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18 **UNITED STATES DISTRICT COURT**  
 19 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

20 Juan Manuel MONTES BOJORQUEZ,

21 Plaintiff,

22 v.

23 UNITED STATES CUSTOMS AND  
 24 BORDER PROTECTION; John KELLY,  
 25 Secretary, Department of Homeland  
 26 Security; Kevin K. MCALEENAN, Acting  
 27 Commissioner, United States Customs and  
 28 Border Protection; and Patricia MCGURK,  
 Patrol Agent-in-Charge, Calexico Border  
 Patrol Station.

Defendants.

Civil Case No. 17-CV-00780-GPC-NLS

**MEMORANDUM OF LAW IN  
 SUPPORT OF PLAINTIFF'S  
 MOTION FOR PRELIMINARY  
 INJUNCTION**

Date: August 11, 2017

Time: 1:30 p.m.

Courtroom: 2D

Hon. Gonzalo P. Curiel

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1       **I. INTRODUCTION**

2           Plaintiff Juan Manuel Montes Bojorquez (“Mr. Montes”) moves for a preliminary  
3 injunction to restore the status quo pending resolution of this case. Mr. Montes arrived in  
4 the United States from Mexico as a child and obtained authorization to live and work here  
5 pursuant to the Department of Homeland Security’s (“DHS”) Deferred Action for  
6 Childhood Arrivals (“DACA”) program. Yet Defendants unlawfully expelled Mr. Montes  
7 from the United States earlier this year, tearing him away from his family, home, work,  
8 and education.

9           Incredibly, Defendants then used Mr. Montes’s “departure,” which was not  
10 voluntary, as a basis for terminating his DACA status. Mr. Montes is now forced to start  
11 an entirely new life in a country that is relatively unknown to him. He is unable to support  
12 himself or return to school and fears that he will never see his family again. Accordingly,  
13 Mr. Montes asks that he be returned to the United States and that his DACA status and  
14 work authorization be restored pending a final ruling in this case.

15       **II. FACTUAL BACKGROUND**

16           **A. Mr. Montes’s Life in the United States as a Child and DACA Recipient.**

17           Mr. Montes was born in Mexico and entered the United States with his mother in  
18 2003 when he was nine years old and in the third grade. (Decl. of Juan Manuel Montes,  
19 dated July 13, 2017 (“Montes Decl.”),<sup>1</sup> ¶ 1; Decl. of Mr. Montes’s Mother, dated July 13,  
20 2017 (“Doe Decl.”),<sup>2</sup> ¶ 10.) Mr. Montes grew up in Imperial County, California, where he  
21

---

22           <sup>1</sup> Because Mr. Montes is more comfortable in Spanish than in English, his declaration is  
23 in Spanish, with a certified translation.

24           <sup>2</sup> Pursuant to Fed. R. Civ. P. 5.2(e), Plaintiff has filed an *Ex Parte* Motion to Seal  
25 Documents and Information (“Motion to Seal”). The motion seeks to seal (1) portions of  
26 both Mr. Montes’s mother’s declaration and the Declaration of Madelon V. Baranoski,  
27 Ph.D, dated July 14, 2017 (“Baranoski Decl.”), as well as (2) four exhibits containing  
28 highly sensitive medical and education information about Mr. Montes. For the reasons  
discussed in the Motion to Seal, Mr. Montes’s mother’s identity should not be publicly



1 attended elementary, junior high, and high school and lived before he was deported.  
2 (Montes Decl., ¶ 2.) Like many other boys his age, Mr. Montes played soccer and took  
3 karate classes as a kid. (Doe Decl., ¶ 3.)

4 But Mr. Montes also struggled with certain disabilities as a child. (*Id.*, ¶¶ 5, 7-12.)  
5 When Mr. Montes was six years old, he fell off a swing and suffered a head injury, which  
6 affected his ability to process information and learn. (*Id.*, ¶ 5, [Sealed] Ex. A (High School  
7 Psycho-Educational Evaluation; *see* Baranoski Decl., ¶¶ 2-3.)<sup>3</sup> Thereafter, he was  
8 diagnosed with Attention Deficit Hyperactivity Disorder (“ADHD”) at a young age. (Doe  
9 Decl., ¶ 8.) He also developed a tic in his eyes, which worsens under stress. (*Id.*, ¶ 7;  
10 Montes Decl., ¶ 3.) When he was about 14 years old, he had an electroencephalogram  
11 (“EEG”) done on his brain, which registered an abnormality consistent with the brain injury  
12 he suffered as a small child. (Doe Decl., ¶ 11, [Sealed] Ex. C (EEG results).)

13 Throughout his childhood and until he was about 16 years old, Mr. Montes regularly  
14 saw a psychiatrist to help him manage his ADHD and anxiety. (*Id.*, ¶ 9, [Sealed] Ex. A;  
15 Montes Decl., ¶ 4.) Mr. Montes was also placed in special education classes. (*Id.*, ¶ 5;  
16 Doe Decl., ¶ 10.) School records show that Mr. Montes had difficulty with reading  
17 comprehension, and educators recommended that tests be read to him and directions  
18 repeated and clarified. (*Id.*, ¶ 12, [Sealed] Ex. B (Other School Records); [Sealed] Ex. A;  
19 *see* Baranoski Decl., ¶ 6.) Despite these challenges, Mr. Montes graduated from high  
20 school in 2013, at the age of 19. (Montes Decl. ¶ 6; Doe Decl. ¶ 14.)

21 That same year, in 2013, Mr. Montes also applied for the DACA program (Montes  
22 Decl., ¶ 7), which DHS established in 2012 and continues to exist today. Memorandum of  
23

24 \_\_\_\_\_  
25 disclosed and thus all references to her lodged declaration have been cited herein as “Doe  
26 Decl.” Because Mr. Montes’s mother does not speak or read English, her declaration is in  
27 Spanish, with a certified translation.

28 <sup>3</sup> The four exhibits that have been lodged with Plaintiff’s Motion to Seal are identified  
herein as “[Sealed] Exhibit.”

1 Janet Napolitano, Sec’y of Homeland Security, to Alejandro Mayorkas, Director, USCIS,  
2 *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United*  
3 *States as Children*, June 15, 2012 (“2012 DACA Memorandum”).<sup>4</sup> Under the DACA  
4 program, individuals who (1) were under the age of 31 as of June 15, 2012, (2) came to the  
5 United States before their 16th birthday, (3) have continuously resided in the United States  
6 since June 15, 2007, up until the present time, (4) were physically present in the United  
7 States on June 15, 2012, (5) had no lawful status on June 15, 2012, (6) are currently in  
8 school, have graduated, or obtained a certificate of completion from high school, and  
9 (7) have not been convicted of a felony, significant misdemeanor, or three or more other  
10 misdemeanors, and do not otherwise pose a threat to national security or public safety are  
11 eligible for deferred action. *See id.*

12 USCIS granted Mr. Montes’s DACA application in 2014. (Decl. of Mark Y. Chen,  
13 dated July 14, 2017 (“Chen Decl.”), Ex. 5 (DACA Approval).)<sup>5</sup> Mr. Montes also obtained  
14 an Employment Authorization Document (“EAD”) pursuant to DACA. (Chen Decl., Ex.  
15 6 (EAD).) The EAD issued to Mr. Montes, which bears a “C33” category label, is granted  
16 only to DACA recipients. *See id.*; 8 C.F.R. § 274.12(c)(33); *Arizona Dream Act Coal. v.*  
17 *Brewer*, 81 F. Supp. 3d 795, 801 (D. Ariz. 2015), *aff’d*, 818 F.3d 901 (9th Cir. 2016),  
18 *amended*, 855 F.3d 957 (9th Cir. 2017). That same year, Mr. Montes enrolled in  
19 community college and began pursuing a welding degree. (Montes Decl., ¶ 6.) In 2016,  
20 Mr. Montes successfully renewed his DACA status and EAD, which were not set to expire  
21 until 2018. (Chen Decl., Ex. 7 (DACA Renewal); Ex. 8 (EAD Renewal).)

