No. 06-1625

In the Supreme Court of the United States

NATIONAL WRESTLING COACHES ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether res judicata bars petitioners' claims.

2. Whether the court of appeals correctly held that petitioners lack standing to sue the government for injuries allegedly inflicted by independent educational institutions.

3. Whether petitioners have another "adequate remedy," precluding judicial review under 5 U.S.C. 704.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 1a-4a) is reported at 465 F.3d 20. The memorandum and opinion of the district court (Pet. App. 5a-10a) is reported at 357 F. Supp. 2d 311.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2006. Petitions for rehearing were denied on January 19, 2007 (Pet. App. 11a-12a). On April 12, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 4, 2007, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). In 1975, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX, which remain in effect through the Department of Education (Department). These regulations address the issue of sex discrimination in athletics, providing that "[a] recipient [institution] * * * shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. 106.41(c). The regulations further provide that, to "determin[e] whether equal opportunities are available, the [agency] will consider, among other factors * * * [w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." *Ibid.*; 45 C.F.R. 86.41(c).

In 1979, the HEW issued a Policy Interpretation that provided a three-part test for compliance with the equal athletic opportunity requirements of the Title IX regulations. Pet. App. 19a-30a. An educational institution is in compliance under that test if it meets one of three criteria:

i. "[I]ntercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."

ii. "Where the members of one sex have been and are underrepresented among intercollegiate athletes, * * * the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex."

iii. "Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, * * * it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program."

Pet. App. 28a-29a.

In 1996, the Department further clarified the 1979 Policy Interpretation and the three-part test, emphasizing three points. First, "institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." Pet. App. 33a. Second, the Department's test "does not provide strict numerical formulas or 'cookie cutter' answers to the issues that are inherently case- and fact-specific. Such answers "not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law." *Id.* at 33a-34a. Third, addressing apparent "confusion about the elimination and capping of men's teams in the context of Title IX compliance," *id.* at 36a, the Department explained that "[t]he rules here are straightforward. An institution can choose to elimi-

nate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men." *Ibid*.

2. This is the second of two actions filed by essentially the same set of plaintiffs. The plaintiffs in the first suit, *National Wrestling Coaches Ass'n* v. *United States Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), aff'd, 366 F.3d 930 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005) (*Wrestlers I*), five membership organizations representing the interests of collegiate men's wrestling coaches, athletes, and alumni, alleged that a number of colleges had discriminated against them by eliminating some of their men's sports teams for reasons related to Title IX. *National Wrestling Coaches Ass'n* v. *Dep't of Educ.*, 366 F.3d 930, 935 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005). The plaintiffs sued the Department, the Secretary of Education, and the Assistant Secretary of Education for Civil Rights, alleging that the Department's 1979 Policy Interpretation and 1996 Clarification were substantively and procedurally flawed. *Id.* at 935-936.

a. The district court granted the government's motion to dismiss the *Wrestlers I* complaint for lack of Article III standing. 263 F. Supp. 2d at 82. The court noted that the constitutional requirements of standing are difficult to satisfy where a person brings suit against the government but alleges injury inflicted by the allegedly unlawful conduct of regulated third parties. See *id*. at 110 (citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). The court concluded that the plaintiffs lacked standing because they had failed to establish that their injuries were fairly traceable to the challenged government action or likely to be redressed by a favor-

able decision. *Id*. at 117-123. The district court added, however, that the plaintiffs could bring suit directly against the federally-funded educational institutions alleged to have discriminated against them. See *id.* at 94-97 & n.6 (citing *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979)).

b. The court of appeals affirmed. *Wrestlers I*, 366 F.3d at 933. It held that the plaintiffs lacked Article III standing because (1) the Department's actions did not cause their alleged injuries, and (2) plaintiffs had offered "nothing to support [their] claim that a favorable ruling would alter the school's conduct" with respect to the wrestling programs. *Id*. at 944. As the court explained, "nothing in the [challenged] Three-Part test requires schools to eliminate or cap men's wrestling or any other athletic program." *Id*. at 939. Furthermore, a school may decide to cut or cap a sports team for any number of reasons having nothing to do with the Title IX policies that the plaintiffs challenged. *Id*. at 940.

