

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 14-1128

ERIC FLORES,

Petitioner

v.

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Respondents

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ON PETITION FOR REVIEW FROM THE UNITED STATES DEPARTMENT  
OF EDUCATION, OFFICE FOR CIVIL RIGHTS, DALLAS OFFICE

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THE UNITED STATES DEPARTMENT OF EDUCATION'S  
MOTION TO DISMISS THE PETITION FOR REVIEW  
FOR LACK OF SUBJECT MATTER JURISDICTION,  
MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND  
MOTION TO DISMISS AS MOOT PETITIONER'S PENDING MOTIONS

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Petitioner Eric Flores, proceeding pro se, has petitioned this Court for review of a discretionary decision of the United States Department of Education's (Department) Office of Civil Rights (OCR). OCR's February 13, 2014, letter to Flores denied his appeal challenging OCR's dismissal of his complaint of discrimination based on, *inter alia*, race or national origin in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (Title VI). See denial

letter (Attachment A). Flores subsequently filed a motion to exceed the page limits in his petition; a motion to proceed on appeal in forma pauperis (IFP); a motion to request the administrative record pertinent to the dismissal of his complaint from the Department; a motion seeking relief from what he characterizes as “imminent danger such as torture and death”; and a preliminary motion to vacate the Department’s order. This Court ordered the Department to respond to all motions other than the IFP motion by July 17, 2014.

Pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 27(g), the Department respectfully moves this Court to dismiss Flores’s petition for review for lack of jurisdiction, because he does not have the right to seek review of OCR’s decision in this Court. We also respectfully request the Court to defer the filing of the administrative record pending its resolution of our motion to dismiss the petition, see pp. 11-12, *infra*, and to dismiss as moot Flores’s pending motions, see p. 12, *infra*.

## **BACKGROUND**

1. On October 17, 2013, OCR’s Dallas Office received petitioner Eric Flores’s administrative complaint (Case No. 06142007) against the University of Texas at El Paso (UTEP). Dismissal letter 1 (Attachment B). Flores alleged that UTEP discriminated and retaliated against him on the basis of, *inter alia*, race and national origin in violation of Title VI. Dismissal letter 1. On December 4, 2013,

OCR dismissed and closed Flores's complaint. OCR determined that Flores had filed 16 OCR complaints against UTEP since 2012; that OCR dismissed several recent complaints on the ground that the allegations contained therein "were so incoherent that they were not sufficiently grounded in fact for OCR to infer that discrimination or retaliation occurred"; and that the instant complaint "consist[ed] of incoherent allegations similar to those that have been addressed and found to be without merit in previous OCR complaints." Dismissal letter 1.

On January 16, 2014, Flores appealed OCR's dismissal of his complaint. Denial letter 1. On February 13, 2014, the Regional Director of OCR's Dallas Office issued a letter notifying Flores of the denial of his appeal challenging OCR's dismissal of his complaint, and of several other complaints he had filed against UTEP. The letter stated that "the issues raised in your appeal do not warrant a change in OCR Dallas's disposition of your case under the laws and regulations enforced by OCR." Denial letter 1.

On June 27, 2014, Flores petitioned this Court for review of OCR's decision dismissing his complaint. The petition asks this Court to enjoin UTEP faculty members from using "advanced [satellite] technology" to harm Flores or his relatives; to compel the Department to issue sanctions against UTEP for noncompliance with Title VI and its implementing regulations; to instruct the Department to admonish the Department investigator assigned to this complaint for

allegedly attempting to protect UTEP employees from lawful sanctions for discriminating and retaliating against Flores; and to order the Department to refer Flores's complaint to the United States Department of Justice. Pet. for Rev. 585-587.

