

NO. A10-0215

State of Minnesota
In Supreme Court

Gregory Curtis, et al., individually and on behalf of
all others similarly situated,

Respondents,

vs.

Altria Group, Inc.,

Dismissed Defendant,

and

Philip Morris, Inc.,

Appellant.

**BRIEF AND APPENDIX OF *AMICUS CURIAE*
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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INTRODUCTION AND SUMMARY OF ARGUMENT

Minnesota Association for Justice (“MAJ”) submits this *amicus curiae* brief on one issue: What is the proper analysis for determining “public benefit” to permit a private litigant to bring suit under Minn. Stat. § 8.31, subd. 3a (the “Private AG Statute”)?¹

The Private AG Statute provides standing for persons injured by violations of designated substantive—including consumer protection—laws. The Private AG Statute plainly states that “any person injured” by a violation of these laws “may bring a civil action and recover damages” There is no reference to a public benefit test in the statute. In addition, this Court has emphasized that the statute is remedial and must be broadly construed to “eliminate financial barriers to the vindication of a plaintiff’s rights” and “enable individuals injured by the prohibited conduct to sue for damages.”

Nevertheless, in *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000)—decided 27 years after enactment of the Private AG Statute—this Court, in a divided opinion, established a public benefit test. It is clear, however, that *Ly* did not intend to impose an onerous—and in many cases impossible—burden. *Ly* was decided on narrow facts, an “isolated one-on-one transaction.” And the majority in *Ly* looked for guidance to the authority of the attorney general—which the Court characterized as “broad”—in assessing the scope of standing under the Private AG Statute.

¹ MAJ is an association of trial attorneys dedicated to the Constitution’s guarantee of justice for all. Pursuant to Minn. R. Civ. App. P. 129.03, no one affiliated with any party has participated in writing any part of this brief, and no person or entity, other than the *amicus curiae*, its members, or its counsel, has made or promised a monetary contribution to the preparation or submission of this brief.

To underscore the minimal burden of *Ly*, in *Collins v. Minn. Sch. of Bus.*, 655 N.W.2d 320 (Minn. 2003)—this Court’s only other decision directly on point—a unanimous Court had no difficulty finding public benefit where relatively few persons were injured and money damages were the only relief.

Neither *Ly* nor *Collins* sets forth a bright-line test. Nor, of course, does the statute itself. Thus, a variety of factors—which must be determined case-by-case—may be sufficient. For example, if the transaction is not one-on-one, as in *Ly*, or if misrepresentations are directed to the “public at large,” as in *Collins*, there is presumptively a public benefit. A suit may also benefit the public if it seeks only damages. After all, the Private AG Statute specifically provides for damages, and it is well recognized that damages serve a public benefit by deterring unlawful conduct and ensuring that the wrongdoer—and not the victim or the state—pays for its own misdeeds.

In short, if a private suit implicates wrongful conduct encompassed by the Private AG Statute—conduct that the Legislature has in effect designated as against the public interest by declaring unlawful and also by including within the ambit of section 8.31—any additional showing required for the public benefit test should be minimal, at best.

Any other result would move Minnesota further out of the mainstream.

As it stands, *Ly* is at odds with the law in the vast majority of states. Interestingly, this Court stated in *Ly* that other states had adopted a public interest requirement, but failed to note these are a distinct minority. The State of Washington, for example, one of only two states cited by *Ly*, has a public interest test that, in the words of the Washington

Supreme Court, puts the state “very clearly in the minority” and has been “subject to harsh criticism.”

Minnesota’s minority position is accentuated by a spate of federal court decisions that eviscerate the Private AG Statute. A number of these federal decisions create a bright-line test and dismiss claims where plaintiffs seek only damages. Neither *Ly* nor *Collins* even suggests such a rule. Indeed, *Collins* found a public benefit where the only relief was damages. Some of these federal cases were decided before *Collins*, but even some decided afterwards inexplicably fail to cite this key decision.

For these reasons, MAJ respectfully urges this Court to look to the Private AG Statute and its legislative history, which leave no doubt that the public benefit is served when persons injured by a violation of this state’s consumer laws are given broad rights to seek relief.

ARGUMENT

1. The Private AG Statute, on its Face, Is “Unequivocally Broad”

The starting point for analysis, of course, is the language of the statute itself. *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 5 (Minn. 2001).