In the alternative, the court of appeals held that, "even if [plaintiffs] had standing to pursue the[ir] claims," they had an "adequate remedy that bar[red]" their suit under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, *Wrestlers I*, 366 F.3d at 945, which subjects to judicial review "[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 court rejected the plaintiffs' contention that the Department's policy was "made reviewable by statute," *Wrestlers I*, 366 F.3d at 946-947, and it agreed with the district court that the plaintiffs could bring suit directly against the schools alleged to have engaged in illegal discrimination. *Id.* at 945-946 (citing *Cannon* v. *University of Chicago*, *supra*). This remedy, the court

held, "preclude[d] any suit against the Department under the APA." *Id.* at 946.

Judge Williams dissented, concluding that plaintiffs had standing and lacked an alternative remedy. *Wrestlers I*, 366 F.3d at 958. Judge Williams also dissented when the panel denied a petition for rehearing.

The court of appeals denied a petition for rehearing en banc, with Judge Ginsburg dissenting. *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 383 F.3d 1047 (D.C. Cir. 2004). This Court denied certiorari. 545 U.S. 1104 (2005).

3. Petitioners here (*Wrestlers II*) are the same five organizations that were plaintiffs in *Wrestlers I*, plus two new groups: the Juniata Wrestling Club and the Committee to Reinstate Delaware Wrestling. As in *Wrestlers I*, petitioners have sued the Department, the Secretary of Education, and the Assistant Secretary for Civil Rights. They again allege that educational institutions have engaged in illegal discrimination against male athletes, and they seek to set aside Title IX enforcement policies, including the Department's 1979 Policy Interpretation (Pet. App. 19a-30a), 1996 Clarification (*id.* at 31a-55a), and the 2003 Clarification (*id.* at 56a-60a). *Id.* at 61a-114a (amended complaint). Petitioners also allege that Title IX is unconstitutional if interpreted to authorize the regulations as written. See *ibid.*

a. The district court issued an order directing the parties to show cause why petitioners' suit should not be dismissed and subsequently dismissed the case on the basis of *Wrestlers I*. Pet. App. 5a-6a. The court noted that "[t]he plaintiff groups in the two cases are identical, except for the addition of the Juniata Wrestling Club and the Committee to Reinstate Delaware Wrestling," *id.* at 6a, and it determined that "the Juniata and Dela-

ware [petitioners] are asserting the same causes of action, seeking the same relief, and have alleged injuries that are of the same character as the original [*Wrestlers I*] plaintiffs." *Id.* at 10a. Although it recognized that the new complaint "presents several additional allegations that the Three-Part Test and associated Department rules are unlawful," the court concluded that "[petitioners] offer nothing to distinguish the Court of Appeals' observation in [*Wrestlers I*] that 'the direct causes of [petitioners'] asserted injuries—loss of collegiate-level wrestling opportunities for male student-athletes—are the independent decisions of educational institutions.'" *Id.* at 8a (brackets in original). The court accordingly held that "the issue of redressability in this context has been conclusively settled," and it again emphasized that, "as noted repeatedly by this Court and the Court of Appeals, the proper remedy for [petitioners'] alleged injuries is an 'action directly against universities that discriminate in violation of Title IX.'" *Id.* at 8a-9a.

b. The court of appeals affirmed in part and reversed and remanded in part in a per curiam decision. Pet. App. 1a-4a. Explaining that "[t]here are no material differences between the complaint in [*Wrestlers I*] and the complaint in this case with respect to [petitioners'] statutory and constitutional claims," the court concluded that "the jurisdictional holding in [*Wrestlers I*] is res judicata here as to the five parties who appeared in [*Wrestlers I*]." *Id.* at 2a. The court held that "all parties," including the new petitioners, were "bound by the stare decisis effect of th[e] court's decisions," and the court's decision in *Wrestlers I* "conclusively settled" the "statutory and constitutional issues raised in this case." *Id.* at 2a-3a.