2. Prior to filing this petition for review, Flores twice petitioned this Court for review of OCR's adverse decisions on nearly identical complaints of discrimination and/or retaliation by UTEP in violation of Title VI (Case Nos. 06122112 and 06122188). In both cases, the Department moved to dismiss Flores's petition for lack of jurisdiction, arguing that neither the Administrative Procedure Act (APA) nor any other statute authorizes direct appellate review of a funding agency's discretionary decision not to take enforcement action on an individual's discrimination complaint. This Court issued per curiam orders dismissing Flores's petitions for review.<sup>1</sup> See Order, *Flores v. United States Dep't of Educ.*, No. 13-1161 (per curiam) (Oct. 15, 2013) (granting Department's motion

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<sup>1</sup> Flores also filed a petition for writ of mandamus in the Fourth Circuit and a petition for review in the Fifth Circuit raising the same factual allegations and legal arguments, and requesting the same relief, as the petitions for review he filed in this Court of OCR's decision in Case No. 06122112. The Fourth Circuit denied Flores's petition for writ of mandamus. See Opinion, *In re: Eric Flores*, 519 F. App'x 150 (2013) (No. 13-1331). The Fifth Circuit dismissed Flores's petition for review for lack of jurisdiction. See Order, *Flores v. United States Dep't of Educ.*, No. 13-60078 (May 3, 2013). Flores also petitioned the Fifth Circuit for review of OCR's decision in Case No. 06122188. The Fifth Circuit dismissed Flores's petition for review for lack of jurisdiction. See Order, *Flores v. United States Dep't of Educ.*, No. 13-60303 (July 19, 2013).

to dismiss Case No. 06122188 for lack of jurisdiction); Order, *Flores v. United States Dep't of Educ.*, No. 13-1062 (per curiam) (Dec. 11, 2013) (dismissing Case No. 06122112 on res judicata grounds and citing Fifth Circuit order dismissing same case). See Attachment C (listing related cases).

On April 21, 2014, Flores again filed an OCR complaint nearly identical to this one, alleging that UTEP discriminated and retaliated against him on the basis of, *inter alia*, race and national origin in violation of Title VI (Case No. 06142285). On May 29, 2014, OCR dismissed and closed Flores's complaint on the ground that the allegations contained therein were so incoherent that OCR could not infer that discrimination or retaliation had occurred. Flores then petitioned the Fifth Circuit to review OCR's dismissal letter (Appeal No. 14-60390). The Department moved to dismiss the petition for review for lack of jurisdiction, and that motion is pending.

## **DISCUSSION**

This Court should dismiss the petition for review (Pet. for Rev.) for lack of jurisdiction. The present petition for review for all practical purposes is nearly identical to the petition Flores filed in Appeal No. 13-1161, which this Court dismissed for lack of jurisdiction. The Court should dismiss the pending petition for review for that same reason. As we show below, this Court lacks jurisdiction to review OCR's discretionary determination that Flores's complaint lacked

allegations that were sufficiently grounded in fact for the agency to infer that discrimination or retaliation occurred or is occurring.

1. “Federal courts are courts of limited subject-matter jurisdiction. A federal court created by Congress pursuant to Article III of the Constitution has the power to decide only those cases over which Congress grants jurisdiction.” *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012) (citing *Micei Int’l v. Department of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010)); see also *Sierra Club v. Thomas*, 828 F.2d 783, 792 (D.C. Cir. 1987) (federal courts “have just so much jurisdiction as Congress has provided by statute”). The party claiming federal subject matter jurisdiction has the burden of proving it exists. *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008); *Georgiades v. Martin-Trigona*, 729 F.2d 831, 833 n.4 (D.C. Cir. 1984). “[O]nly when a direct-review statute specifically gives the court of appeals subject-matter jurisdiction to directly review agency action’ may a party seek initial review in an appellate court.” *Micei Int’l*, 613 F.3d at 1151 (quoting *Watts v. Securities & Exch. Comm’n*, 482 F.3d 501, 505 (D.C. Cir. 2007)); see also *National Auto. Dealers Ass’n v. Federal Trade Comm’n*, 670 F.3d 268, 270 (D.C. Cir. 2012) (noting the “normal default rule” that “persons seeking review of agency action go first to district court rather than to a court of appeals” (quoting *Watts*, 482 F.3d at 505)).

2. Flores asserts that Rule 15 of the Federal Rules of Appellate Procedure provides this Court with subject matter jurisdiction over his petition for review. Pet. for Rev. 16. It is well-settled, however, that Rule 15 does not confer jurisdiction upon the courts of appeals, but rather prescribes the procedures to be followed by courts of appeals in cases in which they are authorized by statute to review final agency decisions. See *Office of the Governor, Territory of Guam v. Department of Health & Human Servs., Admin. on Dev. Disability*, 997 F.2d 1290, 1292 (9th Cir. 1993); *Dillard v. United States Dep't of Hous. & Urban Dev.*, 548 F.2d 1142, 1143 (4th Cir. 1977) (per curiam); *Noland v. United States Civil Serv. Comm'n*, 544 F.2d 333, 334 (8th Cir. 1976) (per curiam). Flores's reliance on Rule 15 is therefore misplaced.