The statute is titled “*Private Remedies*”—not *public* remedies. Minn. Stat. § 8.31, subd. 3a (emphasis added). The statute does not mention “public benefit.” The statute expressly provides a cause of action for injured persons to “bring a civil action and recover damages” *Id.* The statute also provides for “equitable relief”; there is no requirement, however, that a private plaintiff seek equitable relief, let alone injunctive relief that halts unlawful conduct. *Id.*

In its entirety, the Private AG Statute states:

Subd. 3a. Private remedies.

In addition to the remedies otherwise provided by law, *any person injured* by a violation of any of the laws referred to in subdivision 1 may bring a *civil action and recover damages*, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, *and receive other equitable relief* as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

Minn. Stat. § 8.31, subd. 3a (emphasis added).

This Court took note of this broad wording in *Group Health*:

In describing who may bring an action, subdivision 3a does so in *the broadest terms*, stating that “*any person* injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages.” *Id.* (emphasis added). Neither the private remedies statute nor the substantive statutes contain any language restricting those who may sue to purchasers or consumers.

Thus, the plain and unambiguous language of the governing statute allows “any person” to bring a private action for redress of violations of the misrepresentation in sales statutes. Specifically, Minn. Stat. § 8.31, subd. 3a, does not limit potential plaintiffs to purchasers of the defendant’s goods.

621 N.W.2d at 8 (emphasis added); *see also id.* at 11 (“[T]he legislature has spoken in *unequivocally broad terms.*”) (emphasis added).

2. The Private AG Statute Is Remedial and Reflects a Legislative Intent to “Eliminate Financial Barriers to the Vindication of a Plaintiff’s Rights” and “Encourag[e] Aggressive Prosecution”

In *Group Health*, this Court further stated:

[W]e cannot overlook the oft-repeated rule of statutory interpretation that, “when the words of a law in their application to an existing situation are

clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.”

621 N.W.2d at 9 (citing Minn. Stat. § 645.16).

Here, the words of the law *and* “the spirit” support an expansive reading of who may bring an action.

As this Court recognized in *Group Health*, this is a “remedial statute,” and “the naturally broad interpretation of ‘any person’ is consistent with *the overall tenor of the statutes . . . to maximize the tools* available to stop the prohibited conduct.” *Id.* at 6, 9 (emphasis added). The Court stated:

The legislative history of the private remedies statute also emphasizes this expansion of enforcement opportunities. . . . Like the wording of the statute, the description of its goal is broad: to enable individuals injured by the prohibited conduct to sue for damages and in doing so complement the limited enforcement resources of the attorney general.

Id. at 10 (emphasis added).²

Similarly, in *State v. Philip Morris Inc.*, this Court, in discussing the Private AG and consumer (and antitrust) statutes, stated: “These provisions reflect a clear legislative policy *encouraging aggressive prosecution* of statutory violations.” 551 N.W.2d 490, 495 (Minn. 1996) (emphasis added). And in *Ly*, this Court stated: “[W]e acknowledged the legislative intent to *eliminate financial barriers* to the vindication of a plaintiff’s rights . . . and to *provide incentive* for counsel to act as private attorney general.” 615 N.W.2d at 311 (emphasis added) (quoting *Church of the Nativity of Our Lord v. Watpro*,

² The Court in *Group Health* also stated that “we do not hold that the scope of those enforcement statutes is entirely without limit.” 621 N.W.2d at 11 n. 7 (citing *Ly*, 615 N.W.2d at 314).

Inc., 491 N.W.2d 1, 8 (Minn. 1992) (quoting *Liess v. Lindemyer*, 354 N.W.2d 556, 558 (Minn. App. 1984))).³

3. Despite the Language of the Private AG Statute and its Legislative History, This Court Imposed a Public Benefit Requirement

a. *Ly v. Nystrom*

Ly involved fraud in the sale of a restaurant, an “isolated one-on-one transaction.” 615 N.W.2d at 310. This Court held that while the unlawful practices were covered by the Consumer Fraud Act, the litigation did not serve a public benefit and thus the Private AG Statute did not apply. *Id.* at 310, 314. This was the first time this Court established a public benefit requirement—27 years after the statute was adopted in 1973. *Id.* at 313.

