No. 11-357

In the Supreme Court of the United States

EQUITY IN ATHLETICS, INC., PETITIONER

v.

DEPARTMENT OF EDUCATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

With respect to the federal respondents, the petition presents the following question:

Whether the court of appeals properly rejected petitioner's procedural and substantive challenges to the Department of Education's policies under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, concerning equal gender opportunity in athletics.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 639 F.3d 91. The opinion of the district court (Pet. App. 38a-87a) is reported at 675 F. Supp. 2d 660.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2011. A petition for rehearing was denied on May 6, 2011 (Pet. App. 88a). On July 22, 2011, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 16, 2011, 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 provides in pertinent part: "No 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, following notice and comment, the Department of Health, Education, and Welfare (HEW) issued regulations under Title IX, which were approved by President Ford. 40 Fed. Reg. 24,128 (1975). HEW's regulations, which are now administered by the Department of Education (DOE), address the issue of gender discrimination in athletics, providing that an institution receiving federal funds "shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. 106.41(c); 40 Fed. Reg. at 24,143; see 20 U.S.C. 3505(a). "In determining 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 members of both sexes." 34 C.F.R. 106.41(c); 40 Fed. Reg. at 24,143.

In 1979, also following notice and comment, HEW issued a Policy Interpretation of its regulations in order to provide further guidance and to address a large number of complaints alleging gender discrimination in athletics. 44 Fed. Reg. 71,413 (1979). That Policy Interpretation establishes what is known as the Three-Part Test, whereby an educational institution is considered to be in compliance with Title IX if it meets one of three criteria:

1. "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or"
2. "[w]here 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; or"
3. "[w]here 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."

Id. at 71,418.

In 1996, DOE issued additional clarification regarding the 1979 Policy Interpretation and the Three-Part Test, emphasizing three points. First, DOE "confirm[ed] that 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. 113a. Second, DOE made clear that its framework for determining Title IX compliance "does not provide strict numerical formulas or 'cookie-cutter' answers to the issues that are inherently case- and fact-specific." *Id.* at 114a. An effort to provide such formulaic answers, DOE stated, "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." *Ibid.* Third, addressing apparent "confusion about the elimination and capping of men's teams in the context of Title IX compliance," *id.* at 117a, DOE explained that "[t]he rules here are straightforward. An institution can choose to eliminate 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.* DOE also issued a further clarification elaborating upon these points in 2003. See *id.* at 140a.

2. In September 2006, the Board of Visitors of respondent James Madison University (JMU), a state-sponsored institution that receives federal funds, voted to eliminate seven men's and three women's intercollegiate athletic teams. Pet. App. 46a. JMU stated that the primary purpose of its decision was to assure compliance with Title IX by satisfying the first criterion of the Three-Part Test (which examines whether athletic opportunities are "substantially proportionate" to enrollment). *Ibid.* JMU explained that it had considered other methods of Title IX compliance, but had deemed "unacceptable" any plan that would require it to add teams. *Ibid.*

Petitioner is a nonprofit corporation formed for the purpose of opposing the cuts to JMU's athletic program. Pet. App. 38a, 46a-47a. In March 2007, petitioner filed suit in the United States District Court for the Western District of Virginia against respondents DOE, the Secretary of Education, the Assistant Secretary for Civil Rights, and the United States, raising various procedural and substantive challenges to the Three-Part Test

and seeking declaratory and injunctive relief that would prevent its enforcement. *Id.* at 47a.

In June, 2007, petitioner amended its complaint to assert claims against JMU and various JMU officials, and sought a preliminary injunction to bar JMU's planned cuts to its athletic program. Pet. App. 48a. The district court denied the motion, and the court of appeals affirmed. 504 F. Supp. 2d 88 (W.D. Va. 2007); 291 Fed. Appx. 517 (4th Cir. 2008). This Court denied certiorari. 129 S. Ct. 1613 (2009).

3. Following the denial of the preliminary-injunction motion, petitioner filed a second amended complaint against respondents, again asserting, in part, that the Three-Part Test was procedurally and substantively invalid. Pet. App. 48a-49a. The district court granted respondents' motions to dismiss. *Id.* at 38a-87a.

