

No. 21-655

---

IN THE  
**Supreme Court of the United States**

---

MAX RAY BUTLER,

*Petitioner,*

v.

S. PORTER, ET AL.,

*Respondents.*

---

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

---

**PETITION FOR REHEARING**

---

THOMAS S. LEATHERBURY  
VINSON & ELKINS LLP  
2001 Ross Avenue  
Suite 3900  
Dallas, TX 75201

MICHAEL W. SHAPIRO  
SMU DEDMAN SCHOOL OF  
LAW FIRST AMENDMENT  
LITIGATION CLINIC  
P.O. Box 750116  
Dallas, TX 75275

J. BENJAMIN AGUIÑAGA  
*Counsel of Record*

JONES DAY  
2727 N. Harwood Street  
Dallas, TX 75201  
(214) 969-3939

[jbaguinaga@jonesday.com](mailto:jbaguinaga@jonesday.com)

AMANDA K. RICE  
JONES DAY  
150 W. Jefferson  
Suite 2100  
Detroit, MI 48226

*Counsel for Petitioner*  
(additional counsel listed on inside cover)

---

(continued from front cover)

JAMES T. DAWSON	PARKER J. CRAGG
VINSON & ELKINS LLP	VINSON & ELKINS LLP
2200 Pennsylvania	1001 Fannin Street
Avenue NW	Suite 2500
Washington, DC 20037	Houston, TX 77002

*Counsel for Petitioner*

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
PETITION FOR REHEARING.....	1
REASONS FOR GRANTING REHEARING.....	1
CONCLUSION .....	4

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Bistrrian v. Levi</i> , 912 F.3d 79 (3d Cir. 2018).....	2
<i>Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics</i> , 403 U.S. 388 (1971) .....	1, 2, 3
<i>Booth v. Churner</i> , 532 U.S. 731 (2001) .....	2
<i>Collins v. Yellen</i> , 141 S. Ct. 1761 (2021) .....	3
<i>Edwards v. Vannoy</i> , 141 S. Ct. 1547 (2021) .....	3
<i>Ramos v. Louisiana</i> , 140 S. Ct. 1390 (2020) .....	3
<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020) .....	3
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017) .....	2
<b>OTHER AUTHORITIES</b>	
Sup. Ct. R. 44.2.....	1

## PETITION FOR REHEARING

Petitioner Max Ray Butler respectfully petitions for rehearing of this Court’s January 10, 2022 Order denying his petition for a writ of certiorari.

### REASONS FOR GRANTING REHEARING

Rule 44.2 authorizes a petition for rehearing based on “intervening circumstances of a substantial . . . effect.” Mr. Butler’s petition explained why this Court’s review was warranted in the first instance—namely, the existence of a clear circuit split on the important question whether remedies under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), are categorically unavailable to federal prisoners. Four days after Mr. Butler filed his petition, this Court granted certiorari in *Egbert v. Boule*, No. 21-147 (U.S.). That decision constitutes an “intervening circumstance[] of a substantial . . . effect,” because it provides an additional and independent justification for this Court’s review.

As relevant here, the Court granted certiorari in *Egbert* on the question “[w]hether a cause of action exists under *Bivens* for First Amendment retaliation claims.” Pet., *Egbert, supra*, at I. Mr. Egbert’s opening merits brief argues that “this Court should not extend *Bivens* to First Amendment retaliation claims.” Br. for Pet’r, *Egbert, supra*, at 25 (capitalization altered). And the United States has filed an *amicus curiae* brief in support of Mr. Egbert, arguing that “[m]ultiple special factors counsel against extending the *Bivens* remedy to First Amendment retaliation claims.” Br. of United States as *Amicus Curiae, Egbert, supra*, at 19. In other words, this Court granted review on—and

Mr. Egbert and the United States have asked this Court to answer “no” to—the *categorical* question whether a cause of action under *Bivens* exists for First Amendment retaliation claims.

The Court cannot answer “no” to that categorical question in *Egbert*. That is because *Egbert* does not arise in the federal prison context. And as Mr. Butler explained in his petition, Pet. 25–28, the federal prison context requires a different *Bivens* analysis because Congress has expressly regulated federal prisoner *Bivens* claims under the Prison Litigation Reform Act of 1996 (“PLRA”).

