STATEMENT OF ISSUES ON APPEAL

1. Should the decision of the Court of Appeals be affirmed because any ruling that the Respondents were required to exhaust state administrative remedies before suing to recover damages under 42 U.S.C. § 1983 would be unconstitutional?

2. Should the decision of the Court of Appeals be affirmed on grounds that the Respondents sought damages for violation of their federal due process rights, and the United States Supreme Court has ruled that exhaustion of state remedies is not required to recover damages under 42 U.S.C. § 1983?

3. Should the decision of the Court of Appeals be affirmed on grounds that the appeal remedy provided would not have been adequate to provide the Respondents with the damages remedy they were seeking and because such an appeal would have been futile?

4. Should the decision of the Court of Appeals be affirmed because the Court of Appeals correctly ruled that the Respondents did in fact exhaust all administrative remedies and the only remedy not pursued – an appeal to the circuit court – is a judicial remedy?

STATEMENT OF THE CASE

On February 9, 2009, the South Carolina Court of Appeals reversed summary judgment entered in favor of the Petitioner, Sumter School District 17, and against the

Respondents, Joseph Stinney and Cynthia Stinney, Individually and as Parents and Natural Guardians of Maurice Stinney, a minor over the age of fourteen years, and Marquis Stinney, on grounds that the trial court erred in ruling that Respondents were required to exhaust state administrative remedies as a condition of suing for damages under 42 U.S.C. § 1983. Stinney v. Sumter School Dist. 17, 382 S.C. 352, 675 S.E.2d 760 (Ct .App. 2009) Reh'g denied May 4, 2009, cert. granted April 9, 2010. Petitioner thereafter filed a Petition for Writ of Certiorari seeking review of the Court of Appeals' decision. Respondents opposed this petition on grounds, *inter alia*, that federal law preempted any state law that might require the exhaustion of state administrative remedies as a condition of suing under 42 U.S.C. § 1983.

By Order dated May 13, 2010, this Court granted the Petition for Writ of Certiorari not only on the issues raised by Petitioner, but also on Respondents' claim that federal law preempted any state law that might require the exhaustion of administrative remedies as a condition of suing under 42 U.S.C. § 1983.

STATEMENT OF FACTS

On September 23, 2003, Sumter High School students Marquis Stinney and Maurice Stinney were involved in a fight with two other students on school grounds. Although the boys had no previous record of misconduct - Marquis was an honor student, and both boys were on the football team - Sumter High School suspended them from school the next day. (Appen. at 13-14).

Following an evidentiary hearing on September 30, 2003 at the District Office, a Hearing Officers' Panel expelled the boys for the remainder of the 2003-2004 school term.

The Stinneys appealed this decision to the Superintendent of District 17. On October 20, 2005, the Superintendent upheld the Hearing Panel's recommendation to expel the students.

The Stinneys then appealed the decision to the Board of Trustees. The Board of Trustees upheld the decision to expel the boys for the remainder of the 2003-2004 school year. (Appen. at 13-14).

As a result of this expulsion, Marquis Stinney was denied the opportunity to complete his senior year at Sumter High School. He was removed from the honor roll, denied the chance to play football for the school team, and denied the chance to go to his Junior/Senior Prom. Maurice was also denied the opportunity to complete his high school education at Sumter High School and was denied a chance to play on the football team. (Appen. at 14).

In order to complete their high school education, both boys enrolled in Crestwood High School in Sumter School District 2. Because there was no school bus transportation from the Stinney home to Crestwood High School, the Stinneys incurred substantial transportation expenses in providing transportation for their children to the school.

Both boys also suffered emotional distress as a result of the expulsion. The Stinneys incurred medical expenses in the course of providing their sons with psychological treatment for this emotional distress. (Appen. at 15). See also (Appen. at 31, 34, 37).