The district court rejected petitioner's substantive challenges to the Three-Part Test, observing that courts of appeals that had addressed arguments similar to petitioner's had uniformly concluded that the arguments lack merit. Pet. App. 50a-72a. The district court similarly rejected petitioner's procedural challenges to the Three-Part Test. *Id.* at 69a-72a. And it rejected petitioner's claim that JMU had acted unlawfully in its stated efforts to comply with the first criterion of the Three-Part Test, concluding that petitioner lacked standing to challenge one of JMU's actions and that petitioner's arguments were otherwise meritless. *Id.* at 72a-87a.

4. The court of appeals affirmed. Pet. App. 1a-37a. The court "first address[ed] the issue of standing" and concluded that "EIA meets the requirements for organizational standing as to its claims against DOE and JMU." *Id.* at 9a, 11a. Turning to the merits, the court

of appeals expressly agreed with the unanimous view of other circuits that the Three-Part Test is consistent with the text of Title IX and satisfies constitutional equal-protection principles. *Id.* at 16a-24a. It additionally concluded that there were no procedural defects that rendered the Three-Part Test invalid. *Id.* at 24a-27a & n.11. And the court upheld as well the district court's dismissal of petitioner's claims against JMU. *Id.* at 27a-37a.

ARGUMENT

Petitioner renews (Pet. 20-39) various procedural and substantive challenges to the Three-Part Test.[*] The decision of the court of appeals is correct, and, as petitioner concedes (Pet. 15), the courts of appeals that have addressed the issue have consistently rejected similar attacks on the three-part test. See *McCormick* v. *School Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004); *Chalenor* v. *University of N.D.*, 291 F.3d 1042, 1046-1047 & n.4 (8th Cir. 2002); *Miami Univ. Wrestling Club* v. *Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Neal* v. *Board of Trs.*, 198 F.3d 763, 770-773 (9th Cir. 1999); *Kelley* v. *Board of Trs.*, 35 F.3d 265, 271-272 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824, 832-833 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); *Williams* v.

[*] This brief in opposition addresses only petitioner's arguments concerning the claims against the federal respondents. It does not address petitioner's contentions (Pet. 18-19, 35-36, 38-39) that actions taken by JMU in a stated effort to comply with the first criterion of the Three-Part Test were unlawful. And to the extent that petitioner might be suggesting (Pet. 15-17), that certiorari is warranted to address an asserted circuit conflict regarding standing, that suggestion lacks merit because petitioner prevailed on the standing issue in the court of appeals (see Pet. App. 9a-16a).

School Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994); *Cohen* v. *Brown Univ.*, 991 F.2d 888, 899-902 (1st Cir. 1993). This Court has repeatedly denied certiorari to review the circuits' unanimous conclusion. See *Neal* v. *Board of Trs.*, 540 U.S. 874 (2003); *Kelley*, 513 U.S. 1128; *Roberts*, 510 U.S. 1004. No further review is warranted.

1. Petitioner first contends (Pet. 20-25) that DOE's interpretation of Title IX should receive little or no deference from the courts. That contention lacks merit.

Federal law expressly authorizes "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity" to promulgate Title IX regulations. 20 U.S.C. 1682; see also Education Amendments Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (specifically requiring proposed HEW regulations of "intercollegiate athletic activity"). Regulations and guidance issued pursuant to that provision are entitled to deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 227-228 (2001); see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Petitioner identifies no court of appeals that has held otherwise, and there are none.

To the extent that petitioner raises a question (Pet. 21) about the precise nature of the deference owed to DOE's guidance—*Chevron* deference to the agency's reasonable gap-filling of a statute it administers, 467 U.S. at 842-843, or *Skidmore* deference based on its persuasive application of its expertise, 323 U.S. at 140—that question is not presented here. The court of appeals did not address, and its decision does not depend upon, that issue. Because DOE's interpretation of Title IX "is both persuasive and not unreasonable," it would warrant def-

erence under either standard. *McCormick*, 370 F.3d at 290; see also *Horner* v. *Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994) (deferring to Three-Part Test without specifying precise nature of deference).

Petitioner contends (Pet. 23-25) that even if HEW had authority to interpret Title IX when the statute was originally enacted, that authority was not transferred to DOE, and thus DOE's current interpretation deserves no deference at all. The court of appeals correctly determined otherwise. Pet. App. 5a. As this Court recognized in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 516 n.4 (1982), "HEW's functions under Title IX were transferred in 1979 to the Department of Education." At that time, Congress divided HEW into two separate agencies, the Department of Health and Human Services and DOE. See Department of Education Organization Act, Pub. L. No. 96-88, § 101, 93 Stat. 669 (20 U.S.C. 3401 *et seq.*). HEW's Title IX regulations, 45 C.F.R. 86.41, were subsequently recodified as DOE regulations without substantial change, 34 C.F.R. 106.41. Moreover, as several courts of appeals have recognized, DOE has effectively incorporated the Three-Part Test as its own. *McCormick*, 370 F.3d at 287; *Horner*, 43 F.3d at 273 n.6; *Cohen*, 991 F.2d at 895, 896 n.10; see, *e.g.*, Pet. App. 120a (1996 Clarification), 140a (2003 Clarification). Petitioner's characterization of this Court's statement in *Bell* as dictum, and its suggestion that all of the courts of appeals to have addressed this issue are wrong, provides no meaningful basis for further review.

