

DETAINED

Magistrate Judge Brian A. Tsuchida

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUIS CALDERON,

Petitioner,

v.

KRISTI NOEM, *et al.*;

Respondents.

CASE NO.: 2:26-cv-00352-BAT

**PETITIONER'S REPLY TO RETURN
MEMORANDUM**

Noted for Consideration:
February 23, 2026

I. ARGUMENT

Federal Respondents argue that Petitioner's instant habeas petition should be "dismissed under the abuse of the writ doctrine...." Dkt. 8, at 4. For the following reasons, Petitioner respectfully disagrees.

PETITIONER'S REPLY TO RETURN
MEMORANUM

CASE NO.: 2:26-CV-00352-BAT

Page 1

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A. Respondents have not met their burden of pleading abuse of the writ.

The Supreme Court held that the government bears the burden of pleading abuse of the writ. *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991). “The government satisfies this burden if, with clarity and particularity, it notes petitioner’s prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ.” *Id.* Here, Respondents noted Petitioner’s prior writ history and allege he had abused the writ. Dkt. 8, at 3-4. However, Petitioner contends that Respondents did not, with clarity and particularity, identify the claims that appear for the first time. Respondents make no meaningful mention to Petitioner’s arguments presented in the instant Petitioner. They merely state “[h]e also asserts a Sixth Amendment claim” without identifying how that claim is different and why it should be precluded. *See id.* at 4. Respondents simply state that Petitioner “previously raised the claims and/or facts at issue here *Calderon I*” without detailing with sufficient clarity and particularity how those claims are the same as presented in the instant petition. *Id.* Therefore, Petitioner argues that Respondents did not satisfy their burden of pleading abuse of the writ and maintains that his claims are distinct from those presented in his first petition.

B. The “abuse of the writ” doctrine should not apply to Petitioner’s claim.

1. The “abuse of the writ” doctrine does not explicitly apply to habeas petitions brought under § 2241.

The abuse of the writ doctrine created a “gatekeeping” mechanism to restrict the filing of second or successive habeas petitions. *Barapind v. Reno*, 225 F.3d 1100, 1111 (9th Cir. 2000). The doctrine and the gatekeeping provisions were codified under the Anti-Terrorism and

1 Effective Death Penalty Act of 1996 at 28 U.S.C. § 2244. *Id.* at 1110. But those gatekeeping
2 provisions do not apply to all habeas petitions. *Id.* at 1111. Relevant here, the provisions under
3 28 U.S.C. § 2244 specifically apply to habeas petitions filed under 28 U.S.C. § 2254 and not
4 under § 2241. *Id.* Therefore, strict adherence to the gatekeeping regime of § 2244 is inapplicable
5 to “second or successive” § 2241 habeas petitions.

6 **2. *Petitioner was invited to submit another habeas petition.***

7 Petitioner was invited to challenge his current detention based on language used by the
8 Honorable Judge Lauren King. *Calderon v. Noem*, No. 2:25-cv-2136-LK-TLF, 2025 U.S. Dist.
9 LEXIS 266732, at *21 (W.D. Wash. Dec. 29, 2025) (“To the extent [Petitioner] wishes to
10 challenge his current detention, he is free to file a new habeas petition pursuant to Section 2241.”).
11 Petitioner’s current detention is a result of his unconstitutional re-detention that was based on
12 now-dismissed charges that subjected him to mandatory detention under the Laken Riley Act
13 (LRA).

14 Had the LRA not applied to Petitioner at the time of his unlawful re-detention, he may not
15 be detained now. Therefore, he is challenging his current detention in the instant petition, as Judge
16 King’s order did not explicitly state that he was invited to challenge his current detention “after
17 his criminal charges have been dismissed” as Respondents suggest. *See* Dkt. 8, at 2. The
18 lawfulness of his current detention cannot be separated from the decision to unconstitutionally re-
19 detain him under the LRA. Judge King herself stated that “the relevant facts are those that existed
20 at the time of [Petitioner’s] re-detention in April 2025.” *Calderon*, 2025 U.S. Dist. LEXIS
21 266732, at *8-10. Any vagueness or uncertainty in the language of that decision should not be

1 held against Petitioner or bar his instant petition. Therefore, in an exercise of judicial discretion
2 permitted under the abuse of the writ doctrine for § 2241 petitions, the Court should find that the
3 writ does not bar the instant petition.