On September 15, 2005, Respondents Joseph Stinney and Cynthia Stinney, as Parents and Natural Guardians of Maurice Stinney and Marquis Stinney, filed the instant action seeking to recover damages from Sumter School District 17. (Appen. at 12). Count One alleged that the School District failed to follow its own policies in the course of expelling the students and that the Plaintiffs-Respondents had suffered damages as a result of this failure. Count II alleged that the School District had violated the Plaintiffs-Respondents' rights to

due process under, *inter alia*, the federal constitution and that the Plaintiffs-Respondents had suffered damages as a result of this failure. The Civil Rights Act, of course, provides a private cause of action for this constitutional deprivation. 42 U.S.C. § 1983. Counts III and IV alleged that the School District had negligently failed to properly supervise the student Plaintiffs-Respondents and that the Plaintiffs-Respondents had suffered damages as a result of this failure. (Appen. at 15-18).

The School District moved, *inter alia*, for summary judgment on all counts. (Appen. at 8). The School District claimed, *inter alia*, that the Circuit Court lacked subject matter jurisdiction because the Plaintiffs-Respondents had failed to exhaust all administrative remedies given that they did not appeal the administrative decision to the Circuit Court. (Appen. at 8).

By Order dated May 1, 2007, the Circuit Court granted the motion for summary judgment on the Plaintiffs-Respondents' 42 U.S.C. § 1983 due process claim and denied the motion as to the remaining claims:

> . . . With regard to Plaintiffs' claim of a denial of due process, I find as a matter of law that the Plaintiffs failed to fully exhaust all remedies afforded to them by the Defendant in these types of proceedings. Consequently, summary judgment is granted with respect to Plaintiffs' second cause of action alleging denial of due process.
>
> As to the Plaintiffs' remaining causes of action, I find that there is some genuine issue of material fact in the record regarding Plaintiffs' claims that the Defendant failed to protect the Plaintiff students. …
>
> For the foregoing reasons, Defendant's Motion to Dismiss and/or for Summary Judgment is GRANTED as to Plaintiffs' Second Cause of Action for Denial of Due Process. Defendant's Motion to Dismiss and for Summary Judgment is DENIED as to Plaintiffs' remaining causes of actions. [sic].

(Appen. at 2).

On appeal from the grant of summary judgment on the 42 U.S.C. § 1983 due process claim, Respondents argued that the Circuit Court had erred in requiring the exhaustion of administrative remedies because the United States Supreme Court had ruled that exhaustion of state administrative remedies is not required in an action for damages under 42 U.S.C. § 1983. (Appen. at 165-167). The Respondents also explained that they had, in fact, exhausted all administrative remedies prior to filing suit and that the only remedy they did not exhaust was a judicial one, *viz*., appeal to the circuit court, that exhaustion of administrative remedies was not required under South Carolina law because such exhaustion would have been futile in this case; and that S.C. Code Ann. § 1-23-380 (2005) in any event authorized the lawsuit without exhaustion f such remedy. (Appen. at 167-173).

The Court of Appeals agreed with all three of Respondents' arguments that exhaustion is not required under South Carolina law. Stinney, supra. Having disposed of the appeal on this basis, the Court of Appeals did not reach the argument that federal law would preempt any state-law exhaustion requirement.

ARGUMENT

I. (Number IV on Respondents' Return To Petition For Writ of Certiorari) **THE DECISION MUST BE AFFIRMED BECAUSE A PLAINTIFF IN A 42 U.S.C. § 1983 ACTION MAY NOT BE REQUIRED TO EXHAUST STATE REMEDIES PRIOR TO BRINGING SUIT**

The Civil Rights Act of 1971 expressly provides a federal cause of action for damages for violations under color of state law of rights secured by, *inter alia*, the United States Constitution. 42 U.S.C. § 1983. There is no requirement in this statute that state remedies – administrative or otherwise - be exhausted prior to bringing such an action.

