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# A Survey Of Recent Developments In The Law: Civil Procedure

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### III. CIVIL PROCEDURE

#### A. *Removal Jurisdiction*

When a case consists of a claim that includes both issues of federal and state law, removal of the claim is authorized under a theory of supplemental jurisdiction.<sup>1</sup> The United States Supreme Court, in *Wisconsin Department of Corrections v. Schacht*,<sup>2</sup> found a significant difference between the former situation and a case that involved a federal claim intertwined with a claim of an Eleventh Amendment<sup>3</sup> bar.<sup>4</sup> Specifically, the Supreme Court held that “presence in an otherwise removable case of an Eleventh Amendment-barred claim does not destroy removal jurisdiction that would otherwise exist and a federal court may proceed to hear non-barred claims.”<sup>5</sup>

The Wisconsin Department of Corrections dismissed prison guard Keith Schacht for stealing items from a state prison.<sup>6</sup> In response, Schacht filed a complaint in state court against the Department and several employees (in both a personal and official capacity) alleging a violation of Schacht’s civil rights.<sup>7</sup>

The Department’s answer, filed in federal court, raised a defense that the Eleventh Amendment to the Constitution, including the doctrine of sovereign immunity, barred the section 1983 claim against the state and its employees in their official capacity.<sup>8</sup> The federal district court granted the individual defendants’ summary judgment on the claims against the individuals in their personal

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1. *See Wisconsin Dep’t of Corrections v. Schacht*, 118 S. Ct. 2047, 2051 (1998), *abrogating* *Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994).

2. 118 S. Ct. 2047 (1998).

3. *See* U.S. CONST. amend XI.

4. *See Schacht*, 118 S. Ct. at 2051.

5. *Id.* at 2047.

6. *See id.* at 2050.

7. *See id.* Specifically, the complaint alleged in several different claims that the Department and its employees had deprived Schacht of liberty and property without due process of law, thereby violating the U.S. Constitution and civil rights laws. *See id.*

8. *See id.*

capacity.<sup>9</sup> The court held that even if Schacht's allegations were true, his dismissal did not violate the Fourteenth Amendment's Due Process Clause.<sup>10</sup> The court also granted the Department's motion to dismiss the claims against the state.<sup>11</sup>

On appeal, Schacht only disputed the district court's holding on the personal capacity claims.<sup>12</sup> During the appeal, the Court of Appeals for the Seventh Circuit considered the permissibility of removal from state to federal court.<sup>13</sup> The court held that removal to federal court had been improper because the federal courts lacked of jurisdiction over Schacht's case.<sup>14</sup> The presence of even one claim subject to an Eleventh Amendment bar will deprive the federal court of jurisdiction over the entire case.<sup>15</sup>

The Supreme Court did not agree with the Seventh Circuit.<sup>16</sup> The Supreme Court noted that the federal removal statute's<sup>17</sup> governing provision authorizes removal of any action where (1) the federal district courts have original jurisdiction, and (2) the action is brought in a state court.<sup>18</sup> Federal statutes do not, however, address situations subject to an Eleventh Amendment bar.<sup>19</sup>

Schacht presented a multi-part argument in support of destroying removal jurisdiction where a federal claim is subject to an Eleventh Amendment bar.<sup>20</sup> First, Schacht distinguished cases containing both federal law and state law claims from cases containing a federal claim with an Eleventh Amendment bar.<sup>21</sup> The court of

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9. *See id.*

10. *See id.* *See also* U.S. CONST. amend. XIV.

11. *See Schacht*, 118 S. Ct. at 2050. The court noted that Schacht agreed that claims for money damages were barred by the Eleventh Amendment but wanted to pursue a claim for injunctive relief. *See id.* However, Schacht's complaint did not request injunctive relief; thus, the complaint was dismissed. *See id.*

12. *See id.*

13. *See id.*; *see also* Wisconsin Dep't of Corrections v. Schacht, 116 F.3d 1151, 1153 (7th Cir. 1997).