That congressional action makes all the difference. The Court’s traditional hesitation in recognizing new *Bivens* remedies is borne out of “respect [for] the role of Congress.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). It seeks to honor “the likely or probable intent of Congress” where Congress has been “silen[t].” *Id.* at 1854, 1862. But there is no congressional silence in the prison context. Nor is there any reason to guess as to Congress’s likely or probable intent. Through the PLRA, Congress has expressly “regulate[d] how [prisoner] *Bivens* actions are brought.” *Bistrrian v. Levi*, 912 F.3d 79, 93 (3d Cir. 2018); *see also Booth v. Churner*, 532 U.S. 731, 740 (2001) (“Congress meant” for the PLRA to compel exhaustion of prisoner *Bivens* claims). Thus, rather than *respecting* congressional intent, any decision foreclosing prisoner *Bivens* claims would “do[] considerable *violence* to congressional intent.” Pet. 27 (emphasis added).

As a result, the Court cannot categorically foreclose all *Bivens* remedies for First Amendment retaliation claims in *Egbert*, as the top-side merits briefing

requests, without addressing prisoner claims in particular. Indeed, even if the Court took the drastic step of purporting to foreclose all First Amendment retaliation claims under *Bivens*, federal prisoners would retain an independent argument that the PLRA compels a different result for their claims. And that is significant because the case law suggests that prisoner claims comprise a large (if not majority) share of *Bivens* First Amendment retaliation claims. See Pet., *Egbert*, *supra*, at 11–13; Reply Br., *Egbert*, *supra*, at 4–5 (relying on the prisoner cases cited in Mr. Butler’s petition *including Mr. Butler’s case itself* to claim a circuit split on First Amendment retaliation claims).

The Court should thus hold Mr. Butler’s petition pending the decision in *Egbert* and then grant Mr. Butler’s petition. Unlike the plaintiff in *Egbert*, Mr. Butler is a former federal prisoner with a First Amendment retaliation claim. The Fifth Circuit decided—and his petition presents—the question how the PLRA bears on the viability of a prisoner’s *Bivens* claim. And that question has squarely divided the federal courts of appeals. Mr. Butler’s petition is thus both independently cert-worthy and critical to the question presented in *Egbert*. After this Court speaks to non-prisoner retaliation claims in *Egbert*, it should grant this petition and decide whether *Bivens* remedies for such claims are available to federal prisoners. Cf., e.g., *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (petition held pending the decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and then granted a week later); *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (petition held pending the decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), and then granted two weeks later).

## CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the Court should grant rehearing, hold the petition pending the Court's decision in *Egbert*, and then grant the petition and review the judgment below.

February 4, 2022

Respectfully submitted,

THOMAS S. LEATHERBURY  
VINSON & ELKINS LLP  
2001 Ross Avenue  
Suite 3900  
Dallas, TX 75201

MICHAEL W. SHAPIRO  
SMU DEDMAN SCHOOL OF  
LAW FIRST AMENDMENT  
LITIGATION CLINIC  
P.O. Box 750116  
Dallas, TX 75275

JAMES T. DAWSON  
VINSON & ELKINS LLP  
2200 Pennsylvania  
Avenue NW  
Washington, DC 20037

J. BENJAMIN AGUIÑAGA  
*Counsel of Record*  
JONES DAY  
2727 N. Harwood Street  
Dallas, TX 75201  
(214) 969-3939  
jbaguinaga@jonesday.com

AMANDA K. RICE  
JONES DAY  
150 W. Jefferson  
Suite 2100  
Detroit, MI 48226

PARKER J. CRAGG  
VINSON & ELKINS LLP  
1001 Fannin Street  
Suite 2500  
Houston, TX 77002

*Counsel for Petitioner*

**CERTIFICATE OF COUNSEL**

Pursuant to Rule 44.2, I, J. Benjamin Aguiñaga, counsel for petitioner Max Ray Butler, hereby certify that the petition for rehearing is restricted to the grounds specified in Rule 44.2. I further certify that the petition for rehearing is presented in good faith and not for delay.

February 4, 2022

/s/ J. Benjamin Aguiñaga  
J. Benjamin Aguiñaga