The United States Supreme Court has repeatedly held that exhaustion of state administrative remedies is *not* a prerequisite to a Section 1983 action. Jones v. Bock, 127

S.Ct. 910, 921 (2007)(Section 19830 "does not require exhaustion at all"); Wilkinson v. Dodson, 544 U.S. 74, 79 (2005)("habeas corpus actions require a petitioner fully to exhaust state remedies, which § 1983 does not"); Patsy v. Florida Bd. of Regents, 457 U.S. 496, 500-501 (1982)("we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983"). The "no exhaustion" rule applies regardless of whether the action is filed in federal court. McKithen v. Brown, 481 F.3d 89 (2d Cir. 2007)(exhaustion of state remedies is not required in a 42 U.S.C. § 1983 action filed in federal court), or state court, Fellerman v. University of Connecticut, 192 Conn. 539, 549, 473 A.2d 1176 (1984) (Patsy rule finding no exhaustion requirement applies with equal force when § 1983 action is brought in state court).

Petitioner concedes – as it must – that the exhaustion of state administrative remedies is not required when a plaintiff sues under 42 U.S.C. § 1983. (Petitioner's Brief at 17)("it is correct that with some exceptions, the exhaustion of administrative remedies is not a prerequisite to an action under 42 U.S.C. § 1983").[1] Despite this concession, Petitioner insists that the Court of Appeals construe the South Carolina statutes incorrectly. Petitioner contends that the Court of Appeals: (1) should have construed § 59-63-240 as requiring that administrative remedies must be exhausted before the Respondents could proceed with the 42 U.S.C. § 1983 action; (2) should have construed § 1-23-380 as being inapplicable given the more specific provision of § 59-63-240; and (3) should have construed judicial review authorized by § 59-63-240 as part of the administrative remedy system. But what Petitioner

[1] Notwithstanding the Petitioner's suggestive comment that there are exceptions to this rule, there are no exceptions applicable to this case. The sole exception to the rule known to the Respondents is that prisoners in correctional facilities are required to exhaust prison remedies prior to bringing 42 U.S.C. § 1983 actions. This sole exception obviously has no application to the instant case.

completely overlooks is that, if the Court of Appeals had construed (or if this Court should construe) the state statutes as Petitioner urges, *then these statutes would all be unconstitutional under the Supremacy Clause*. U.S. Const. art. VI. No South Carolina court can impose limitations on a plaintiff's right to sue under 42 U.S.C. § 1983; nor may the state legislature do so for that matter. Federal law would simply preempt the state statutes – or any state court's judicially-imposed exhaustion requirement - if so construed and should this Court so rule, Respondents would have a right of appeal to the United States Supreme Court which would reverse such a construction by a state court.

Of course, the latter scenario is unlikely to occur. This Court has repeatedly stated that "we will not construe a statute to do that which is unconstitutional." Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245, 247 (2000). Accord, Mitchell v. Owens, 304 S.C. 23, 402 S.E.2d 888 (1991) (holding that statutes are presumed to be constitutional and will be construed so as to render them valid). Accordingly, even assuming *arguendo* that Petitioner's "exhaustion is required" construction of the statutes is a reasonable one, South Carolina law would have required the Court of Appeals to do precisely what it did; and that is to reject this construction in favor of one that leaves both statutes constitutional. Thus, whatever the merits of Petitioner's statutory construction argument, this Court can and indeed *must* construe the subject statutes as not requiring the exhaustion of administrative remedies as a prerequisite to filing a 42 U.S.C. § 1983 action.

The Petitioner in fact can think of no argument to even challenge this proposition. In an apparent attempt to avoid sanctions under Rule 240, SCACR, for filing a frivolous petition and appellate brief, Petitioner asks the Court to rule on the merits that the process afforded

the Respondents was actually all the process that they were due and, therefore, summary judgment should be entered on the due process claim.