14. *See id.*

15. *See id.* at 2051. The court of appeals asserted that the Eleventh Amendment had been interpreted by their court as prohibiting assertion of an Eleventh Amendment bar in federal court. *See id.*

16. *See id.*

17. *See* 28 U.S.C. § 1441 (1994).

18. *See Schacht*, 118 S. Ct. at 2051. Section 1331 grants federal courts "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331 (1994).

19. *See Schacht*, 118 S. Ct. at 2051.

20. *See id.*

21. *See id.* The court acknowledged that they have previously suggested that the inclusion of even one claim arising under federal law is sufficient for original

appeals agreed with that distinction, noting that in the former cases, supplemental jurisdiction under 28 U.S.C. section 1367(a) extends to cover the state law claims.<sup>22</sup> In the latter cases, supplemental jurisdiction is not extended to the claims.<sup>23</sup> Instead, the Eleventh Amendment prohibits the court from hearing and deciding the claim.<sup>24</sup>

The second part of Schacht's argument focused on the jurisdictional character of the difference between the claims.<sup>25</sup> The court of appeals found a difference, stating that neither section 1367 nor any other law permits supplemental jurisdiction in cases with federal claims<sup>26</sup> and an Eleventh Amendment bar; these cases are on a different footing than those that are not independently removable.<sup>27</sup> The Supreme Court responded to this argument, in part, within the analysis of Schacht's third argument.<sup>28</sup>

Third, Schacht applied an analogy to removal based on diversity jurisdiction under 28 U.S.C. section 1332.<sup>29</sup> As long as there is a claim against a non-diverse defendant, a diverse defendant can not remove a case to federal court.<sup>30</sup> Schacht argued that because the jurisdictional problem here was just as serious as in diversity situations, the presence of one claim should destroy removal jurisdiction in the same manner as in diversity cases.<sup>31</sup>

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jurisdiction. *See id.* However, that statement appears only in the context of cases involving both state law claims and federal law claims. *See id.*

22. *See id.* Section 1367 (a) states:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case of controversy . . . .

28 U.S.C. § 1367(a) (1994).

23. *See Schacht*, 118 S. Ct. at 2052.

24. *See id.*

25. *See id.*

26. *See id.*

27. *See id.* The Seventh Circuit went on to explain that this difference is due to the affirmative limitation which the doctrine of sovereign immunity imposed on jurisdiction. *See id.*

28. *See id.*

29. *See id.* Section 1332 (a)(1) provides original jurisdiction where the controversy exceeds \$75,000 and is between citizens of a different state. *See* 28 U.S.C. § 1332 (a)(1) (1994 & Supp. III 1998).

30. *See Schacht*, 118 S. Ct. at 2052; *see also* *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68-69 (1996).

31. *See Schacht*, 118 S. Ct. at 2052.

The Supreme Court was not convinced by Schacht's analogy and observed that in diversity cases where a non-diverse party is present, jurisdiction is automatically destroyed.<sup>32</sup> Further, it cannot be consented to or waived and cannot be ignored by the court.<sup>33</sup> In contrast, the Eleventh Amendment does not automatically destroy jurisdiction, rather, it grants the State power to assert or waive the defense of sovereign immunity.<sup>34</sup> Additionally, the court is not required to raise the defect *sua sponte*.<sup>35</sup> Other conditions, including timing of removal jurisdiction, further undermine the analogy.<sup>36</sup> These differences support different treatment for original jurisdiction purposes and destroy the proposed analogy.<sup>37</sup> Thus, if Schacht had originally filed his claim in federal court, that court would have had original jurisdiction, and Schacht would be allowed to remove to federal court.<sup>38</sup>