The court found only "one notable difference" between the claims presented in *Wrestlers I* and *Wrestlers II*. Pet. App. 3a. In *Wrestlers II*, petitioner College Sports Council (CSC) sought to challenge the Department's denial of a rulemaking petition it had filed seeking repeal of the three-part test. The court held that CSC had standing to pursue that challenge and that *Wrestlers I* "is not res judicata as to this issue" because CSC's petition to initiate rulemaking had not been not denied until after the judgment in *Wrestlers I* had been issued. *Ibid.* The court remanded the case to the district court on that limited issue. *Id.* at 3a-4a.[1]

ARGUMENT

The per curiam decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The Court denied certiorari as to the earlier iteration of this case. *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 383 F.3d 1047 (D.C. Cir. 2004), cert. denied, 545 U.S. 1104 (2005). Further review of this follow-on action is similarly unwarranted.

1. This Court "has long recognized that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.'" *Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) (brackets in original) (quoting *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 166 (1932)). Thus, a "question of subject-matter jurisdiction" that has been "fully litigated in the original forum" cannot be "retried in a subsequent action be-

[1] CSC filed for voluntary dismissal of its claims on April 2, 2007, and is not a petitioner here. See Notice of Voluntary Dismissal, *College Sports Council* v. *Department of Education*, No. 03-2588-EGS (D.D.C).

tween the parties." *Durfee* v. *Duke*, 375 U.S. 106, 112 (1963); see *Dynaquest Corp.* v. *USPS*, 242 F.3d 1070, 1076 n.5 (D.C. Cir. 2001) ("[T]he doctrine of *res judicata* applies to dismissal for lack of jurisdiction as well as for other grounds.") (quoting *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983)), cert. denied, 534 U.S. 953 (2001)).

Under these principles, the five petitioners who were plaintiffs in *Wrestlers I* cannot relitigate the Article III standing question that was "conclusively settled" (Pet. App. 2a-3a) in that case. The court in *Wrestlers I* held that the relief sought by petitioners against the government could not redress their claimed injuries, and for that reason subject matter jurisdiction was lacking. 366 F.3d at 930. That jurisdictional holding is preclusive here and compels dismissal of petitioners' claims.[2] See Pet. App. 2a ("[w]e affirm the District Court's judgment that appellants lack standing for want of redressability").

That conclusion is not undermined by petitioners' claimed "curable-defect" exception to res judicata. See Pet. 13-17. The court of appeals held in *Wrestlers I* that petitioners lacked Article III standing because they had sued the government for injury alleged to have been caused by the unlawful discrimination of independent

[2] Although petitioners suggest that the *Wrestlers I* proceedings were based on a "misread[ing]" of a General Accounting Office (GAO) report (Pet. 18 & n.10), the court of appeals made clear in *Wrestlers I* that the cited report was not necessary to its analysis. See 366 F.3d at 942-943. Nor does this Court's intervening decision in *Jackson* v. *Birmingham Board of Education*, 544 U.S. 167 (2005), cited by petitioners (Pet. 18 & n.11), alter the analysis. *Jackson* held that the private right of action implied by Title IX encompasses retaliation claims. That ruling provides no assistance to petitioners on the dispositive issues of preclusion and subject matter jurisdiction.

educational institutions. On that basis, the court of appeals determined that the relief sought would not redress the injuries claimed. *Wrestlers I*, 366 F.3d at 930. That fatal deficiency in petitioners' standing is equally present in this case, and is not a "defect" that can be "cured." See Pet. App. 2a ("There are no material differences between the complaint in [*Wrestlers I*] and the complaint in this case with respect to appellants' statutory and constitutional claims.").[3]