The Court, of course, may not take such a drastic step in this appeal from a grant of summary judgment. First, Respondents have provided sworn evidence that the hearing conducted "was not a fact finding process …[but] was a process to rubber stamp the lower administrator's recommendation for expulsion." (Appen. at 32). Second, as Respondents argued in opposition to the summary judgment motion, the November 4 [2003] letter - from the Superintendant upholding the recommendation of the hearing officer - told the Stinneys that their children were expelled for the remainder of the year. The letter did *not* advise them that they had a right to appeal this decision to the Circuit Court, even though earlier letters had provided this advice. The letter advised that the only rights they had was to petition to re-enter at the end of the school year. (Appen. at 90-91). Accordingly, from Respondents' standpoint, it looked as though they no longer even had a right to any judicial review. Hence, it is not surprising that they did not take this optional step. Third, the administrative procedures provided did not provide a damages remedy for the violation of the boys' constitutional rights. On summary judgment, of course, the foregoing evidence of lack of due process must be viewed in the light most favorable to the Respondents. Viewed in this light, material questions of fact exist as to whether Respondents received due process, and this Court must decline the Petitioner's invitation to rule *as a matter of law* that they did.

Respondents respectfully submit that the Court should and must affirm the Court of Appeals.

II. THE COURT OF APPEALS CORRECTLY RULED THAT PRIOR TO SEEKING DAMAGES FOR CONSTITUTIONAL DEPRIVATIONS, EXHAUSTION WAS NOT REQUIRED BECAUSE THE ADMINISTRATIVE REMEDIES PROVIDED WERE NOT ADEQUATE

While federal pre-emption completely moots Petitioner's argument that the Court of Appeals erred in construing the exhaustion statutes at issue, Respondents submit that the Court of Appeals' construction of the statutes as *not* requiring exhaustion is entirely correct. In reversing the Circuit Court, the Court of Appeals agreed with Respondents that a direct appeal would *not* have provided them with an adequate remedy given the fact that they sought damages for constitutional deprivations. As the Court of Appeals explained:

> We agree that a direct appeal would not have provided the Stinneys with any immediate relief. The students' reinstatement to school pending an appeal of the Board's expulsion order is effectively prohibited by S.C. Code Ann. § 59-63-240 (2004). This statute provides that a student who has been recommended for expulsion may be suspended from school and all school activities during the time of the expulsion procedures. Therefore, theoretically, the Stinneys would still accumulate at least a portion of the damages described in their complaint (i.e., transportation and psychotherapy expenses) regardless of any direct appeal to circuit court. Further, the Stinneys would be unable to seek damages in a direct appeal to circuit court….Under these circumstances a direct appeal would likely have been futile. One does not have to exhaust administrative remedies when it would be futile to do so. (Internal cites omitted).

Stinney, 382 S.C. at 358, 358-59, 675 S.E.2d at 763.

South Carolina law squarely supports this ruling. Exhaustion of remedies is required only where the remedy provided is adequate. B & A Development v. Georgetown, 372 S.C. 261, 641 S.E.2d 888 (2007)(recognizing that whether a remedy is constitutionally adequate is an exception to the exhaustion requirement). Moreover:

> The doctrine of exhaustion of administrative remedies is generally considered a rule of "policy, convenience and discretion, rather than one of law, and is not jurisdictional." …While exhaustion is an "inflexible" rule in some jurisdictions, in South Carolina it "is discretionary in nature."

Brown v. James, ___ S.E.2d ____, 2010, WL 1540923, S.C. App., April 12, 2010 (4674)(Internal cites omitted). Consistent with the discretionary nature of this doctrine, as

the Court of Appeals recently emphasized, "[t]his court does not require parties to engage in futile actions in order to protect their interests on appellate review." (Internal citations omitted). Cole v. Raut, 365 S.C. 434, 445, 617 S.E.2d 740, 745 (Ct. App. 2005), Reh'g denied Aug. 29, 2005, cert, granted, Dec. 19, 2006, Judgment Reversed by Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30 (2008) Reh'g denied, July 23, 2008.

The Court of Appeals properly recognized that an appeal to the Circuit Court would have been limited strictly to the administrative record and the sole inquiry would have been whether the expulsion order should have been vacated. Damages could not have been awarded. As previously noted, "[t]his court does not require parties to engage in futile actions in order to protect their interests on appellate review." Cole v. Raut, 365 S.C. at 445, 617 S.E.2d at 745. Consequently, the Court of Appeals correctly ruled that the Circuit Court abused its discretion in granting summary judgment because the administrative remedy was not adequate for the damages claimed and because requiring Respondents to pursue this remedy would have been futile.