Finally, the Court rejected Schacht's last argument, which alleged that after the state asserted the Eleventh Amendment defense, the federal court lacked subject matter jurisdiction and should have remanded under 28 U.S.C. section 1447(c).<sup>39</sup> The Court stated that an ordinary reading of the statute shows that it refers to situations where the court lacks subject matter jurisdiction over *a case*, not over *one claim within a case*.<sup>40</sup> In addition, the statute's objective, to provide procedural guidance after removal, is ir-

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32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.* at 2053. Removal jurisdiction should be reviewed by looking at the status of the case at the time the complaint was filed, which is prior to defendant's answer. *See id.* Thus, the underlying relevant condition could not exist prior to removal because the state must assert the Eleventh Amendment bar as a defense in their answer. *See id.* As of the time of the filing, a case involving incomplete diversity would have been outside the jurisdiction of the federal court. *See id.*

37. *See id.* at 2053. The court further stated that in cases of diversity jurisdiction, original jurisdiction is destroyed by one claim against a non-diverse party. *See id.* However, with subject matter jurisdictional issues, the Court has previously assumed that the potential of an Eleventh Amendment bar over one claim will not destroy jurisdiction over the entire case. *See id.* The Court further stated that this case is more analogous to cases in which diversity is destroyed by a later event (e.g., change in citizenship of a party). *See id.* "In such cases a federal court will keep a removed case." *Id.*

38. *See id.* at 2053.

39. *See id.* at 2054. Section 1447 (c) provides "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c) (1994) (emphasis added).

40. *See Schacht*, 118 S. Ct. at 2054.

relevant to the problem presented here.<sup>41</sup>

*B. Rule 68—Offers of Judgment or Settlement*

The Minnesota Supreme Court recently resolved a conflict between Minnesota Statutes section 549 and Rule 68 of the Minnesota Rules of Civil Procedure.<sup>42</sup> Specifically, the court held that if a plaintiff rejects a Rule 68 settlement offer from a defendant that is ultimately more favorable than the judgment, the plaintiff is not denied costs and disbursements allowable under section 549.<sup>43</sup>

Amy Borchert (“Borchert”) sued Larry Maloney (“Maloney”) for damages from injuries she sustained as an automobile passenger when Maloney’s vehicle collided with hers.<sup>44</sup> Borchert rejected Maloney’s \$10,000 settlement offer made pursuant to Rule 68.<sup>45</sup> At trial, the jury awarded Borchert \$11,651 in damages, attributing sixty percent of the award to Maloney’s negligence and forty percent to the driver of the car Borchert was riding in.<sup>46</sup> After a reduction for comparative negligence and collateral source offsets, Borchert received a final damage award of \$4,502.40, plus costs and disbursements.<sup>47</sup> In addition, the trial court ordered Borchert to pay Maloney’s costs and disbursements since the net judgment was less than the Rule 68 settlement offer.<sup>48</sup>

The Minnesota Court of Appeals reversed the judgment, holding that “[w]here a plaintiff rejects a Rule 68 offer of settlement by a defendant and [ultimately] receives a judgment less favorable than the [Rule 68] offer, the plaintiff is denied costs and disbursements.”<sup>49</sup>

The Minnesota Supreme Court disagreed and upheld the holding of the trial court.<sup>50</sup> Before beginning its analysis, the court defined the conflict.<sup>51</sup> Under Rule 68,<sup>52</sup> when a settlement offer is

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41. *See id.* The statute section differentiates between removals due to lack of subject matter jurisdiction and removal for other reasons (e.g., the removal took place after expiration of pertinent time limits). *See id.*

42. *See Borchert v. Maloney*, 581 N.W.2d 838, 839 (Minn. 1998).

43. *See id.* at 840.

44. *See id.* at 839.

45. *See id.*; *see also* MINN. R. CIV. P. 68 (1998).

46. *See Borchert*, 581 N.W.2d at 839. Borchert was a passenger in the vehicle of an uninsured motorist. *See id.*

47. *See id.*

48. *See id.*

49. *Id.*

50. *See id.* at 840.