The Court stated:

Since the Private AG Statute grants private citizens the right to act as a “private” attorney general, the role and duties of the attorney general with

³ One essential tool in fulfilling this legislative intent is the attorneys’ fee provision of the Private AG Statute. *Amicus Minnesota Defense Lawyers Association* argues that “there is no real concern that private claimants will not pursue their lawsuits absent the potential for recovering attorneys’ fees” Minn. Def. Law. Ass’n Br. at 6. This ignores the plain language of the statute—which is in *express derogation* of the common-law “American Rule”—and its legislative history. This also ignores the real-world costs of litigation. In *Ly*, this Court quoted *Church of Nativity*:

Nativity’s pursuit of a remedy has involved much time and labor; it has been difficult, lengthy and expensive. If there are no attorney fees awarded in this case, Nativity will spend virtually all of its damage award paying its attorneys.

Ly, 615 N.W.2d at 311 (quoting *Church of the Nativity*, 491 N.W.2d at 8). (*Ly* cited portions of *Church of Nativity* with approval; because *Church of Nativity*, however, did not engage in a public benefit analysis, *Ly* stated that to the extent the case “could be construed to permit recovery . . . without proof of public benefit, it is overruled.” *Ly*, 615 N.W.2d at 314 n. 25.)

respect to enforcing the fraudulent business practices laws must define the limits of the private claimant under the statute.

Id. The Court concluded:

The duty of the attorney general’s office, and thus the purpose of any statute granting private citizens authority to bring a lawsuit in lieu of the attorney general, is the protection of public rights and the preservation of the interests of the state.

Based on these considerations *we hold that the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public.*

Id. at 313-14 (emphasis added).⁴

Ly did not intend for this public benefit requirement to foreclose a remedy—and, in many cases, close the courthouse door—to thousands of Minnesota citizens.

For example, while the Court analogized the authority of a private plaintiff under the statute to that of the attorney general, the Court also specifically recognized the “broad enforcement authority” of the attorney general. *Id.* at 308; *see also id.* at 313 (citing Minn. Stat. § 8.01, which sets forth the attorney general’s expansive statutory

⁴ Justices Page and Gilbert dissented from the majority’s “newly discovered ‘public benefit’ requirement” *Ly*, 615 N.W.2d at 315 (Gilbert, J., dissenting). Justice Page stated:

Had the legislature intended to limit the scope of section 8.31 subdivision 3a to those causes of action that have a public benefit, it could have easily done so. Whether for good or for ill, by the plain words of the statute, it did not. This court is not authorized nor is it this court’s role to read into a statute that which the legislature, by its plain language, has left out.

615 N.W.2d at 315. Justice Gilbert joined Justice Page’s dissent and also wrote separately that private enforcement of consumer laws by itself serves the public interest. *Id.* at 316 (“It creates an unreasonable result to hold that enforcement of the state’s laws does not benefit the public generally.”).

authority and *Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961), which recognizes the attorney general's additional common-law authority). (*See also* Section 4c below.)

The Court also looked to the legislative history of the Private AG Statute, quoting legislators who underscored that a goal of the statute was to allow a person to sue for damages. *Ly*, 615 N.W.2d at 311. (*See also* Section 4b below.)

In addition, the Court cited three Court of Appeals decisions where, the Court stated, a public benefit had been required for an award of attorneys' fees under the Private AG Statute, *id.* at 312, but which also demonstrate the traditional, broad-ranging use of the statute in Minnesota. In the first cited case, *Liess*, one individual successfully sued under the Private AG Statute for fraud in connection with the sale of her house. 354 N.W.2d at 557. In the second cited case, *Untiedt v. Grand Lab., Inc.*, one farm couple successfully sued the manufacturer of a defective cattle vaccine for lost milk production; in affirming, the Court of Appeals noted that the trial court found an award of fees "would advance the public interest because the agricultural community has been particularly susceptible to misrepresentation and the possibility of an award would provide an incentive for experienced litigators to take on similar cases." 1994 Minn. App. LEXIS 1313, at *9 (Minn. App. Dec. 27, 1994). In the third cited case, *Wexler v. Bros. Entm't Group, Inc.*, one father sued after his son incurred \$11.89 in unreimbursed charges in a telephone trivia game. 457 N.W.2d 218, 220 (Minn. App. 1990). By the time of appeal, the telephone company had entered into an assurance of discontinuance with the attorney general. *Id.* at 222. The Court of Appeals nevertheless allowed the

case to proceed, finding that nominal damages support a cause of action under the Consumer Fraud Act. *Id.*