3. Flores is also incorrect in asserting that the Administrative Procedure Act (APA) affords this Court jurisdiction to adjudicate his petition for review. Pet. for Rev. 22-23. The APA provides for judicial review of “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. 704. The APA, however, makes unreviewable “agency action [that] is committed to agency discretion by law.” 5 U.S.C. 701(a)(2).

a. At the outset, we note that OCR's denial of Flores's appeal is “agency action \* \* \* committed to agency discretion by law,” and thus unreviewable

under the APA. 5 U.S.C. 701(a)(2). In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court explained that “an agency’s decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2),” unless the “substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers.” *Id.* at 832-833. In other words, judicial “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Id.* at 830.

Nowhere in Title VI or its implementing regulations are there any substantive guidelines for the Department to follow in investigating and resolving individual discrimination complaints, or for a court to judge such actions. See 34 C.F.R. Pt. 100. Accordingly, OCR’s denial of Flores’s appeal challenging its decision to dismiss his complaint is a discretionary agency action for which the APA does not allow judicial review. See *Marlow v. United States Dep’t of Educ.*, 820 F.2d 581, 582-583 (2d Cir. 1987) (per curiam) (no APA jurisdiction where anti-discrimination statute “provides no express guidelines for [determining liability and] neither the statute nor the regulations impose significant substantive limitations on the Department’s investigation and resolution of individual complaints of discrimination”), cert. denied, 484 U.S. 1044, and 484 U.S. 1045 (1988); cf. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124-1125 (6th Cir. 1996)



(no jurisdiction under the APA for suit claiming that HHS failed to collect specified racial data, where Title VI regulations indicated collection of such data was discretionary, not mandatory).

b. Even if OCR's dismissal of Flores's complaint were not considered a discretionary agency action, this Court would nonetheless lack jurisdiction to consider this petition for review. As indicated, the APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

Neither Title VI – nor any other statute of which we are aware – affords this Court jurisdiction to review OCR's dismissal of Flores's complaint.<sup>2</sup> Direct appellate review under Title VI is limited to those final agency orders "terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d-1 of this title." 42 U.S.C. 2000d-2. By limiting direct appellate review in this fashion, Congress demonstrated an intent not to allow direct appellate review in circumstances such

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<sup>2</sup> Although Flores's administrative complaint alleged discrimination on the basis of sex, see Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and of age, see Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, he failed to reiterate these allegations in his petition for review. Flores thus has waived these claims. See *Fashion Valley Mall, LLC v. National Labor Relations Bd.*, 524 F.3d 1378, 1380 (D.C. Cir. 2008). In any event, these statutes afford no basis for appellate jurisdiction for essentially the same reasons that Title VI does not.

as this, in which individuals have filed administrative complaints with OCR alleging prohibited discrimination and are disappointed with the disposition of their complaints. Accordingly, appellate review of OCR's action is not "made reviewable by statute." 5 U.S.C. 704.

Nor is OCR's denial of Flores's appeal "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. First, OCR's dismissal of the complaint is not a "final agency action" within the meaning of the APA. Title VI's implementing regulations define this term for purposes of the APA to require a decision by a hearing examiner. See 34 C.F.R. 101.104, 101.106. The Title VI regulations further limit the opportunity for a hearing to review decisions terminating or refusing to grant or to continue federal financial assistance. See 34 C.F.R. 100.8(c), 100.9. Thus, under these Title VI regulations, only those decisions concerning the termination of, or refusal to grant or continue, federal financial assistance may constitute "final agency action" that would be subject to direct review by this Court under the APA.<sup>3</sup>

Moreover, OCR's dismissal of Flores's complaint is not an agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. To the

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<sup>3</sup> Because the Department is charged with enforcing Title VI, its interpretation of the statute is entitled to *Chevron* deference. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998); *Peters v. Jenney*, 327 F.3d 307, 315-316 (4th Cir. 2003).