22  
23  
24 <sup>4</sup> *See* [https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-](https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca)  
25 [arrivals-daca](https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca) (last visited July 13, 2017).

26 <sup>5</sup> Several exhibits in support of this Motion have been minimally redacted solely to  
27 protect Mr. Montes’s personal identifying information, such as his date of birth, A#, and  
28 addresses.

1 Mr. Montes understood that he would lose his DACA status if he left the United  
 2 States without permission from the United States government. (Doe Decl., ¶ 35; Montes  
 3 Decl., ¶ 9.) Indeed, he was regularly reminded of this fact because the front of his work  
 4 permit prominently states in bold: “**NOT VALID FOR REENTRY TO U.S.**” (*Id.*; Chen  
 5 Decl., Ex. 6.) Likewise, Mr. Montes had told his friends that he could not leave the country.  
 6 *See* Decl. of Leslie Ramirez, dated July 5, 2017 (“Ramirez Decl.”),<sup>6</sup> ¶¶ 7-8; Decl. of  
 7 Kamylee Zarate, dated May 4, 2017 (“K. Zarate Decl.”), ¶¶ 4-5); Decl. of Jose Zarate,  
 8 dated June 27, 2017 (“J. Zarate Decl.”), ¶ 4.

9 After receiving his EAD, Mr. Montes found employment as a farm worker to support  
 10 himself through school. (Montes Decl., ¶¶ 10-11.) For the past several years, he worked  
 11 in various parts of California and Arizona, rising early each morning to pick crops in the  
 12 fields. (*Id.*, Ex. 3 (photograph of Mr. Montes working); J. Zarate Decl., ¶¶ 2-3; Ramirez  
 13 Decl., ¶ 5.) Mr. Montes planned to return to community college once he saved up enough  
 14 money for tuition and books for the next semester. (Montes Decl., ¶ 11; *see* Doe Decl.,  
 15 ¶ 15.) However, his plans were cut short this year when, one Saturday night after a long  
 16 day of work, Border Patrol agents stopped him near a friend’s house in Calexico and  
 17 summarily expelled him from the United States. (Montes Decl., ¶¶ 17-28.)

18 **B. CBP Unlawfully Expelled Mr. Montes Without a Court Hearing or**  
 19 **Checking His Immigration Status.**

20 On Saturday, February 18, 2017, Mr. Montes went to work, before dawn, in the  
 21 fields around the Imperial Valley. (*Id.*, ¶ 12.) After work, he returned home to shower and  
 22 change, and then headed to Calexico, a border town on the U.S. side of the border, to have  
 23 dinner with his friend, Danielle Jimenez (“Dani”) and others. (*Id.*, ¶¶ 12-13; Doe Decl.,  
 24 ¶ 17; Declaration of Danielle Jimenez, dated July 12, 2017 (“Jimenez Decl.”), ¶¶ 3, 5-7.)  
 25 Mr. Montes also hoped to potentially see Leslie Ramirez in Calexico. (Montes Decl., ¶ 14.)  
 26

27 <sup>6</sup> Because Ms. Ramirez does not speak or read English, her declaration is in Spanish,  
 28 with a certified translation.

1 Ms. Ramirez is Mr. Montes's friend from San Diego County who was visiting family and  
2 would be on her way to pick up her daughter in Mexicali that weekend. (*Id.*; Ramirez  
3 Decl., ¶ 9.) Mexicali lies on the other side of the border from Calexico. (Chen Decl., Ex.  
4 9 (map of border area).) Mr. Montes and Ms. Ramirez had discussed meeting that Saturday  
5 night at the Jack-in-the-Box restaurant across the street from the Port of Entry in Calexico  
6 on the U.S. side. (Montes Decl., ¶ 14; Ramirez Decl., ¶ 10; *see* Chen Decl., Ex. 10  
7 (photographs of Jack-in-the-Box restaurant).) Ms. Ramirez is a U.S. lawful permanent  
8 resident who is originally from Mexicali and travels there regularly because her mother  
9 and brother, as well as the father of her three-year-old daughter, live in Mexicali. (Ramirez  
10 Decl., ¶¶ 3, 9-10.)

11 Mr. Montes left his friend Dani's house, which is a short walk from the Port of Entry,  
12 around 10:00 p.m. and headed towards a taxi stand near the Jack-in-the-Box restaurant to  
13 find a ride back home or possibly to meet up with Ms. Ramirez. (Montes Decl., ¶¶ 17-21;  
14 Jimenez Decl., ¶¶ 4, 9; *see also* Chen Decl., Ex. 9 & Ex. 11 (photographs of taxi stand).)  
15 Mr. Montes had not yet heard from Ms. Ramirez about whether they were going to meet.  
16 (Montes Decl., ¶ 20; Ramirez Decl., ¶ 11.)

17 While walking in this area near the Port of Entry, Mr. Montes was stopped by a law  
18 enforcement officer in a green uniform on a bicycle, whom Mr. Montes believed was a  
19 Border Patrol agent. (Montes Decl., ¶ 23.) The agent asked Mr. Montes for his  
20 identification, but Mr. Montes had left his usual wallet, which contained his California  
21 identification card and EAD, in his friend Jose Zarate's car. (*Id.*; *see* J. Zarate Decl., ¶ 8.)  
22 The agent detained Mr. Montes and called another officer to the scene. (Montes Decl.,  
23 ¶ 24.) The second agent arrived a few minutes later and forced Mr. Montes onto a  
24 government vehicle. (*Id.*)

25 Mr. Montes asked the agents why they were taking him, as he had done nothing  
26 wrong. (*Id.*) One of the agents responded that, because Mr. Montes did not have his  
27 identification, they needed to check who he was. (*Id.*) The second agent then drove Mr.  
28 Montes to a nearby facility, where he was detained and questioned for a few hours. (*Id.*,

1 ¶¶ 25-26.) Despite stating that they needed to identify Mr. Montes, none of the agents  
2 appear to have checked his fingerprints or immigration files. (*Id.*, ¶ 26.)

3 Mr. Montes does not recall whether the agents asked if he had permission to live and  
4 work in the United States, which he did as a DACA recipient. (*Id.*) According to former  
5 U.S. CBP Commissioner R. Gil Kerlikowske, “[t]he creation and implementation of the  
6 DACA program would have been considered such an important matter that [CBP] agents  
7 would have been trained on how to identify a DACA recipient in their custody.” (Decl. of  
8 R. Gil Kerlikowske, dated June 28, 2017 (“Kerlikowske Decl.”), ¶ 7.) But that  
9 identification did not happen in Mr. Montes’s case.

10 Late that night, a CBP or Border Patrol agent walked Mr. Montes and several other  
11 detainees to a chain-link fence enclosure. (Montes Decl., ¶ 27.) Mr. Montes and the other  
12 detainees received their belongings and were then forced into a vehicle. (*Id.*) They were  
13 driven to the border near Mexicali in the dead of night. (*Id.*) A CBP or Border Patrol agent  
14 then told Mr. Montes to walk straight into Mexicali. (*Id.*) Mr. Montes complied because  
15 he did not believe he had any choice. (*Id.*) He knew that the agent was kicking him out of  
16 the country, but he did not know why. (*Id.*) Mr. Montes did not receive copies of any of  
17 the documents he signed. (*Id.*, ¶ 28.)