2. Although res judicata does not apply to the two petitioners that were not parties in *Wrestlers I*, the court of appeals correctly held that the jurisdictional and statutory issues they raised were foreclosed as a matter of precedent. Pet. App. 2a-3a. Petitioners seek to relitigate the validity of *Wrestlers I*'s standing analysis, but that analysis is correct and is not in conflict with any decision of this Court or the other courts of appeals. Indeed, this Court denied the petition for a writ of certiorari in *Wrestlers I*, 545 U.S. 1104 (2005) (No. 04-922), and there is no reason for a different result here.

a. To establish standing under Article III, a plaintiff must allege an injury in fact that is fairly traceable to the challenged government action and is likely to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Mere "spec-

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[3] Petitioners contend that the principles of res judicata do not apply because their complaint is a new cause of action that challenges the clarification of the three-part test issued by the Department in 2003 (Pet. App. 56a-60a), which is part of the same Title IX enforcement policy as the 1979 Policy Interpretation (*id.* at 19a-30a) and 1996 Clarification (*id.* at 31a-55a) originally challenged. See Pet. 16-17. As explained below, the court of appeals correctly held that those claims that were not barred by res judicata are foreclosed as a matter of precedent. See Pet. App. 2a-3a.

ula[tion]" that the alleged injury will be redressed by a favorable decision is insufficient to meet the constitutional requirements. *Id.* at 561. Petitioners claim as the source of their injury the decisions made by various colleges and universities to eliminate or to reduce the size of their men's sports teams. But petitioners have not sued any of the allegedly offending educational institutions. Instead, they have sued the Department, claiming that the Department's Title IX enforcement policies are responsible for their alleged injury.

Because petitioners' alleged injury arises from the government's regulation of a third party not before the Court, the redressability component of standing is "'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)).[4] Where standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ibid.* (quoting *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 615 (1989)), "it becomes the burden of the

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[4] Petitioners also assert that they have standing to seek redress of various "direct injuries" that "[*Wrestlers I*] did not address." Pet. 20 (emphasis omitted) (citing *International Primate Prot. League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991)). Those claims are meritless. Unlike the plaintiffs in *International Primate*, who actually "lost the right" to file in their forum of choice, petitioners have not in any way been precluded from utilizing the administrative forum they prefer. See Pet. 21. Additionally, although petitioners argue that the Department has directly impaired their "freedom to interact" with affected schools (Pet. 19), petitioners have not, as described below, pp. 13-15, *infra*, offered any reason to believe that Title IX or the Department's regulations, rather than the unrelated choices of the independent educational institutions involved, caused their injury.

plaintiff to adduce facts showing that those choices have been or will be made in such manner as to * * * permit redressability of injury." *Ibid.*; see *Wright*, 468 U.S. at 739-740, 758 (holding that parents of black public school children lacked standing to challenge the IRS's failure to withdraw tax exempt status from racially discriminatory schools because it was entirely speculative whether withdrawal of a tax exemption would lead the school to change its policies).

Petitioners fail sufficiently to allege standing as required by these cases. Like the plaintiffs in *Wrestlers I*, see 366 F.3d at 936-945, petitioners here have failed to show a "substantial probability" that a decision invalidating the 1979 Policy Interpretation, the 1996 Clarification, or even Title IX itself would likely lead universities and colleges to alter their independent decisions to eliminate or reduce the size of men's athletic programs. *Warth* v. *Seldin*, 422 U.S. 490, 504 (1975). As the court of appeals recognized in *Wrestlers I*, 366 F.3d at 940, a college or university may choose to eliminate or reduce the roster size of an athletic squad for any number of reasons unrelated to legal requirements or the sex of the athletes involved—such as budgetary constraints, spectator interest, or the lack of suitable competition. See Pet. App. 75a (recognizing that a school might refuse to fund women's, as well as men's, teams); *cf. Telephone & Data Sys., Inc.* v. *FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994) (refusing "'to presume illegal activities' on the part of actors not before the court") (quoting *United Transp. Union* v. *ICC*, 891 F.2d 908, 914 (D.C. Cir. 1989), cert. denied, 497 U.S. 1024 (1990)). Under these circumstances, the court of appeals correctly concluded that petitioners failed to satisfy the redressability element of

Article III standing. That case-specific and fact-bound question does not warrant this Court's review.