51. *See id.* at 839.

rejected, the offeree must pay the offeror's costs when the judgment is less favorable than the settlement offer.<sup>53</sup> Conversely, under the statute, a prevailing party is entitled to recover his or her costs.<sup>54</sup>

The court first determined the identity of the prevailing party.<sup>55</sup> The prevailing party is the party who receives the favorable decision or verdict.<sup>56</sup> The fact that the judgment against Maloney was more favorable than the Rule 68 settlement offer indicates that Maloney was partially successful.<sup>57</sup> Yet, Borchert prevailed on the merits and received a verdict and judgment in her favor.<sup>58</sup> Thus, the court held that it was clear that Borchert was the prevailing party.<sup>59</sup>

The court next analyzed whether Rule 68 precluded Borchert from recovering her costs and disbursements.<sup>60</sup> The court acknowledged the district court's finding that Rule 68 does not specifically include a requirement that the offeree pay for her own disbursements and costs.<sup>61</sup> To give effect to both the statute and the rule, the court agreed with the district court and held that Borchert was entitled to recover her costs and disbursements under the

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52. See MINN. R. CIV. P. 68 ("If the judgment finally entered is not more favorable to the offeree than the offer, the offeree must pay the offeror's costs and disbursements.").

53. See *Borchert*, 581 N.W.2d at 839.

54. See *id.*; see also MINN. STAT. § 549.02 (1998) (providing that costs shall be allowed upon a judgment in the plaintiff's favor of \$100 or more in an action only for the recovery of money); MINN. STAT. § 549.04 (1998) (providing that in every district court action, the prevailing party shall be allowed reasonable disbursements paid or incurred).

55. See *Borchert*, 581 N.W.2d at 839. Borchert argued that she was the prevailing party. See *id.* Her reasoning stemmed from the jury finding that Maloney was negligent and that Borchert sustained damages as a result of the negligence. See *id.* Conversely, Maloney argued that Borchert was not the prevailing party because the rejection of the settlement offer was the equivalent of a claim that her damages exceeded \$10,000. See *id.* at 840. Consequently, Maloney asserted that she was required to obtain a judgment in excess of \$10,000. See *id.* at 839-40.

56. See *id.* at 840. In determining who qualified as the prevailing party, the court considered the general result and inquired into who had succeeded in the action in view of the law. See *id.*

57. See *id.* 581 N.W.2d at 840.

58. See *id.*

59. See *id.*

60. See *id.* Maloney argued that allowing Borchert to recover her costs would be contrary to public policy and the purpose of Rule 68 because the purpose of Rule 68 is to promote settlements. See *id.*

61. See *id.*

statute.<sup>62</sup> The court stated, “[i]f the rule was intended to prevent an offeree who prevails on the lawsuit’s merits from recovering her costs and disbursements even though the judgment entered was less than the Rule 68 offer, it would specifically say so, as does [Federal Rule of Civil Procedure] 68.”<sup>63</sup> The federal rule states that the offeree is responsible for all costs incurred after the presentation of the settlement offer.<sup>64</sup>

The court further reasoned that a holding that Borchert was entitled to recover her reasonable costs and disbursements was not inconsistent with the purpose of Rule 68.<sup>65</sup> Rule 68 encourages settlement of lawsuits.<sup>66</sup> Even if, in the end, the offeree may recover her own costs, the effect of paying the offeror’s costs is still a powerful incentive for reaching a settlement.<sup>67</sup>

### C. Intervention

The federal circuit courts have differing views on whether standing under Article III<sup>68</sup> is required in cases of intervention.<sup>69</sup> The Eighth Circuit Court of Appeals clarified its position on the issue in *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*.<sup>70</sup> The court denied intervention of ten legislators due to a lack of standing.<sup>71</sup>

The legislators’ efforts to obtain standing stemmed from the Missouri Attorney General’s unsuccessful efforts to sustain family planning funding legislation that excluded Planned Parenthood from receiving funds.<sup>72</sup> The Missouri Legislature annually enacted

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62. *See id.*

63. *Id.*

64. *See id.*; *see also* FED. R. CIV. P. 68 (providing in relevant part: “[I]f the judgment finally obtained by the offeree is not more favorable to the offeree than the offer, the offeree must pay the costs incurred after the making of the offer.”).