18 An arrangement between the United States and Mexico in fact precludes the  
19 repatriation of Mexican nationals to Mexico between the hours of 10:00 p.m. and 6:00 a.m.  
20 (Chen Decl., Ex. 13 (Repatriation Arrangements).) “[T]hese repatriation arrangements  
21 were signed to end problems of dangerous night-time repatriations, as well as repatriations  
22 of children and other vulnerable populations without sufficient safeguards.” (Kerlikowske  
23 Decl., ¶ 5.) However, “given the large numbers of individuals repatriated across the United  
24 States-Mexico land borders,” former CBP Commissioner Kerlikowske, who participated  
25 in the development and signing of the nine local repatriation arrangements between DHS  
26 and Mexico in 2016, “would not be surprised that repatriations in violation of the  
27 arrangements continued to exist.” (*Id.*, ¶ 6.)

28

1           **C. Mr. Montes Was Stranded in Mexicali.**

2           After being expelled to Mexicali, Mr. Montes felt scared, lost, and confused.  
3 (Montes Decl., ¶ 29.) He did not know where to go, and it was past midnight. (*Id.*) He  
4 eventually decided to walk to a shopping center called La Cachanilla, which he vaguely  
5 remembered from when he was a child. (*Id.*) It took him some time to find the shopping  
6 center because he did not know his way around Mexicali. (*Id.*)

7           Sometime after reaching the shopping center, Mr. Montes called his friend Leslie  
8 Ramirez for help, thinking that she may still be in Mexicali. (*Id.*, ¶ 32; Ramirez Decl.,  
9 ¶ 12.) Ms. Ramirez answered and spoke with Mr. Montes on the phone sometime after  
10 1:00 a.m. (*Id.*) Mr. Montes told Ms. Ramirez that he had just been kicked out of the United  
11 States by immigration and did not know what to do. (*Id.*, ¶¶ 12-13; Montes Decl., ¶ 32.)  
12 “At first, [she] thought he was joking. [She] couldn’t believe he was in Mexico because  
13 [she] knew he wasn’t allowed to leave the United States.” (Ramirez Decl., ¶ 12.) Mr.  
14 Montes described where he was, and Ms. Ramirez then suggested he take a taxi to meet  
15 her, which he did. (*Id.*, ¶ 13; Montes Decl., ¶ 33.) Ms. Ramirez “was in shock when [she]  
16 saw him.” (Ramirez Decl., ¶ 13.) Mr. Montes “looked very sad,” and “[h]e kept looking  
17 down and would not look at [her].” (*Id.*) “It was obvious that he wanted to cry,” and he  
18 “could barely talk.” (*Id.*; Montes Decl., ¶ 34.)

19           Ms. Ramirez invited Mr. Montes inside the bar thinking that might make him feel  
20 better. (*Id.*, ¶ 35; Ramirez Decl., ¶ 14.) But Mr. Montes refused to go inside the bar. (*Id.*;  
21 Montes Decl., ¶ 35.) Mr. Montes was too upset because of what had just happened to him  
22 and embarrassed because of what he was wearing. (*Id.*; Ramirez Decl., ¶ 14.) Mr. Montes  
23 was wearing “jeans and a sweatshirt, clothes that he might wear to work . . . not wearing  
24 clothes that one would wear to go to a bar or a club.” (*Id.*) Mr. Montes stayed with Ms.  
25 Ramirez for about 30 minutes and then left in a taxi. (*Id.*, ¶ 15; Montes Decl., ¶ 36.)

26           Because Mr. Montes did not know Mexicali and had nowhere to sleep, he returned  
27 to the La Cachanilla shopping center and stayed awake the rest of the night. (*Id.*) At some  
28 point, Mr. Montes also tried to contact his close friend Jose Zarate by phone and through



1 Facebook messenger texts. (*Id.*, ¶ 30; J. Zarate Decl., ¶¶ 5-6, Ex. 1 (Facebook Messenger  
2 screenshots of messages, with translation); K. Zarate Decl., ¶ 6.) Mr. Zarate did not  
3 immediately pick up or respond because it was late and his wife had asked him not to pick  
4 up the phone so late. (*Id.*; J. Zarate Decl., ¶ 5.)

5 When Mr. Montes finally got through to Mr. Zarate, he told Mr. Zarate that he was  
6 in Mexico, did not know what to do, and needed help. (J. Zarate Decl., ¶ 7; Montes Decl.,  
7 ¶ 30.) Mr. Zarate “was very worried about [Mr. Montes] because [Mr. Montes had] never  
8 mentioned to [him] that he was going to Mexicali and [Mr. Zarate] knew [Mr. Montes]  
9 would never leave the country on his own and that something must have gone wrong.” (J.  
10 Zarate Decl., ¶ 5.) Mr. Zarate told Mr. Montes that he would go to Mexicali to help him  
11 in the morning. (*Id.*, ¶¶ 5, 7.) Mr. Zarate was in tears after speaking with Mr. Montes,  
12 whom he considers to be like a younger brother and very close friend. (*Id.*, ¶¶ 2, 10.) Mr.  
13 Zarate told his wife that Mr. Montes had been deported and was walking in the streets alone  
14 because he had nowhere to go. (K. Zarate Decl., ¶ 7.) Mr. Montes had not yet called his  
15 mother by this point because he did not know how to tell her what had happened or want  
16 to worry her. (*Id.*, ¶ 8; Montes Decl., ¶ 31; J. Zarate Decl., ¶ 7.)

17 In the morning of February 19, 2017, after sunrise, he met with the Zarates. (*Id.*,  
18 ¶ 11; K. Zarate Decl., ¶ 8.) Mr. Montes “was in shock and crying” when Mr. and Mrs.  
19 Zarate saw him. (J. Zarate Decl., ¶ 11.) Mr. Montes looked “lost and scared.” (K. Zarate  
20 Decl., ¶ 8.) Ms. Zarate had never seen him look like that. (*Id.*) Mr. Montes told the Zarates  
21 how Border Patrol agents had arrested and forcibly expelled him and that he was afraid he  
22 would never return to the United States. (*Id.*; J. Zarate Decl., ¶ 12.)

23 After eating with the Zarates, Mr. Montes called his mother and explained what had  
24 happened to him. (*Id.*, ¶ 15; Montes Decl., ¶ 40; K. Zarate Decl., ¶ 10.) Mr. Montes was  
25 crying while speaking with his mother. (*Id.*; J. Zarate Decl., ¶ 15; Montes Decl., ¶ 40.) He  
26 told his mother that he was taken to the Border Patrol station and kicked out of the country.  
27 (*Id.*; Doe Decl., ¶ 20.) “When [she] heard all this, it felt like someone had thrown a bucket  
28 of cold water on [her].” (*Id.*, ¶ 21.) She was “shocked” and could not believe her son, who

1 had DACA status, could be deported in this way. (*Id.*) Mr. Montes rarely went out to see  
2 friends or spent the night away from home. (*Id.*, ¶¶ 17-18.) After the call, Mr. Montes's  
3 mother packed some of her son's belongings and asked a family friend to drive them down  
4 to Mr. Montes in Mexicali. (*Id.*, ¶ 22.)

5 Meanwhile, the Zarates drove Mr. Montes to Ms. Zarate's aunt's house in Mexicali  
6 so that he would have somewhere to rest. (Montes Decl., ¶ 41; J. Zarate Decl., ¶ 16; K.  
7 Zarate Decl., ¶ 11.) At some point, Mr. Montes also retrieved his wallet, identification,  
8 EAD, and phone charger from Mr. Zarate's car. (Montes Decl., ¶ 42; *see* J. Zarate Decl.,  
9 ¶ 11.) That same evening, the Zarates drove Mr. Montes back to the border to pick up the  
10 belongings that his mother had sent. (*Id.*, ¶ 16; Montes Decl., ¶ 44; K. Zarate Decl., ¶ 12.)  
11 The Zarates then drove back to California, and, at his mother's request, Mr. Montes went  
12 to find a taxi to take him to his step-relative's home. (*Id.*; Montes Decl., ¶¶ 43, 46; J. Zarate  
13 Decl., ¶ 16; Doe Decl., ¶ 23.).