contrary, it is settled that individuals have an implied private right of action under Title VI against recipients of federal financial assistance who engage in prohibited discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (“[P]rivate individuals may sue to enforce [Title VI] and obtain both injunctive relief and damages.”); *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (same). Indeed, in a decision authored by then-Circuit Judge Ruth Bader Ginsburg, this Court concluded that “*Cannon* suggests that Congress considered private suits to end discrimination not merely adequate but *in fact the proper means* for individuals to enforce Title VI.” *Women’s Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990) (emphasis added). Accordingly, Flores was entitled to file a Title VI suit in district court against UTEP, but may not seek review under the APA in this Court of OCR’s dismissal of his complaint.<sup>4</sup>

4. Flores has moved this Court to order the Department to provide him with the administrative record pertinent to the dismissal of his complaint. See p. 2, *supra*. In the event that the Department’s motion to dismiss is granted by the Court, this proceeding will be dismissed and there will be no need for the agency to prepare and file an administrative record. To avoid the expenditure of time and

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<sup>4</sup> The OCR letter denying Flores’s administrative appeal informed him that he “may have the right to file a private suit in Federal court whether or not OCR finds a violation.” Denial letter 1.

resources on a task that may prove to be unnecessary, the Department respectfully requests the Court to defer the filing of the administrative record until after it rules upon the Department's motion to dismiss. Should the Department's motion to dismiss be denied, we respectfully request that the administrative record be due 40 days from the date of the denial of the motion.

5. Flores has filed several other motions in addition to his request for the administrative record from the Department. See p. 2, *supra*. Because this Court lacks jurisdiction to consider the petition for review, it should dismiss these motions as moot.

6. Undersigned counsel contacted the pro se petitioner via e-mail on July 9, 2014, to ask whether he intends to oppose these motions. Petitioner's e-mail response stated that he opposes these motions and intends to file an opposition.

## CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for review for lack of jurisdiction and dismiss Flores's pending motions as moot. The Court should also defer the filing of the administrative record until after it rules upon the motion to dismiss.

Respectfully submitted,

JOCELYN SAMUELS  
Acting Assistant Attorney General

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DENNIS J. DIMSEY  
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**Attachment A: Denial letter**



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

1999 BRYAN STREET, SUITE 1620  
DALLAS, TEXAS 75201-6831

REGION VI  
ARKANSAS  
LOUISIANA  
MISSISSIPPI  
TEXAS

Mr. Eric Flores  
General Delivery  
8401 Boeing Dr.  
El Paso, TX 79910

Re: Case Nos.: 06142007, 06142015, 06132386, 06132370, 06132356,  
06132324, 06132262, 06132377  
University of Texas at El Paso

Dear Mr. Flores:

This is in response to your appeal dated January 16, 2014, regarding closure of the above-referenced complaints you filed against the University of Texas at El Paso.

After careful consideration, I find that the issues raised in your appeal do not warrant a change in OCR Dallas's disposition of your case under the laws and regulations enforced by OCR. Accordingly, your appeal is denied.

This concludes OCR's consideration of your appeal and is the final agency determination. Final agency determinations are not formal statements of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and are made available to the public.

You have now exhausted all avenues of review within the U.S. Department of Education regarding your above-referenced complaints and OCR's determinations. You may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

Sincerely,

Taylor D. August  
Director, Dallas Office  
Office for Civil Rights

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

**Attachment B: Dismissal letter**





UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

1999 BRYAN ST., SUITE 1620  
DALLAS, TX 75201-6810

REGION VI  
ARKANSAS  
LOUISIANA  
MISSISSIPPI  
TEXAS

December 4, 2013

Reference No: 06142007

Mr. Eric Flores  
8401 Boeing Dr.  
El Paso, TX 79910

Dear Mr. Flores:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), Dallas Office, has completed its evaluation of the above-referenced complaint that you filed on October 17, 2013, against the University of Texas at El Paso (UTEP), located in El Paso, Texas. Your complaint alleges that UTEP discriminated against you on the bases of race, national origin, sex, and age. You also alleged retaliation.

According to OCR's *Case Processing Manual*, OCR may close a complaint that is a continuation of a pattern of complaints previously filed by the complainant or someone other than the complainant involving the same or similar allegations against the same recipient or against another recipient that have been found to be without merit by OCR. Since 2012, you have now filed sixteen OCR complaints against UTEP. In several recent complaints (06132324, 06132335, 06132356, 06132370, and 06132377), OCR found your allegations to be without merit, dismissing them on the ground that your allegations were so incoherent that they were not sufficiently grounded in fact for OCR to infer that discrimination or retaliation occurred. Because your current complaint consists of incoherent allegations similar to those that have been addressed and found to be without merit in previous OCR complaints, OCR is dismissing your complaint and will not pursue it further. This complaint is closed, effective the date of this letter.