65. *See Borchert*, 581 N.W.2d at 840-41.

66. *See id.* at 840. The court acknowledged that the advisory committee notes stated that “[the] principal effect of making an offer of settlement under Rule 68 is to shift the burden of paying costs properly taxable under Minn. R. Civ. P. 54.04.” *See id.* (citing MINN. R. CIV. P. 68, advisory committee’s note c (1985)). However, the court rejected the notes stating that, while helpful, the notes are not binding on the court. *See id.*

67. *See id.* at 841.

68. *See* U.S. CONST. art. III.

69. *See Planned Parenthood of Mid-Mo. and E. Kan., Inc. v. Ehlmann*, 137 F.3d 573, 577 (8th Cir. 1998).

70. 137 F.3d 573, 578 (8th Cir. 1998)

71. *See id.* at 575.

72. *See id.*



a program where the Department of Health ("Department") funded family planning services for low-income people.<sup>73</sup> Before 1995, the program did not prevent entities that performed abortions from participating, but restrained them from using the funds to promote or perform abortions.<sup>74</sup> In 1995, a bill was enacted by the Missouri Legislature that expressly limited these funds.<sup>75</sup> The Department interpreted the language of the bill to exclude Planned Parenthood because it performed abortion services.<sup>76</sup>

On May 23, 1996, Planned Parenthood, seeking an injunction, charged that the statute was unconstitutional.<sup>77</sup> The district court granted the motions for preliminary and permanent injunctions with an amended order on June 27, 1996.<sup>78</sup> The order enjoined the Department from: (1) excluding Planned Parenthood from the funds; (2) precluding submission by Planned Parenthood of proposals for funds; and (3) using different criteria to evaluate Planned Parenthood's proposals.<sup>79</sup> The Department, represented by the Missouri Attorney General, did not appeal.<sup>80</sup>

On May 17, 1996, the Missouri Legislature reenacted verbatim the language of the 1995 bill for the 1996 fiscal year.<sup>81</sup> The Department followed the amended order of the court and allowed Planned Parenthood to participate in the program.<sup>82</sup>

In 1997, the Missouri Legislature enacted a three tiered system, via House Bill 20 ("H.B. 20"), for appropriating funds for family planning services to the Department.<sup>83</sup> The first tier provided that "the Department could pay or grant family planning funds to public, quasi-public and private family planning organizations that did not provide or promote abortions."<sup>84</sup> If a court declared the first tier unconstitutional, then the Department could implement

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73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.* Planned Parenthood provides medical and family planning services to 26 Missouri counties. *See id.* Abortions are performed at two of the nine Missouri clinics. *See id.* Additionally, Planned Parenthood supports preserving legal and safe abortion services. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* at 575-76.

83. *See id.* at 576.

84. *Id.*

the second tier.<sup>85</sup> The second tier omitted funding to private organizations but kept in the provision that the funds could be appropriated to public or quasi-public organizations that did not provide abortion services.<sup>86</sup> In the event the second tier was declared unconstitutional, the third tier provided that the funds would only be appropriated to public organizations.<sup>87</sup>

The Governor had the option to line item veto H.B. 20 or to sign it as enacted.<sup>88</sup> Although he had expressed opposition to a scheme that would exclude Planned Parenthood, he signed the bill into law on June 26, 1997.<sup>89</sup> He then directed the Attorney General to seek clarification from the district court about the applicability of the 1996 injunction.<sup>90</sup> The Attorney General filed a motion to clarify on June 27, 1997, which stated that the Department desired to comply with the permanent injunction.<sup>91</sup> On June 30, 1997, via telephonic conference, the district court heard arguments.<sup>92</sup> That same day, the district court proclaimed that H.B. 20 was unconstitutional.<sup>93</sup> The Attorney General did not appeal the ruling.<sup>94</sup>