14 On his way to find a taxi, Mr. Montes was approached by two men. (Montes Decl.,  
15 ¶ 46.) One man wrapped his arm around Mr. Montes's neck and held a blade to his back,  
16 while the other man grabbed Mr. Montes's suitcase. (*Id.*) Mr. Montes hit one of the men  
17 with his elbow and tried to flee, but then tripped and fell. (*Id.*) The two men caught up to  
18 him and began kicking him in the back and legs as he lay on the ground. (*Id.*, Ex. 4  
19 (photograph of Mr. Montes's injuries taken in late February/early March 2017).)

20 Terrified, Mr. Montes attempted to return to the United States, which he believed  
21 would be safer. (Montes Decl., ¶¶ 47-48; Doe Decl., ¶ 24.) He crossed the border by  
22 jumping a nearby fence, but then turned himself in shortly thereafter when he saw some  
23 CBP officers. (Montes Decl., ¶ 48.) According to CBP's records, Mr. Montes was  
24 apprehended at 7:12 p.m. (Chen Decl., Ex. 14 (CBP I-213 Form).) The officers patted  
25 him down, confiscated his phone and wallet, and then took him to a nearby facility.  
26 (Montes Decl., ¶¶ 48- 49.) He was held for approximately 20 hours and interrogated in  
27 Spanish. (*Id.*; *see* Chen Decl., Ex. 14.)) This time, CBP officers also took his fingerprints.  
28 (*Id.*, Ex. 15 (Expedited Removal Records).) The officers told him to sign several



1 documents without explaining to him what the documents were or giving him the chance  
2 to read the documents. (Montes Decl., ¶ 51.) Mr. Montes did not receive a copy of any of  
3 the documents that he signed. (*Id.*)

4 During those 20 hours of detention, after a sleepless night left stranded in Mexicali  
5 and after being robbed and assaulted, Mr. Montes was interrogated by CBP officers. (*Id.*,  
6 ¶¶ 49-50; Chen Decl., Ex. 15.). According to CBP records, the officers purportedly asked  
7 whether Mr. Montes was in possession of any immigration documents that would allow  
8 him to enter or remain in the United States legally and Mr. Montes purportedly responded  
9 “No.” (*Id.*) It is not apparent from the record whether the officers conducting the interview  
10 accommodated for Mr. Montes’s learning disabilities by repeating their questions to ensure  
11 he actually understood what was being asked of him.<sup>7</sup> It is also unclear whether CBP  
12 checked any databases that would have clearly shown that Mr. Montes was a DACA  
13 recipient. (*See* Kerlikowske Decl., ¶ 7.) What is clear is that Mr. Montes was very tired  
14 and scared because of what had happened to him the night before. (Montes Decl., ¶ 50.)

15 On February 20, 2017, in the afternoon, CBP officers issued an expedited removal  
16 order and again physically removed Mr. Montes to Mexico. *See* 8 U.S.C. § 1225(b); Chen  
17 Decl., Ex. 15. He is currently staying with family in Mexico. (Doe Decl., ¶ 26; Montes  
18 Decl., ¶ 53.) Due to CBP’s unlawful expulsion of Mr. Montes and refusal to permit him  
19 re-entry, he is unable to see his mother and brother or continue his work or studies. (*Id.*,  
20 ¶¶ 54-55.) This is causing Mr. Montes significant stress and hurting his wellbeing and  
21 mental health. (*Id.*; Doe Decl., ¶¶ 27-30.)

22 **D. Based on the Unlawful Expulsion, Mr. Montes Has Lost His DACA**  
23 **Status and Work Permit.**

24 On April 18, 2017, the day Mr. Montes filed the original complaint in this case, DHS  
25 told the press, not counsel, in a public statement that Mr. Montes’s DACA status had  
26 expired in 2015 and had not been renewed. (Chen Decl., Ex. 16 (*USA Today* article).) The  
27

28 <sup>7</sup> *See* Baranoski Decl., ¶ 7 (opining on Mr. Montes’s likely response in this situation).

1 following day, DHS reversed its position, publicly stating that Mr. Montes had in fact  
2 renewed his DACA status, but that he had departed the United States at an unknown date  
3 or time without “advance parole,” which terminated his DACA status. (Chen Decl., Ex.  
4 17 (DHS Statement).)

5 Almost two months later, on June 6, 2017, counsel for Mr. Montes received a USCIS  
6 Notice of Action from opposing counsel, dated April 21, 2017. (Chen Decl., Ex. 18.) That  
7 notice officially terminated Mr. Montes’s DACA status and his employment authorization  
8 based on DHS records that “show [he] entered the United States without inspection on or  
9 about February 19, 2017,” allegedly admitted to entering the country illegally, and did not  
10 request authorization to travel outside of the United States “prior to [his] departure from  
11 the United States.” (*Id.*) Nowhere in this Notice does the government recognize that Mr.  
12 Montes did not “depart” the country of his own volition.

### 13 **III. ARGUMENT**

14 Mr. Montes was unlawfully expelled from the United States in violation of the Due  
15 Process Clause of the U.S. Constitution, the Immigration and Nationality Act, the  
16 Administrative Procedures Act, and federal regulations. He is suffering irreparable harm  
17 because he has been ripped away from his life and family in the United States.  
18 Accordingly, this Court should enter a preliminary injunction to restore the status quo,  
19 restore Mr. Montes’s DACA status, and return him to the United States where he can live  
20 and work as he did prior to his expulsion pending adjudication of this case. The  
21 government will not suffer any harm if Mr. Montes returns to the United States, and  
22 granting this motion would allow Mr. Montes to resume contributing to society. Moreover,  
23 granting a preliminary injunction is in the public interest given the promise that the U.S.  
24 Government made to millions of undocumented young people like Mr. Montes that, if they  
25 came out of the shadows and applied for DACA, which Mr. Montes did, they would not  
26 have to fear deportation, which is the nightmare situation in which Mr. Montes now finds  
27 himself.

1           **A. The Legal Standard for a Preliminary Injunction.**

2           A plaintiff is entitled to a preliminary injunction to preserve the status quo pending  
3 an adjudication on the merits. *Textile Unlimited, Inc. v. A. BMH & Co.*, 240 F.3d 781, 786  
4 (9th Cir. 2010). “[T]he status quo is the last, uncontested status preceding the  
5 commencement of the controversy,” and not the position the parties are in at the time the  
6 complaint is filed. *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476  
7 (9th Cir. 1969); see *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir.  
8 2000). Here, Mr. Montes living and working in the United States with DACA status is the  
9 status quo. Defendants disrupted that by unlawfully expelling Mr. Montes, which  
10 commenced this controversy.

11           To obtain a preliminary injunction, a plaintiff must demonstrate that (1) he is likely  
12 to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of  
13 preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in  
14 the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374  
15 (2008); *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.  
16 2009). As the Ninth Circuit confirmed in *Alliance for the Wild Rockies v. Cottrell*, 632  
17 F.3d 1127, 1134 (9th Cir. 2011), *Winter*’s four-prong test continues to incorporate a  
18 sliding-scale approach: “‘Serious questions going to the merits’ and a balance of hardships  
19 that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so  
20 long as the plaintiff also shows that there is a likelihood of irreparable injury and that the  
21 injunction is in the public interest.” *Id.* at 1135.

