement-at-hearing-on-boeings-broken-safety-culture>, ¶ 13.

Senator Johnson noted, “any retaliation by Boeing against its employees for identifying safety issues is inexcusable and will inevitably lead to additional problems going unreported.” *Opening Statement of Ranking Member Ron Johnson*, “Examining Boeing’s Broken Safety Culture: Firsthand Accounts” (April 17, 2024), <https://www.hsgac.senate.gov/wp-content/uploads/2024.04.17-Ranking-Member-Ron-Johnson-Opening-Statement.pdf>, p. 1, ¶ 5. After interviewing 250 employees, the FAA expert panel found “there was a very real fear of retribution and payback . . .”

Opening Statement of Senator Maria Cantwell, Senate Committee on Commerce, Science, and Transportation, Hearing on FAA Organization Designation Authorization (ODA) Expert Panel Report (April 17, 2024), <https://www.commerce.senate.gov/services/files/D6543600-9B6A-4BD5-BFB4-8A8B5353235D>, p. 4, ¶ 9.

Public confidence has been eroded as a result of Boeing's retaliations and safety violations. "Recent reports on mechanical and technical failures involving Boeing aircraft have jeopardized the public's confidence in Boeing airplanes." *Opening Statement of Ranking Member Ron Johnson*, "Examining Boeing's Broken Safety Culture: Firsthand Accounts" (April 17, 2024), <https://www.hsgac.senate.gov/wp-content/uploads/2024.04.17-Ranking-Member-Ron-Johnson-Opening-Statement.pdf>, p. 1, ¶ 1. News outlets have similarly reported that "Boeing's crisis could result in more expensive airfares and weaker economic growth, economists say." *Boeing's problems could soon become your problem*, Bryan Mena, CNN (March 15, 2024), <https://www.cnn.com/2024/03/15/economy/boeing-airfares-economy/index.html>, ¶ 3.

Senator Blumenthal noted the Committee on Homeland Security and Governmental Affairs "intend[s] to uncover what has enabled the culture of safety disregard to exist, so that we can change it for good" and the hearing was "the first of several we intend to hold to get to the bottom of Boeing's broken safety culture." *Blumenthal Delivers Opening Statement at Hearing on Boeing's Broken Safety Culture*, Press Release (April 17, 2024), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-delivers-opening-statement-at-hearing-on-boeings-broken-safety-culture>, ¶¶ 19, 22.

b. Relevance to the petition

The Senate hearings concerning the retaliatory scheme at Boeing highlight the importance of the issues and arguments raised in the petition. The petition asserts retaliatory schemes are particularly reprehensible and in need of deterrence under the law due to the uniquely strong financial incentives for such conduct. Petition, 32-33. The Senate hearings provided support for this assertion. The petition further argues the longstanding and unresolved question regarding potential harm to others must be addressed by this Court. *Id.* at 10-15. Only then will punitive damages be able to sufficiently deter retaliatory schemes and all other forms of reprehensible conduct.

In the present case, as with Boeing, the evidence showed the conduct was likely to continue without deterrence because of the strong financial motive, pattern, and intent to continue the unlawful scheme. Petition, 21-23, 25. The potential harm includes, at a minimum, continued retaliations against employees. Without consideration of potential harm to others, punitive damages are limited, at most, to a single-digit ratio only considering the compensatory damages of the plaintiff. Such damages are a drop in the bucket when weighed against the profit a company gains from shirking safety regulations through a retaliatory scheme. Consequently, such damages are unable to provide deterrence.¹

1. The failure to consider the potential harm to others *undermines the right of states to adequately deter retaliatory terminations, along with all other types of reprehensible conduct.* While punitive damages are capped under federal law, states are authorized to enact their own versions of OSHA, and

As the law stands now, bad actors may engage in retaliatory schemes with near impunity, comfortable in the knowledge that if they were ever caught the maximum punitive damages they would incur would be solely based on the potential harm to the plaintiff. *See id.* at 11-14; and *Trebelhorn*, 544 P.3d at 359. However, potential harm to the plaintiff is completely irrelevant in such cases because the plaintiff has already been injured. It is the potential harm to others that must be considered. *TXO*, 509 U.S. at 460 (“It is appropriate to consider . . . *the possible harm to other victims that might have resulted if similar future behavior were not deterred.*”) (emphasis added).

In addition to revealing the immense public interest in deterring such conduct, the Senate hearings also demonstrated retaliatory schemes are particularly reprehensible and in need of additional deterrence, as asserted in the petition. Petition, 31-33. Boeing’s scheme to suppress safety violations caused deaths to innocent passengers and retaliations and harm to many employees. The entire U.S. economy was also harmed. In addition, while the Boeing crisis was a devastating tragedy, it could have been much worse if it involved a different industry. Companies that engage in even more hazardous industries such as nuclear power, scientific research, artificial intelligence, or otherwise, could pose exponentially

twenty-nine states have done so as of spring 2023, including Vermont, California, and others. *See, e.g.*, U.S. Department of Labor, Occupational Safety and Health Administration: Whistleblower Protection Program, <https://www.whistleblowers.gov/whistleblower-retaliation-rights>; Petition, 28 (Vermont OSHA punitive damages without statutory cap); and *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 304, 188 Cal. Rptr. 159, 168 (Ct. App. 1982) (California OSHA punitive damages without statutory cap).

greater risks to the country if engaging in the same type of retaliatory scheme as Boeing and Foxmar. Moreover, public confidence in all industries will be undermined if such retaliatory schemes continue.

The recent Senate hearings rang the alarm that this conduct has not been sufficiently deterred, and that the safety of the country requires further deterrence. It is up to the courts to do so. Congress and state legislatures rely heavily on the judicial system to use punitive damages to deter such conduct. Legislation cannot, by itself, effectively deter retaliatory schemes because statutory fines are impractical given the varying degrees of reprehensibility that exist depending on the circumstances of each case. For instance, a retaliatory scheme to suppress safety complaints at a nuclear power plant is much more reprehensible, and requires much greater deterrence, than the same scheme at an amusement park. Congress and the states cannot legislate fines for every possible type of retaliatory scheme in every type of possible industry, hence the need for punitive damages.

Conversely, even if this Court were to somehow hold potential harm to others should not be considered, it should still grant certiorari in order to put Congress and state legislatures on notice so that they may attempt to legislate a method other than punitive damages to protect society against dangerous conduct. The unresolved issue as it stands goes against the common understanding of punitive damages used by legislatures in statutes—that they are intended to deter conduct that risks *potential harm to others* if not deterred.

CONCLUSION

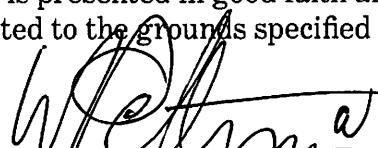
For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant rehearing, grant the petition for a writ of certiorari, and review the judgment below.

Respectfully submitted,

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As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.


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