2. Petitioner also contends (Pet. 25-34) that the Three-Part Test should be considered a nullity because it is procedurally invalid. Petitioner's contentions lack

merit; no court of appeals has agreed with them; and the issue does not warrant review by this Court.

a. Petitioner asserts that HEW was required to, but did not, promulgate its Three-Part Test pursuant to formal notice-and-comment rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. 553. As a threshold matter, petitioner's factual premise is incorrect: the 1979 Policy Interpretation, including the Three-Part Test, was issued after full notice and comment. See 44 Fed. Reg. at 71,413 (noting that HEW had "published a proposed Policy Interpretation for public comment" a year earlier and had received "[o]ver 700 comments reflecting a broad range of opinion"); see also, *e.g.*, *Cohen*, 991 F.2d at 893 (observing that Policy Interpretation was published "after notice and comment"); *Miami Univ.*, 302 F.3d at 615 (same).

In any event, the court of appeals correctly concluded that the Three-Part Test and its subsequent clarifications fall within an exception to the APA's notice-and-comment requirement for "interpretive rules." 5 U.S.C. 553(b)(A); see Pet. App. 25a-27a. The Three-Part Test "did not create new rights, impose new obligations, or change the existing law." *Id.* at 25a (citation omitted). Instead, as HEW explained, the Policy Interpretation "represented HEW's *interpretation*" of Title IX and the 1975 implementing regulations. *Ibid.* (quoting 44 Fed. Reg. at 71,413) (brackets omitted; emphasis added by court).

The court of appeals' determination that the Three-Part Test is an "interpretive rule" accords with the D.C. Circuit's conclusion in *National Wrestling Coaches Ass'n* v. *Department of Education*, 366 F.3d 930, 940 (2004), cert. denied, 545 U.S. 1104 (2005), that the Three-Part Test and its clarifications "are interpretive

guidelines that the Department was not required to issue in the first place." Pet. App. 26a. Petitioner's attempt to characterize the D.C. Circuit's statement in that case as dictum, and its suggestion that the statement is inconsistent with other D.C. Circuit decisions that do not address Title IX (Pet. 28-30), does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

b. Petitioner separately asserts (Pet. 31-32) that the Three-Part Test is invalid because it did not comply with procedures set forth in 20 U.S.C. 1682, which provides that agency "rules, regulations, or orders of general applicability" under Title IX shall not become effective "unless and until approved by the President." As the court of appeals correctly concluded, however, "[a]s with the APA's notice and comment requirements, * * * the requirement of presidential approval does not apply to the issuance of interpretive guidelines." Pet. App. 26a (citing *Cohen* v. *Brown Univ.*, 879 F. Supp. 185, 199 (D.R.I. 1995), rev'd in part on other grounds, 101 F.3d 155 (1st Cir. 1996)). Petitioner's suggestion that the court of appeals' conclusion on this point conflicts with *Lujan* v. *Franklin County Board of Education*, 766 F.2d 917 (6th Cir. 1985), is misplaced. That decision addressed a different agency action—one claimed to be an "order" that "imposed" certain "duties" on certain persons—under a different statute. *Id.* at 923.

c. Petitioner further asserts (Pet. 33-34) that the Three-Part Test is invalid for failure to comply with the provision of the General Education Provisions Act that required congressional review of certain HEW regulations. 20 U.S.C. 1232(d)(1) (1976). The court of appeals

found that argument "difficult to glean" and rejected it, noting petitioner's concession that HEW at the time had given the matter careful consideration and decided that the congressional-review requirement did not apply. Pet. App. 24a n.11. Petitioner cites no court that has reached a contrary conclusion, and the court of appeals' fact-specific determination does not warrant this Court's review.