22           Put more plainly, “[i]f the balance of harm tips decidedly toward [Mr. Montes], then  
23 [he] need not show as robust a likelihood of success on the merits as when the balance tips  
24 less decidedly.” *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir.  
25 1988) (internal quotation and citation omitted). “Serious questions” are “substantial,  
26 difficult and doubtful, as to make them a fair ground for litigation and thus for more  
27 deliberative investigation.” *Id.* (internal quotation and citation omitted).

28

1           **B. Mr. Montes Should Be Returned to the United States Pending**  
2           **Adjudication of this Case.**

3           **1. “Serious Questions” Going to the Merits of Mr. Montes’s Claims**  
4           **Satisfy the First *Winter* Factor.**

5           The main issue before this Court is a factual one: whether Mr. Montes was expelled  
6 from the United States by the government, on the night of February 18-19, 2017, without  
7 a hearing before an immigration judge or other procedural and substantive safeguards. If  
8 he was, then defendants clearly violated his constitutional, statutory, and regulatory rights.  
9 Specifically, Mr. Montes would prevail on Count Three of the First Amended Complaint  
10 (“FAC”), which alleges that Defendants unlawfully expelled Mr. Montes from the United  
11 States in flagrant disregard of his due process rights and without following any of the  
12 removal procedures set forth in the Immigration and Nationality Act (“INA”) or in the  
13 INA’s implementing regulations. (*See* Dkt. No. 11.) Mr. Montes would also prevail on  
14 Count Four of the FAC if he was subjected to administrative voluntary departure, because  
15 he could not have knowingly, voluntarily, and intelligently agreed to voluntary departure  
16 given the circumstances of his unlawful expulsion. (*Id.*)

17           Based on the declarations and other evidence filed in support of this motion, Mr.  
18 Montes is likely to succeed in showing that government officials, acting outside of any  
19 constitutional, statutory, or regulatory authority, unlawfully expelled him. There simply  
20 can be no doubt that, at the very least, there is a “fair chance of success on the merits,”  
21 because there are “substantial [and] doubtful” questions” that are “fair ground for  
22 litigation” and “for more deliberative investigation.” *Marcos*, 862 F.2d at 1362. “The  
23 district court is not required to make any binding findings of fact; it need only find  
24 probabilities that the necessary facts can be proved.” *Sierra On-Line, Inc. v. Phoenix*  
25 *Software, Inc.*, 739 F.2d 1415, 1423 (9th Cir. 1984).

26           **a) Mr. Montes’s Fly-By-Night Expulsion Violates the**  
27           **Constitution and the Immigration Laws and Regulations.**  
28

1 It is “well established that aliens facing deportation from this country are entitled to  
2 due process rights under the Fifth Amendment.” *Walters v. Reno*, 145 F.3d 1032, 1037  
3 (9th Cir. 1998). The Due Process Clause of the Fifth Amendment in simple terms requires  
4 fairness, which the Supreme Court has interpreted to mean, at a minimum, “the opportunity  
5 to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424  
6 U.S. 319, 333 (1976). Thus, the government may not deport a non-citizen from the United  
7 States unless it has first accorded him the most basic procedural protections—notice and a  
8 hearing at a meaningful time and in a meaningful manner. *See Landon v. Plasencia*, 459  
9 U.S. 21, 32-33 (1982); *Lianhua Jiang v. Holder*, 754 F.3d 733, 741 (9th Cir. 2014). Mr.  
10 Montes was clearly not provided with notice or a hearing when he was removed on  
11 February 18-19, 2017.

12 “Voluntary departure” provides an exception to the rule of a hearing before an  
13 immigration judge. *See* 8 U.S.C. § 1229c. However, Defendants do not, and cannot,  
14 contend that voluntary departure was issued in this case, because even voluntary departure  
15 requires a formal process where the noncitizen is advised of his right to a hearing before  
16 an immigration judge and must “voluntarily, knowingly, and intelligently” waive that right.  
17 *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 374 n.27 (C.D. Cal. 1982).<sup>8</sup>

18 The INA’s implementing regulations further require that agents complete and file a  
19 Form I-210 (Voluntary Departure and Verification of Departure), which requires that  
20 individuals be fingerprinted. *See* 8 C.F.R. § 240.25(d); Chen Decl., Ex. 19 (sample ICE  
21 Form I-210); *see also* 8 C.F.R. § 236.5 (“Every alien 14 years of age or older who is found  
22 to be inadmissible to the United States and ordered removed by an immigration judge shall  
23 be fingerprinted, unless during the preceding year he or she has been fingerprinted at an  
24 American consular office.”). The Form I-210 also requires a signature from both the  
25 noncitizen and the agent. *See* Chen Decl., Ex. 19. Additionally, agents are required to  
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27 <sup>8</sup> Importantly, immigration regulations explicitly preclude the use of threats, coercion,  
28 or physical abuse by an immigration officer to induce an individual to waive his rights.  
*See* 8 C.F.R. § 287.8(c)(2)(vii).

1 provide the individual with a Form I-826 (Notice of Rights and Request for Disposition),  
2 informing him of his right to a hearing before an immigration judge and his right to seek  
3 the advice of counsel. *See id.*, Ex. 20 (sample Form I-826). Defendants have produced  
4 no records showing that they completed these forms in Mr. Montes’s case, and yet they  
5 removed him.<sup>9</sup>

6 Defendants’ inability to produce voluntary departure forms in fact would tend to  
7 confirm that Mr. Montes never voluntarily departed. Indeed, Ninth Circuit and Board of  
8 Immigration Appeals case law acknowledge that, in practice, immigration authorities  
9 sometimes engage in an informal “voluntary departure” or “voluntary return” done without  
10 a formal waiver of rights. *See, e.g., Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 (9th Cir.  
11 2006); *Matter of Garcia-Ramirez*, 26 I. & N. Dec. 674, 676 (BIA 2015); *Matter of*  
12 *Castrejon-Colino*, 26 I. & N. Dec. 667, 670 (BIA 2015). This practice is further  
13 corroborated by a 2012 electronic email obtained in response to a Freedom of Information  
14 Act request, which states that “A-Files” are not required for “voluntary returns” because  
15 the “alien . . . is voluntarily returning” to Mexico. (Chen Decl., Ex.12 (FOIA email).)  
16 While cases acknowledge this occurs in practice, there is of course no legal authority for  
17 such an informal proceeding without a valid waiver of the right to a hearing before an  
18 immigration judge. Removal in contravention of procedural due process and statutory  
19 requirements is not a “departure” under the INA. *See Mendez v. I.N.S.*, 563 F.2d 956, 958  
20 (9th Cir. 1977); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (“We might as well  
21 hold that if he had been kidnapped and taken to Cuba, he made a statutory ‘entry’ on his  
22

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23  
24  
25  
26  
27  
28  
<sup>9</sup> Expedited removal proceedings are another exception to regular removal proceedings,  
but Defendants do not contend that Mr. Montes was subjected to expedited removal  
proceedings on the night of February 18-19, 2017. Expedited removal statutorily applies  
to noncitizens “arriving in the United States” or to “certain other aliens” present but not  
“admitted or paroled” into the United States. 8 U.S.C. §§ 1225(b)(1)(A)(i),  
1225(b)(1)(A)(iii); 69 Fed. Reg. 48877-01 (Aug. 11, 2004). As explained above, Mr.  
Montes was not “an alien . . . who is arriving in the United States.” 8 U.S.C.  
§§ 1225(b)(1)(A)(i); 1225(b)(A)(iii)(II).



1 voluntary return. Respect for law does not thrive on captious interpretations.”); *Singh v.*  
 2 *Waters*, 87 F.3d 346, 349 (9th Cir. 1996) (a deportation in violation of the right to counsel  
 3 and a judge’s order is not lawfully a “departure”).