4 **C. A fundamental miscarriage of justice would result from failure to entertain**
5 **Petitioner's claim.**

6 If this Court does find Petitioner's petition to be inappropriately successive, the claim can
7 still be entertained if a "fundamental miscarriage of justice would result from a failure to entertain
8 the claim." *Barapind*, 225 F.3d at 1111 (quoting *McCleskey*, 499 U.S. at 470). "The very nature
9 of the writ [of habeas corpus] demands that it be administered with the initiative and flexibility
10 essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*
11 *v. Nelson*, 394 U.S. 286, 291 (1969). Historically, a fundamental miscarriage of justice occurs
12 where "a constitutional violation probably has caused the conviction of one innocent of the
13 crime." *Harris v. Vasquez*, 949 F.2d 1497, 1511-12 (9th Cir. 1990) (quoting *McCleskey*, 499 U.S.
14 at 494). Analogizing Petitioner's circumstances to this actual-innocence exception, Petitioner's
15 claim should be entertained to prevent a fundamental miscarriage of justice.

16 It is clear that Petitioner is being held in detention in violation of the Constitution,
17 especially considering the basis of his current detention was for a charge that has now been
18 dismissed by our criminal courts. As alleged in his petition, the LRA undermines the integrity of
19 our criminal justice systems and of long-standing due process principles such as the presumption
20 of innocence. Dkt. 1, at 5-9. The LRA effectively eliminates the presumption of innocence and
21 increases a noncitizen's exposure to penalty based on charges that have yet been adjudicated or

1 proven beyond a reasonable doubt *Id.* at 6-8. The LRA directly contravenes established Supreme
2 Court precedent and constitutional requirements. *See, e.g., Erlinger v. United States*, 602 U.S.
3 821, 830 (2024); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *In re Winship*, 397 U. S.
4 358, 364 (1970). The LRA as applied to Petitioner undoubtedly constitutes a fundamental
5 miscarriage of justice. *See* Dkt. 1.

6 It would have been preferable for Petitioner to have raised the constitutional infirmaries
7 present in the LRA as applied to him in the first petition. However, Petitioner believed that the
8 case law in this circuit was clear and that an as-applied constitutional challenge was not necessary
9 or required. *See e.g., Vargas v. Jennings*, No. 20-cv-5785-PJH, 2020 U.S. Dist. LEXIS 167842
10 (N.D. Cal. Sept. 14, 2020) (finding serious questions going to the merits that the petitioner had a
11 protected liberty interest in his conditional release and that he must be afforded a pre-deprivation
12 hearing prior to re-arrest, even when the government alleges mandatory detention applies).
13 Petitioner's counsel did not deliberately withhold claims and is not making any attempt to "vex
14 or harass" the Court. *See Harris v. Pulley*, 885 F.2d 1354, 1380 (9th Cir. 1989).

15 This is a rare and extraordinary case, given the unprecedented nature and overreach of the
16 LRA. A constitutional violation is occurring here—Petitioner was detained under a law that
17 stripped him of long-recognized and fundamental protections guaranteed under the highest laws
18 of the land, the Constitution and the jurisprudence of the Supreme Court. Courts around the
19 country have also recently found "serious due process concerns" with regard to the LRA. *See e.g.,*
20 *Lnu v. Chestnut*, No. 1:26-cv-00016-JLT-SAB-HC, 2026 U.S. Dist. LEXIS 29638, at *9-10 (E.D.
21 Cal. Feb. 12, 2026); *Singh v. Chestnut*, No. 1:26-cv-00546-DJC-AC, 2026 U.S. Dist. LEXIS, at

*6 (E.D. Cal. Feb. 2, 2026); *Doe v. Moniz*, No. 1:25-cv-12094-IT, 2025 U.S. Dist. LEXIS 173360, at *22-27 (D. Mass. Sept. 5, 2025); *Vega v. Arnott*, No. 6:26-cv-3097-MDH, 2026 U.S. Dist. LEXIS 34869, at *10-16 (W.D. Miss. Feb. 20, 2026). Petitioner's claim present a clear exception to the alleged abuse of the writ, if the Court finds the writ applies. Therefore, this Court should find that not entertaining this habeas petition would result in a fundamental miscarriage of justice and should decide Petitioner's claims on the merits, merits which Respondents do not attempt to engage with. *See* Dkt. 8.

II. CONCLUSION

The Court should find that the abuse of the writ does not bar the instant petition. Petitioner was invited to submit another habeas petition challenging his current detention—his current detention cannot be viewed exclusive and separate from the decision to re-detain him because had he not been unconstitutionally re-detained, he would not currently be in detention. If the Court does find the abuse of the writ applies, it should entertain Petitioner's instant petition because failure to do so would result in a fundamental miscarriage of justice.

For the reasons outlined in the instant petition, Dkt. 1, this Court should grant Petitioner's habeas petition and order that Respondents not re-detain him absent a pre-deprivation hearing.

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1 Dated this 23rd day of February 2026,

2 /s/ Hilary Smith

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6 *I certify that this memorandum contains 1,411 words, in compliance with the Local Civil*
7 *Rules.*

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PETITIONER'S REPLY TO RETURN
MEMORANUM

CASE NO.: 2:26-CV-00352-BAT

Page 7

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