On July 25, 1997, ten Missouri senators and representatives who voted for H.B. 20 sought intervention to assist the Department in defending the constitutionality of H.B. 20.<sup>95</sup> The motion sought a right to intervene under section 24(a) of the Federal Rules of Civil Procedure, or for leave to intervene under 24(b) of the Federal Rules of Civil Procedure.<sup>96</sup> The Attorney General did not op-

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85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.* The legislators contend that the Attorney General did not defend the constitutionality of H.B. 20 and that he did not "attempt to explain the severability of the three-tiered system." *Id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.* FED. R. CIV. P. 24 (a) states, in part, that anyone will be permitted to intervene when: (1) a statute confers an unconditional right to intervene or (2) when the applicant claims an interest relation to the transaction and the disposition of the action may impair or impede the applicant's ability to protect their interest, unless the matter is adequately represented by existing parties. *See* FED. R. CIV. P. 24 (a). Rule 24(b) states, in part, that anyone may be permitted to intervene when: (1) a statute confers the right or (2) when an applicant's claim and the main action have a common question of law or fact. *See* FED. R. CIV. P. 24(b) The court should consider whether the intervention will unduly prejudice or delay the

pose the motion.<sup>97</sup> However, Planned Parenthood filed a motion in opposition to the legislators' motion to intervene.<sup>98</sup> The district court denied the motion to intervene, stating that the "legislators did not have the requisite Article III standing to litigate claims."<sup>99</sup>

The court recognized its previous decision in *Mausolf v. Babbit*<sup>100</sup> and held "that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in Federal Court."<sup>101</sup> Thus, an intervenor must both possess standing and satisfy the requirements of Rule 24.<sup>102</sup> The court disagreed with the legislators' claim that they possessed standing as legislators and citizens.<sup>103</sup>

The legislators first cited *Coleman v. Miller*<sup>104</sup> to support their claim of standing as legislators for an institutional injury.<sup>105</sup> In *Coleman*, the Supreme Court held that twenty state legislators had standing to challenge whether the State Lieutenant Governor had the authority to cast the deciding vote in favor of an amendment to the constitution involving child labor.<sup>106</sup> The Supreme Court concluded that because the legislators had voted against the amendment, they had a "plain, direct and adequate interest in maintaining the effectiveness of their votes."<sup>107</sup> The legislators here argued that their votes were nullified both by the Missouri Executive

adjudication of the rights of the original parties. *See id.*

97. *See Ehlmann*, 137 F.3d at 576.

98. *See id.*

99. *Id.* at 576.

100. 85 F.3d 1295 (8th Cir. 1996).

101. *Ehlmann*, 137 F.3d at 576 (quoting *Mausolf*, 85 F.3d at 1300).

102. *See Ehlmann*, 137 F.3d at 577. The legislators contended that they should have been allowed to intervene because they satisfied the four factors required for intervention under Rule 24 (a) of the Federal Rules of Civil Procedure. *See id.* at 576-77. "To intervene as of right, an applicant must (1) have a recognized interest in the subject matter of the litigation that (2) might be impaired by the disposition of the case and that (3) will not be adequately protected by the existing parties." *Mausolf*, 85 F.3d at 1299.

103. *See Ehlmann*, 137 F.3d at 577. Under Article III of the U.S. Constitution, the party seeking standing must have suffered an concrete and particularized "injury in fact" that is actual or imminent and that is "an invasion of a legally protect interest." *Id.* The injury must be casually connected to the conduct which must be "fairly traceable to the challenged action," and it must be likely, not speculative, that the injury will be "redressed by a favorable decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

104. 307 U.S. 433 (1939).

105. *See Ehlmann*, 137 F.3d at 577; *see also Coleman v. Miller*, 307 U.S. 433, 441 (1939).