4 **b) The Declarations and Other Evidence Presented in This**  
 5 **Case Raise Substantial and Doubtful Questions that Go to**  
 6 **the Merits of Mr. Montes’s Claims.**

7 Mr. Montes has presented ample evidence for this Court to conclude that there are  
 8 serious questions going to the merits of his claims. There is relevant and reliable evidence  
 9 that raises “substantial [and] doubtful” questions” that are “fair ground for litigation” and  
 10 “for more deliberative investigation,” as required for a preliminary injunction.<sup>10</sup> *Marcos*,  
 11 862 F.2d at 1362.

12 *First*, several witnesses can corroborate that Mr. Montes was in the United States on  
 13 February 18, 2017, and not in Mexico or anywhere else. Mr. Montes’s mother saw him  
 14 that afternoon when he returned from work.<sup>11</sup> (Doe Decl., ¶ 17.) Mr. Montes’s relatives  
 15 also saw him that afternoon in his home in Imperial County. (*Id.*; Montes Decl., ¶ 13.)  
 16 When Mr. Montes returned from work, he showered and changed clothes and asked his  
 17 mother for permission to see a friend in Calexico. (Doe Decl., ¶ 17.) That friend, Dani  
 18 Jimenez, can also corroborate that she saw and spent time with Mr. Montes on the evening  
 19 of February 18, 2017. (Jimenez Decl., ¶ 13.) She was with him up until he walked towards  
 20 the taxi stand by the Port of Entry on the U.S. side at about 10:00 p.m. (*Id.*, ¶ 9.)

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23 <sup>10</sup> “Due to the urgency of obtaining a preliminary injunction at a point when there has  
 24 been limited factual development, the rules of evidence do not apply strictly to preliminary  
 25 injunction proceedings.” *Herb Reed Enterprises, LLC v. Florida Entertainment*  
*Management, Inc.*, 736 F.3d 1239, 1250 n. 5 (9th Cir. 2013).

26 <sup>11</sup> On the night of February 17, 2017, Mr. Montes sent a message to his friend Jose Zarate  
 27 via Facebook inquiring as to whether there might be work for him the next day, on February  
 28 18, in the fields. (J. Zarate Decl., Ex. 1.) Clearly Mr. Montes’s intention was to be in the  
 United States—ideally working—on February 18.

1           *Second*, the evidence shows that Mr. Montes went to Calexico specifically to have  
2 dinner with Ms. Jimenez and then to potentially meet up with Ms. Ramirez while she was  
3 in the area. (*Id.*, ¶¶ 3-5; Montes Decl., ¶¶ 13-14; Doe Decl., ¶ 17; Ramirez Decl., ¶ 10.)  
4 The evidence shows, in other words, that he had no plans to travel abroad that night and  
5 did not pack anything for travel. Ms. Ramirez can also explain why Mr. Montes was near  
6 the Calexico Port of Entry as they had discussed meeting at the Jack-in-the-Box across the  
7 street that night. (Ramirez Decl., ¶ 10; *see* Chen Decl., Ex. 10.)

8           *Third*, Mr. Montes knew that he could not go to Mexico, and there was simply no  
9 reason for him to do so. Mr. Montes knew that he would lose his DACA status if he left  
10 the United States without permission from the government. (Montes Decl., ¶ 9; Doe Decl.,  
11 ¶ 35.) He was constantly reminded of this fact because the EAD card he carries to work  
12 prominently states, “**NOT VALID FOR REENTRY TO U.S.**” (Chen Decl., Ex. 6.) Mr.  
13 Montes’s friends also recall him stating that he could not leave the United States. (J. Zarate  
14 Decl., ¶ 4; K. Zarate Decl., ¶¶ 4, 5, 9; Ramirez Decl., ¶¶ 7-8.) Furthermore, before telling  
15 Ms. Ramirez that he could not leave the United States, Mr. Montes would come up with  
16 other excuses for not going to Mexicali with her. (*Id.*, ¶ 7.)

17           More important, Mr. Montes had absolutely no reason to jeopardize his life in the  
18 United States for a night in Mexico, which was spent on the streets and in an empty  
19 shopping plaza waiting for help from his U.S. friends. (Montes Decl., ¶¶ 29, 36; J. Zarate  
20 Decl., ¶ 11; K. Zarate Decl., ¶ 8.) Mr. Montes lived in the United States with his mother  
21 and younger brother, to whom he is very close. (Montes Decl., ¶ 54; Doe Decl., ¶¶ 32, 34.)  
22 Mr. Montes’s messaging logs confirm that he did not want to be in Mexicali on the night  
23 of February 18-19, and that he wound up spending the night on the streets because he had  
24 nowhere to go. (J. Zarate Decl., Ex. 1.) Ms. Ramirez also confirms that, when she saw  
25 Mr. Montes, he had just been deported, he was in shock and scared, and he clearly was not  
26 interested in socializing. (*See* Ramirez Decl., ¶ 13.) What is more, the fact that Mr. Montes  
27 was wearing clothes that one would wear for farm work and not a bar or nightclub indicates  
28



1 that Mr. Montes was not in Mexicali that night of his own accord. (*Id.* ¶ 14; Montes Decl.,  
2 ¶ 35.)

3 *Fourth*, Mr. Montes’s statements to Ms. Ramirez and Mr. Zarate are especially  
4 reliable because they were made while Mr. Montes was still suffering from the extreme  
5 stress and shock of having just been deported. *See White v. Illinois*, 502 U.S. 346 (1992)  
6 (holding that such “excited utterances” may carry more weight with a trier of fact). While  
7 Mr. Montes and the Border Patrol agents were the only *known* percipient witnesses to his  
8 arrest, detention, and removal, Mr. Montes spoke with Ms. Ramirez almost immediately  
9 after his deportation and told her what had happened to him. (Montes Decl., ¶ 32; Ramirez  
10 Decl., ¶¶ 12-13.) Mr. Zarate also received messages from Mr. Montes shortly after his  
11 deportation indicating that he was in Mexico and needed help. (J. Zarate Decl., ¶¶ 5-6 &  
12 Ex. 1.). Ms. Ramirez, Mr. Zarate, and Ms. Zarate can attest to Mr. Montes’s distraught  
13 state of mind. (Ramirez Decl., ¶¶ 12-13; J. Zarate Decl., ¶¶ 5, 11; K. Zarate Decl., ¶ 8.)  
14 Mr. Montes’s statements to his mother, Ms. Ramirez, and the Zarates are all consistent.

15 *Fifth*, Mr. Montes did not have his ID or EAD with him that night, which may  
16 explain why Border Patrol agents were quick to remove him without ensuring that he was  
17 deportable or following proper procedures. There is no completed Form I-210 in Mr.  
18 Montes’s “A-file,” and no record that he was fingerprinted, given a Form I-826, or advised  
19 of his rights. While it was illegal to deport Mr. Montes in this way, it is also conceivable  
20 that Border Patrol did not bother to check their databases or to fingerprint Mr. Montes  
21 because he had no identification on him. Moreover, Mr. Montes prefers to speak Spanish  
22 (Montes Decl., ¶ 1), which may further explain why Border Patrol agents may have  
23 assumed he was from Mexico. For these reasons, it is entirely possible that Border Patrol  
24 agents “voluntarily returned” Mr. Montes to Mexico without following proper procedure.

25 *Sixth*, Mr. Montes has difficulty processing information quickly and likely was not  
26 able to advocate for himself in a way that may have alerted agents as to his status. (*See*  
27 Baranoski Decl., ¶ 7.) As consistently reflected in his school records and psychological  
28 evaluations, Mr. Montes has trouble processing information and understanding directions.