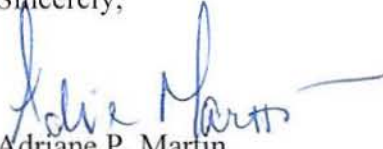
This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public. You may have the right to file a private suit in Federal court whether or not OCR finds a violation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

*The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.*

If you have any questions, you may contact Ms. Rhonda Jackson, the assigned investigator, at (214) 661-9625, or you may contact me at (214) 661-9600.

Sincerely,



Adriane P. Martin  
Supervisory Attorney/Team Leader  
Dallas Office

**Attachment C: Certificate of Parties, Rulings, and Related Cases**

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

The United States Department of Education, as respondent, certifies that:

### **1. Parties**

This is a petition for review of a decision of the United States Department of Education, Office for Civil Rights. The pro se petitioner is Eric Flores. The respondents are the United States Department of Education and the United States Department of Justice, and officials of these agencies. There are no intervenors or *amici*.

### **2. Rulings Under Review**

Petitioner seeks review of the February 13, 2014, decision of the United States Department of Education, Office for Civil Rights, denying his appeal of its dismissal of his complaint in Administrative Case No. 06142007. There were no prior proceedings in district court.

### **3. Related Cases**

To the best of our knowledge, this case was not previously before this Court or any other court. As indicated in our motion, see p. 5, *supra*, petitioner recently filed a similar petition for review in the Fifth Circuit (Appeal No. 14-60390), which seeks review of OCR's decision in Administrative Case No. 06142285. The Department has moved to dismiss the petition for review, and that motion is pending.

We are aware of four other similar petitions for review alleging discrimination in violation of Title VI that Flores filed in this Court and the Fifth Circuit. Flores petitioned this Court and the Fifth Circuit for review of OCR's decision in Administrative Case No. 06122112. The Fifth Circuit granted the Department's motion to dismiss for lack of jurisdiction. See Order, *Flores v. United States Dep't of Educ.*, No. 13-60078 (5th Cir.) (May 3, 2013). Citing the Fifth Circuit's order, this Court dismissed Flores's petition on the ground of res judicata. See Order, *Flores v. United States Dep't of Educ.*, No. 13-1062 (per curiam) (Dec. 11, 2013). Flores also petitioned this Court and the Fifth Circuit to review OCR's decision in Administrative Case No. 06122188. Both courts granted the Department's motions to dismiss for lack of jurisdiction. See *Flores v. United States Dep't of Educ.*, No. 13-1161 (per curiam) (Oct. 15, 2013); *Flores v. United States Dep't of Educ.*, No. 13-60303 (5th Cir.) (July 19, 2013).

Petitioner also filed a petition for writ of mandamus in the Fourth Circuit raising the same factual allegations and legal arguments, and requesting the same relief, as the petitions for review he filed in this Court and the Fifth Circuit of OCR's decision in Case No. 06122112. The Fourth Circuit denied the mandamus petition. See Opinion, *In re: Eric Flores*, 519 F. App'x 150 (2013) (No. 13-1331).

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I electronically filed the foregoing THE UNITED STATES DEPARTMENT OF EDUCATION'S MOTION TO DISMISS THE PETITION FOR REVIEW FOR LACK OF SUBJECT MATTER JURISDICTION, MOTION TO DEFER FILING OF THE ADMINISTRATIVE RECORD, AND MOTION TO DISMISS AS MOOT PETITIONER'S PENDING MOTIONS with the Clerk of the Court using the appellate CM/ECF system.

I further certify that, within two business days of July 17, 2014, I will cause to be hand-delivered four paper copies of the foregoing motion to the United States Court of Appeals for the District of Columbia Circuit.

I further certify that petitioner listed below will be served via e-mail and U.S. Mail postage prepaid at the following address:

Eric Flores  
8401 Boeing Drive  
El Paso, TX 79910

s/ Christopher C. Wang  
CHRISTOPHER C. WANG  
Attorney