3. Petitioner also raises (Pet. 37) statutory and constitutional challenges to the Three-Part Test. The court of appeals, in accord with the other circuits that have considered such challenges, correctly rejected those arguments, and they do not merit further review.

a. Petitioner first suggests (Pet. 6-7, 11, 35) that the Three-Part Test conflicts with the statutory text of Title IX. In petitioner's view, the Three-Part Test mandates consideration of statistical disparities between the athletic opportunities for people of different genders in assessing Title IX compliance, whereas the text bans such consideration. As the court of appeals correctly observed, however, petitioner's argument is misplaced in two critical respects, and courts have "consistently dismissed" claims raising the same argument. Pet. App. 16a-21a.

First, the argument "fails to acknowledge the clear statutory language of Title IX that allows for some consideration of proportionality between participation and enrollment." Pet. App. 17a. Although Title IX does not "require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity," it expressly allows

"the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists." 20 U.S.C. 1681(b). Accordingly, because "Title IX, like other anti-discrimination schemes, permits an inference that a significant gender-based statistical disparity may indicate the existence of discrimination," the Three-Part Test is an appropriate enforcement tool. Pet. App. 18a (quoting *Cohen*, 101 F.3d at 170-171); see also *Neal*, 198 F.3d at 771.

Second, petitioner's argument "mischaracterizes the Three-Part Test as a mandatory disparate impact standard." Pet. App. 17a. In point of fact, the Three-Part Test "does not * * * mandate statistical balancing," but instead "merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance." *Id.* at 19a (quoting *Kelley*, 35 F.3d at 271); see *Cohen*, 101 F.3d at 170 ("No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency documents—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals."). As the court of appeals recognized, because there are other ways, aside from statistical balancing, to comply with the Three-Part Test, the overall scheme provides educational institutions with significant "flexibility" in implementing Title IX. Pet. App. 20a; see p. 3, *supra*; see also *Neal*, 198 F.3d at 770.

b. Petitioner also challenges the Three-Part Test on equal-protection grounds. Like the statutory argument, that argument has met with "overwhelming rejection" in the circuits in which it has been raised. Pet. App. 22a. As the courts of appeals have recognized, "[w]hile the effect of Title IX and the relevant regulation and policy

interpretation is that institutions will sometimes consider gender when decreasing their athletic offerings, this limited consideration of sex does not violate the Constitution," because "[t]here is no doubt but that removing the legacy of sexual discrimination * * * from our nation's educational institutions is an important governmental objective." *Id.* at 21a-22a (quoting *Kelley*, 35 F.3d at 272); see *United States* v. *Virginia*, 518 U.S. 515, 533 (1996); see also *Cohen*, 991 F.2d at 900-901; *Neal*, 198 F.3d at 772.

Petitioner errs in suggesting that *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), calls into question the circuits' uniform conclusion on this issue. As the court of appeals recognized, *Parents Involved* "centered on race-based school assignments and the strict scrutiny to which racial classifications are subject," and thus "has little bearing on a case involving sex-based classifications, which are subject to the lesser standard of intermediate scrutiny." Pet. App. 23a. "Moreover, the nature of collegiate athletics differs from the school assignments at issue in *Parents Involved* in part because teams are segregated by sex and participation opportunities are decided in advance." *Ibid.* Indeed, as other courts of appeals have similarly stressed, "'Congress [has] recognized that addressing discrimination in athletics present[s] a unique set of problems not raised in areas such as employment and academics,'" and "it would be inappropriate to import a body of law developed in other contexts." *Boulahanis* v. *Board of Regents*, 198 F.3d 633, 638 n.2 (7th Cir. 1999), cert. denied 530 U.S. 1284 (2000) (quoting *Kelley*, 35 F.3d at 270), abrogated in part on other grounds by *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

Petitioner's invocation (Pet. 38) of the First Amendment adds no meaningful substance to its equal-protection argument. As the court of appeals correctly observed, petitioner "can cite to no authority for applying First Amendment case law in this context." Pet. App. 23a n.10. A "constitutionally protected right to associate for expressive purposes exists if the activity for which persons are associating is itself protected by the First Amendment," *Willis* v. *Town of Marshall*, 426 F.3d 251, 258 (4th Cir. 2005), and courts "have generally been unwilling to extend First Amendment protections to sports or athletics." *Maloney* v. *Cuomo*, 470 F. Supp. 2d 205, 213 (E.D.N.Y. 2007) (citing cases), aff'd, 554 F.3d 56 (2d Cir. 2009), vacated and remanded on other grounds, 130 S. Ct. 3541 (2010).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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