1 (*See id.*; Doe Decl., ¶ 11, Ex. B.) Mr. Montes’s inability to quickly think under pressure is  
2 especially problematic in light of recognized complaints that Border Patrol agents do not  
3 explain to detainees the nature of the immigration proceedings or the rights available. (*See*  
4 Kerlikowske Decl., ¶ 8.)

5 *Finally*, the fact that Defendants do not have records documenting Mr. Montes’s  
6 summary expulsion is neither surprising nor evidence that the expulsion never occurred.  
7 *See Ibarra-Flores v. Gonzales*, 439 F.3d 614, 619 (9th Cir. 2006) (government engaged in  
8 practice of informal voluntary departure without properly documenting required  
9 procedure). Indeed, Defendants initially represented that there were no records of Mr.  
10 Montes having DACA status. (Chen Decl., Ex. 15.) More importantly, as explained above,  
11 there are cases indicating that, in practice, immigration authorities sometimes unlawfully  
12 engage in an informal “voluntary departure” or “voluntary return” done without a formal  
13 waiver of rights or other paperwork. *See supra* at 15 (citing relevant case law).

14 Mr. Montes’s situation is analogous in many ways to the unlawful deportation that  
15 was alleged in *Salgado-Diaz v. Gonzalez*, 395 F.3d 1158, 1163 (9th Cir. 2005), which the  
16 Ninth Circuit stated would be plainly unconstitutional. There, Border Patrol agents  
17 allegedly arrested Salgado-Diaz while he was walking on a street in San Diego to pick up  
18 orange juice for a family gathering, merely because he appeared to be Hispanic. *Id.* The  
19 agents asked him if he had a green card (he did not), and then told him to sign a form which  
20 he understood to be necessary for looking up his pending immigration proceedings. *Id.* In  
21 fact, the form was a voluntary departure form. The agents then took Salgado-Diaz by bus  
22 to Tecate, Mexico. *Id.* at 1161. Given the unique procedural posture of the case, the Ninth  
23 Circuit did not rule on whether the alleged deportation actually occurred. However, it held  
24 that such a deportation would plainly violate due process and remanded for an evidentiary  
25 hearing on the issue. *Id.* at 1162-63. Here, Mr. Montes was similarly arrested while  
26 walking on the streets and then summarily expelled without any hearing in violation of due  
27 process and statutory and regulatory requirements.

28

1 In summary, the evidence in this case is fully consistent with and supports Mr.  
2 Montes's account that he was expelled by government agents and thus did not voluntarily  
3 leave the country on the night of February 18-19. Accordingly, at a very minimum, there  
4 are "serious questions" going to the merits of Mr. Montes's claim that he was physically  
5 removed by Border Patrol agents in violation of his due process, statutory, and regulatory  
6 rights.

7 **c) Mr. Montes Suffered Prejudice.**

8 When alleging a due process violation, a non-citizen must establish that he suffered  
9 prejudice. *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058 (9th Cir. 2005). Prejudice  
10 requires a showing that the outcome of the "proceeding *may have been affected* by the  
11 alleged violation." *Id.* The standard does not demand absolute certainty; rather prejudice  
12 is shown if the violation "potentially . . . affects the outcome of the proceedings." *Agyeman*  
13 *v. I.N.S.*, 296 F.3d 871, 884 (9th Cir. 2002) (internal quotation marks omitted).

14 Here, if Mr. Montes had been given a hearing or other due process protections, the  
15 outcome certainly would have been affected. A formal hearing undoubtedly would have  
16 revealed that Mr. Montes had DACA status, was authorized to be present in the United  
17 States, and was not subject to removal at all. *See Arizona Dream Act Coalition v. Brewer*,  
18 757 F.3d 1053, 1059 (9th Cir. 2014) ("DHS considers DACA recipients not to be  
19 unlawfully present in the United States because their deferred action is a period of stay  
20 authorized by the Attorney General."); *Matter of Pena-Diaz*, 20 I&N Dec. 841, 846 (BIA  
21 1994) (deferred action status "affirmatively permit[s] the alien to remain").

22 To the extent that CBP violated the regulations at 8 C.F.R. § 236.5 in failing to  
23 properly fingerprint Mr. Montes before the expatriation, no showing of prejudice is even  
24 required. *See United States v. Raya-Vaca*, 771 F.3d 1195, 1205 (9th Cir. 2014) ("Because  
25 the regulatory violation here constituted a denial of Raya-Vaca's right to notice and an  
26 opportunity to respond, no showing of prejudice is necessary to establish a due process  
27 violation."); *Leslie v. Attorney General of U.S.*, 611 F.3d 171, 178 (3d Cir. 2010)  
28 ("violations of regulations promulgated to protect fundamental statutory or constitutional

1 rights need not be accompanied by a showing of prejudice to warrant judicial relief.”).  
2 Here, the regulation at 8 C.F.R. § 236.5 was intended to protect fundamental due process  
3 rights – as it requires verification of identity before a person is forcibly repatriated,  
4 protecting against unlawful removals. As such, even though Mr. Montes easily  
5 demonstrates that he suffered prejudice because he was not subject to removal, prejudice  
6 is also presumed.

7 **2. Mr. Montes is Suffering Irreparable Harm as a Result of His**  
8 **Unlawful Physical Removal, Satisfying the Second *Winter* Factor.**

9 It is undisputed that Mr. Montes was authorized by the federal government to live  
10 and work in the United States pursuant to the DACA program from 2014 through 2018.  
11 (*See* Chen Decl., Ex. 17.) Mr. Montes has lived in the United States for most of his life,  
12 including his childhood. (Montes Decl., ¶¶ 1-2.) At the time of his removal, Mr. Montes  
13 was working to support himself and finance his education. (*Id.*, ¶¶ 10-11; Doe Decl., ¶ 15.)  
14 Defendants’ unlawful removal of Mr. Montes and refusal to allow him to return to the  
15 United States is causing Mr. Montes ongoing irreparable harm. (*See, e.g.*, Montes Decl.,  
16 ¶¶ 54-55; Doe Decl., ¶¶ 27-30.) Without a doubt, deportation “visits a great hardship on  
17 the individual and deprives him of the right to stay and live and work in this land of  
18 freedom.” *Bridges v. Wixon*, 326 U.S. 135, 154 (1945).

19 Moreover, “[i]t is well established that the deprivation of constitutional rights  
20 unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002  
21 (9th Cir. 2012) (internal quotation omitted). *See also See Rodriguez v. Robbins*, 715 F.3d  
22 1127, 1145 (9th Cir. 2013) (granting injunction where plaintiffs demonstrated irreparable  
23 harm due to government’s violation of his due process rights by unlawfully detaining  
24 immigrants without providing a bond hearing); *Nelson v. National Aeronautics and Space*  
25 *Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev’d on other grounds*, 562 U.S. 134 (2011)  
26 (“Unlike monetary injuries, constitutional violations cannot be adequately remedied  
27 through damages and therefore generally constitute irreparable harm.”).  
28

1 Here, Defendants’ violation of Mr. Montes’s constitutional rights is even more  
 2 egregious because it remains ongoing: Mr. Montes does not have a lawful means of  
 3 reentering the United States absent this Court’s intervention. Mr. Montes’s DACA status  
 4 has been terminated. (Chen Decl., Ex. 18.) Due to the expedited removal and his unlawful  
 5 presence prior to the “departure,” Mr. Montes is barred from reentry for at least ten years.  
 6 *See* 8 U.S.C. § 1182(a)(9)(A)(i); 8 U.S.C. § 1182(a)(9)(B)(i)(II). Yet the only reason Mr.  
 7 Montes lost his status is because Border Patrol agents wrongfully removed him from the  
 8 country. Defendants plainly cannot use their own wrongful conduct as a predicate for  
 9 stripping Mr. Montes of his rights.