106. *See Coleman*, 307 U.S. at 444.

107. *See id.* at 448.

Branch when they sought to clarify the legislation and by the Attorney General's collaboration with Planned Parenthood to reverse the ruling that H.B. 20 was unconstitutional.<sup>108</sup>

Next, the legislators tried to distinguish a recent Supreme Court decision relied on by the district court, *Raines v. Byrd*.<sup>109</sup> In *Raines*, the Supreme Court limited the scope of *Coleman* stating that the holding "stands (at most . . .) for the proposition that the legislators whose vote would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."<sup>110</sup> The Supreme Court went on to state that the Congressmen's claim did not fall within *Coleman* because "they have not alleged that they voted for a specific bill, that there was sufficient votes to pass the bill, and that the bill was nonetheless defeated."<sup>111</sup>

In the present case, the Eighth Circuit concluded that, under both the *Raines* and *Coleman* decisions, the legislators' votes were not nullified by the Missouri executive branch.<sup>112</sup> There was not nullification in the *Coleman* sense "that a bill [the legislators] voted for would have become law if their vote had not been stripped of its validity . . . ." <sup>113</sup> Further, the court stated that there was no interference in the legislative process by the Missouri executive branch.<sup>114</sup> The complaint merely concerned a disagreement over litigation strategy decisions.<sup>115</sup>

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108. See *id.* at 577. The legislators' specific claims contended that the Attorney General colluded with Planned Parenthood by "not arguing the constitutionality of H.B. 20 under *Rust v. Sullivan*, 500 U.S. 173 (1991), by not opposing Planned Parenthood's evidence presented in opposition to the motion to clarify, and by agreeing to allow Planned Parenthood to submit additional evidence." *Id.*

109. See *id.*; see also *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, six members of Congress filed suit challenging the constitutionality of the Line Item Veto Act. See 521 U.S. at 819. The six congressmen had voted against the Line Item Veto Act and contended that because the President could veto measures after signing them into law, the effect of their votes were altered. See *id.*

110. *Raines*, 521 U.S. at 818-19.

111. *Id.*

112. See *Ehlmann*, 137 F.3d at 578.

113. *Id.*

114. See *id.* The court noted that the legislature passed H.B. 20, which the Governor subsequently signed, to enforce the restrictions of the statute and to seek clarification of the injunction to secure that his administration did not act in contempt of court. See *id.*

115. See *id.*; see also *Moore v. U.S. House of Representatives*, 733 F.2d 946, 952 (D.C. Cir. 1984) (distinguishing between a distortion of the legislative process and general grievances about governmental conduct).

Additionally, the court stated that *Coleman* did not hold that legislators who voted for an act could intervene when a court declares an act by the state legislature to be unconstitutional.<sup>116</sup> Rather, it related to a question of standing for legislators where they contended their votes were nullified by an allegedly illegal action by the Lieutenant Governor.<sup>117</sup>

Finally, the legislators contended that they had standing pursuant to a Missouri Statute.<sup>118</sup> The statute allowed Missouri taxpayers standing to enforce the provisions of laws "prohibiting the use of public funds to perform, assist or encourage an abortion not necessary to save the mother's life."<sup>119</sup> The legislators claimed standing to "defend the constitutionality of an appropriations bill that was passed in compliance with the state's asserted interest as expressed by the above statute."<sup>120</sup>

The court recognized that when authorized by state law, legislators may acquire standing to advocate the constitutionality of a legislative statute.<sup>121</sup> However, the court rejected the legislators' argument that the statute applied because the argument distorted the statute's clear meaning "of granting taxpayer standing to enforce in state court prohibitions against funding abortion-related activities with public funds."<sup>122</sup>

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116. *See Ehlmann*, 137 F.3d at 578.

117. *See id.*

118. *See id.*

119. *Id.* (quoting MO. REV. STAT. § 188.220 (1997)).

120. *Id.*

121. *See id.*

122. *Id.*