Petitioner continues to insist that an administrative remedy must be exhausted if such a remedy is adequate to determine a question of fact. (Petitioner's Brief at 12). That is not the law. The question is whether the remedies provided are "constitutionally adequate." B & A Development v. Georgetown, 372 S.C. 261, 641 S.E.2d 888 (2007). Where a plaintiff is seeking solely damages for constitutional deprivations, the administrative remedy is obviously not constitutionally adequate if it does not provide for a damages remedy.

The decision of the Court of Appeals reversing the Circuit Court, accordingly, must be affirmed.

III. THE COURT OF APPEALS CORRECTLY RULED THAT THE RESPONDENTS DID, IN FACT, EXHAUST ALL ADMINISTRATIVE REMEDIES BECAUSE APPEAL TO THE CIRCUIT COURT IS A JUDICIAL REMEDY

The Court of Appeals alternatively ruled that Respondents had in fact exhausted all *administrative* remedies[2] prior to filing their Section 1983 action. The Court of Appeals explained that appeal to the Circuit Court was, obviously, a *judicial* remedy[3]; therefore Respondents' failure to appeal Petitioner's decision to the Circuit Court could not be deemed a failure to exhaust administrative remedies. Stinney, supra.

Petitioner attempts to circumvent this obvious and common-sense ruling by citing a passage from 73 C.J.S. *Public Admin. Law and Procedure* § 86 (2007). This reliance on an encyclopedia passage rather than South Carolina law underscores the lack of merit of this argument. As the Court of Appeals recognized, §§ 1-23-380 and 1-23-310 do not treat judicial review as part of the administrative remedy. Regardless of the merits of the encyclopedia discourse, the statutes are controlling.

Ultimately, Petitioner asks the Court to accept a comical proposition; to wit: Petitioner does not dispute that appeal to the circuit court is a judicial remedy, but insists that "appellate review" is "an additional layer of protection as part of the administrative process

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[2] It is undisputed that Respondents exhausted all *administrative* remedies prior to filing this suit. They appealed to the Superintendent, appealed to the Board of Trustees – the highest administrative body with decision-making power over the expulsion – and obtained an order from the Board upholding the expulsion.

[3] An appeal to the circuit court is obviously a *judicial* remedy, not an administrative one. Cf. § 1-23-380 (clearly distinguishing between administrative remedies which must be exhausted and describing the appeal to the court as "judicial review" – " [a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article"); B & A Development v. Georgetown, 372 S.C. 261, 641 S.E.2d 888 (2007)("petitioners must exhaust their administrative remedies before proceeding to circuit court").

for students facing expulsion." (Petitioner's Brief at 9). In other words, Petitioner seems to be saying that appeal, although a judicial remedy, is still part of the administrative process.

Petitioner cannot quite explain what this has to do with the doctrine of exhaustion of administrative remedies. Respondent asserts that it would be an exercise in futility for the Court to devote time trying to comprehend Petitioner's tortured discussion of the principle of statutory construction. If the legislature had wanted to make appeal to the circuit court mandatory, the legislature certainly would have said so. Instead, § 59-63-240, the applicable statute, provides that a party "may appeal to the circuit court." Thus, this remedy is optional within the statutory scheme, and Respondents were not required to follow it as far as the language of the statute is concerned. Consequently, Petitioner's attempt to obfuscate this problem by invoking the exhaustion of administrative remedies doctrine fails for the very reason noted by the Court of Appeals - appeal to the Circuit Court is not an administrative remedy at all but, rather, a judicial remedy.

Finally, if there is any remaining doubt about this issue, the Administrative Procedures Act itself expressly provides that "[t]his section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law." § 1-23-380. Consequently, this statute by itself would preclude any appeal to the circuit court as being a prerequisite to an action for damages. Treating this optional *judicial* remedy as a mandatory administrative remedy was obviously a gross abuse of discretion by the Circuit Court. The Court of Appeals properly reversed this judgment.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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