10 As a result of these violations, Mr. Montes is also suffering additional concrete  
 11 irreparable harms. For example, Mr. Montes has been separated from his mother and  
 12 younger brother, which is taking a substantial emotional toll on his wellbeing. (Montes  
 13 Decl., ¶ 54; Doe Decl., ¶¶ 27-30.) He has lost his friendships and the security he felt by  
 14 living and working in the United States. (J. Zarate Decl., ¶ 19; Montes Decl., ¶ 55.)  
 15 Significantly, Mr. Montes has also lost his job and ability to make a living. (*Id.*) And he  
 16 has been unable to secure a well-paying job or continue his college education in Mexico.  
 17 (*Id.*) *See Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)  
 18 (loss of opportunity to pursue one’s profession or career, particularly early in life,  
 19 constitutes irreparable injury); *Leiva-Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011)  
 20 (explaining that “important [irreparable harm] factors include separation from family  
 21 members, medical needs, and potential economic hardship”) (quoting *Andreiu v. Ashcroft*,  
 22 253 F.3d 477, 484 (9th Cir. 2001) (en banc)). Thus, he is being irreparably harmed.

23  
 24 **3. The Balance of Equities Tips Sharply in Favor of Mr. Montes and**  
 25 **an Injunction is in the Public Interest, Satisfying the Remaining**  
 26 **Winter Factors.**

27 The final two elements of the preliminary injunction test—whether the balance of  
 28 the equities and the public interest favor an injunction—merge when the government is a  
 party. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v.*

1 *Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). There is no “blanket presumption in  
2 favor of the government” interest in preliminary injunction cases. *Rodriguez v. Robbins*,  
3 715 F.3d 1127, 1145-46 (9th Cir. 2013).

4 The government will not suffer any harm if Mr. Montes returns to the United States.  
5 To the contrary, enjoining the government’s ban would allow Mr. Montes to resume  
6 contributing to society by working, studying, and providing for himself and his loved ones.  
7 Further, it would be perverse for the government to claim any harm given that the  
8 government’s removal of Mr. Montes was illegal under controlling constitutional,  
9 statutory, and regulatory authority. “[The government] cannot suffer harm from an  
10 injunction that merely ends an unlawful practice[.]” *Rodriguez*, 715 F.3d at 1145; *see also*  
11 *Zepeda v. U.S. I.N.S.*, 753 F.2d at 727 (9th Cir. 1983). Thus, the government will not suffer  
12 irreparable harm, and the balance of hardships overwhelmingly tips in Mr. Montes’s favor.

13 Moreover, granting a preliminary injunction is in the public interest. In announcing  
14 DACA, then DHS Secretary Janet Napolitano explained the strong public interest  
15 underlying the program: “Our Nation’s immigration laws . . . are not designed to be blindly  
16 enforced without consideration given to the individual circumstances of each case. Nor  
17 are they designed to remove productive young people to countries where they may not have  
18 lived or even speak the language. Indeed, many of these young people have already  
19 contributed to our country in significant ways.” 2012 DACA Memorandum. Similarly,  
20 then-President Barack Obama explained the benefits of DACA for DREAMers, describing  
21 them as “talented young people, who, for all intents and purposes, are Americans – they’ve  
22 been raised as Americans, understand themselves to be part of this country.”<sup>12</sup> The change  
23 in presidential administration has not altered the DACA program or the recognition that it

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24  
25  
26 <sup>12</sup> President Barack Obama, Remarks on Immigration Reform, 2012 Daily Comp. Pres.  
27 Doc. 1 (June 15, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201200483/pdf/DCPD-201200483.pdf>.



1 serves the public interest.<sup>13</sup> As such, allowing Defendants to remove DACA recipients in  
 2 violation of constitutional due process and federal law and regulations severely undermines  
 3 the public interest in preserving the DACA program, as well as the public's overarching  
 4 interest in protecting constitutional rights. *See U.S. v. Raines*, 362 U.S. 17, 27 (1960)  
 5 (“[T]here is the highest public interest in the due observance of all the constitutional  
 6 guarantees.”); *Melendres*, 695 F.3d at 1002.

7  
 8 **C. This Court Has Power to Direct that Defendants Return Mr. Montes to  
 the United States.**

9 Once a legal violation has been found, a district court has broad powers and wide  
 10 discretion to fashion a remedy. *Sharp v. Weston*, 233 F.3d 1166, 1173 (9th Cir. 2000)  
 11 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971)). Indeed,  
 12 numerous courts have directed government officials to return individuals who were  
 13 wrongfully deported. *See, e.g., Orabi v. Attorney General of the U.S.*, 738 F.3d 535, 543  
 14 (3d Cir. 2014); *Sutuc v. Attorney General of the U.S.*, No. 15-2425 (3d Cir. Feb. 11 2016);  
 15 *Vayeghan v. Kelly*, Case No. 2:17-702, ECF 5 (C.D. Cal. Jan. 29, 2017) (issuing TRO that  
 16 required the government to return plaintiff to the United States based on alleged legal and  
 17 constitutional violations relating to the cancellation of his visa); *Ying Fong v. Ashcroft*, 317  
 18 F. Supp. 2d 398, 408 (S.D.N.Y. 2004); *Rantesalu v. Cangemi*, No. CIV.04-  
 19 1375(JRT/SRN), 2004 WL 898584, at \*7 (D. Minn. Apr. 23, 2004) (unpublished); *Dennis*  
 20 *v. I.N.S.*, No. CIV.A. 301CV279SRU, 2002 WL 295100 (D. Conn. Feb. 19, 2002).

21 Additionally, this court may compel Defendants to return Mr. Montes under the  
 22 mandamus statute because Defendants have a duty to correct their wrongful conduct. *See*  
 23

24  
 25 \_\_\_\_\_  
 26 <sup>13</sup> Eligible undocumented youth may still apply for or renew their DACA status. *See*  
 27 USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, available at  
 28 [https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-](https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca)  
[daca](https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca) (last visited July 13, 2017); USCIS, *Frequently Asked Questions* (updated on April  
 25, 2017), available at [https://www.uscis.gov/humanitarian/consideration-deferred-](https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions)  
[action-childhood-arrivals-process/frequently-asked-questions](https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions) (same).

1 28 U.S.C. § 1361; *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (holding that “federal  
2 officials do not possess discretion to violate constitutional rights” or federal statutes).

3 Finally, principles of equitable estoppel preclude the government from relying on  
4 the February 20, 2017 expedited removal order as a basis for preventing Mr. Montes’s  
5 return. The only reason Mr. Montes was removed on February 20, 2017 was because he  
6 tried to return home after Defendants wrongfully expelled him from the country two nights  
7 before. *See Salgado-Diaz*, 395 F.3d at 1166 (“[T]he government cannot rely on the post-  
8 expulsion events its own misconduct set in motion.”).

9 **IV. CONCLUSION**

10 For the foregoing reasons, this Court should issue a preliminary injunction, and order  
11 that Mr. Montes be returned to the United States and his DACA status be restored.

12  
13  
14  
15 DATED: July 14, 2017

Respectfully submitted,  
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1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that a true copy of the following document has  
3 been served on July 14, 2017 to all counsel of record who are deemed to have consented  
4 to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4:

5  
6 **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR  
7 PRELIMINARY INJUNCTION**

8 Any other counsel of record will be served by electronic mail, facsimile, and/or  
9 overnight delivery.

10 I declare under penalty of perjury under the laws of United States that the foregoing  
11 is true and correct and that this proof of service was executed on July 14, 2017 at Redwood  
12 City, California.

13  
14 */s/ Amanda Im* \_\_\_\_\_  
15 Amanda Im