3. Review is also unwarranted because, even apart from application of res judicata and petitioners' lack of standing, petitioners' action is foreclosed under 5 U.S.C. 704. The APA provides for judicial review of agency action that is "made reviewable by statute" and final agency action "for which there is no other adequate remedy in a court." *Ibid.* As the court of appeals concluded in *Wrestlers I*, neither basis for suit is available here. See 366 F.3d at 945-948.

This is not a case in which "there is no other adequate remedy in a court." 5 U.S.C. 704. Under *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), petitioners have a private right of action against schools that discriminate in violation of Title IX. Because petitioners challenge the 1979 Policy Interpretation and the 1996 Clarification on the ground that they violate the Equal Protection Clause and Title IX itself, that right of action is an "adequate remedy" for the discrimination alleged. See *Washington Legal Found.* v. *Alexander*, 984 F.2d 483 (D.C. Cir. 1993); accord *Jersey Heights Neighborhood Ass'n* v. *Glendening*, 174 F.3d 180, 191-192 (4th Cir. 1999); *New York City Employees' Ret. Sys.* v. *SEC*, 45 F.3d 7, 14 (2d Cir. 1995).[5]

[5] Petitioners contend (Pet. 30 & n.19) that this Court should grant certiorari to resolve a circuit split over the question of "preemption" under 42 U.S.C. 1983. That alleged split, however, is not at issue in this case. Petitioners are not, as they suggest (Pet. 30), prohibited from raising constitutional challenges to Title IX in suits against school districts in the Third Circuit, see *Williams* v. *School Dist.*, 998 F.2d 168, 175-176 (3d Cir. 1993) (considering Title IX and federal constitutional claims against school district), cert. denied, 510 U.S. 1043 (1994), and neither the district court nor the court of appeals in *Wrestlers I* or *Wrestlers II* addressed the alleged conflict.

Nor is this a case in which agency action is "made reviewable by statute." 5 U.S.C. 704. In arguing otherwise, petitioners rely (Pet. 24) on 20 U.S.C. 1683, which provides that agency action under Title IX "shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds." As the court of appeals explained in *Wrestlers I*, however, "the reference to agency actions 'made reviewable by statute' in § 704 relates to statutory provisions other than the APA that govern judicial review of those actions." 366 F.3d at 946-947. Section 1683 is not such a statute. Cf. *Cousins* v. *Secretary of the U.S. Dep't of Transp.*, 880 F.2d 603, 604-608 (1st Cir. 1989) (en banc) (opinion of Breyer, J.) (holding that provision of Title VI, incorporated in 29 U.S.C. 794a(a)(2), which provides for "such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds," 42 U.S.C. 2000d-2, limits individual to APA review).

Petitioners also err in arguing (Pet. 26) that they can circumvent the APA's judicial review provisions by adding as defendants the Secretary and Assistant Secretary of Education in their official capacities. See Pet. iii n.*. In the context of a suit challenging agency action, a suit against a government officer in his or her official capacity is simply "another way of pleading an action against an entity of which an officer is an agent." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985); see Pet. App. 69a (stating that the Secretary of Education and the Acting Assistant Secretary for Civil Rights, defendants Paige and Marcus, "are not sued in their individual capacities for monetary or punitive damages"). Accordingly, petitioner's suit against the Secretary and Assistant Secre-

tary is simply another way of suing the Department and is subject to the limitations for review of agency action set forth in 5 U.S.C. 704.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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