Nothing in *Ly* indicates that this Court intended its decision to unleash a sea change from this Minnesota law, which, in fact, *Ly* cited with approval.

b. *Collins v. Minn. School of Business*

Less than three years after *Ly*, this Court left no doubt that the public benefit test should be easily satisfied. In *Collins*, 18 former students sued the Minnesota School of Business (“MSB”), alleging that the school made false and misleading statements about its sports medicine program. 655 N.W.2d at 322. The trial court, citing *Ly*, held that the claims did not benefit the public because the persons allegedly harmed were a “relatively small group.” *Id.* at 323-24.

The underlying litigation in *Collins* was resolved with a Rule 68 offer of judgment, which included only monetary relief. *Id.* at 323. Nevertheless, this Court had no hesitation in finding a public benefit. The Court stated that the trial court erred in focusing “on the number of ‘persons who were injured,’” and that this “ignor[ed] the fact that the MSB misrepresented the nature of the program to the public at large.” *Id.* The Court then took note of a number of factors that supported a benefit to the public: the school offered its programs to the general public; more than 1,200 students enrolled in all of its programs; the sports medicine program was licensed by the state; and the school made misrepresentations in a television advertisement and numerous sales presentations. *Id.*

Appellant PMUSA argues that the determining factor in *Collins* was that the school changed the challenged curriculum and stopped television advertisements after suit was filed. App. Br. at 15. While these factors are certainly relevant and by themselves sufficient indicia of public benefit, they are not necessary in every case. In fact, this Court never mentioned that the advertising stopped; the quote in Appellant’s brief is from the decision of the Court of Appeals. Similarly, although this Court noted in its recitation of facts that the school changed its curriculum after students complained and suit was filed, the Court did not list this factor in its discussion of public benefit. *Collins*, 655 N.W.2d at 322, 329-30. Moreover, there is no indication that the school’s remedial acts were pursuant to an injunction; neither this Court nor the Court of Appeals ever mentions injunctive relief.

4. *Ly* and *Collins* Must Be Applied Consistent With the Plain Language of the Private AG Statute and the Legislative Intent

a. A variety of factors satisfy the public benefit test

Ly and *Collins* do not set forth a bright-line rule. Nor does the Private AG Statute. “Public benefit” is, by its very nature, amorphous.⁵

Under *Ly*, it is evident that if more than one person is injured there is presumptively a public benefit. In fact, *Ly* does not hold that *all* one-on-one transactions fail the public benefit test.

⁵ It would be especially inappropriate to formulate a blanket rule in a case such as the present, with its unique facts. See App. Br. at 16, 18 (noting “unique combination of undisputed facts”).

Under *Collins*, there is presumptively a public benefit if advertising is directed to the public at large.

Also, in *Collins*, as discussed above, the advertising stopped and the curriculum changed after the filing of suit. 655 N.W.2d at 330. Although this Court did not appear to base its holding on these facts, this type of conduct is certainly presumptive of a public benefit.

Another factor noted in *Collins* was that the educational program was licensed by the state. *Id.* There is, of course, a public benefit in ensuring that government-sanctioned activities are not conducted fraudulently, especially when budgetary restraints may severely impact the ability of government agencies to ensure compliance.

In addition, *Ly* recognized that the Private AG Statute provides for the award of investigative costs and noted a public interest if “fruits of a successful investigation in a matter of public interest, would be available to others and the attorney general” 615 N.W.2d at 314 n. 24. In other words, the public benefit test should be satisfied if discovery in private litigation is subsequently used by the attorney general or other victims with similar claims.

Most importantly, neither *Ly* nor *Collins* purported to set forth an exclusive list of factors. In both cases, this Court focused on the conduct of the defendant. After all, the essence of the Private AG Statute is to discourage and penalize conduct that violates the designated laws. See *Group Health*, 621 N.W.2d at 10 (describing goal of statute “to

enable individuals *injured by the prohibited conduct* to sue for damages”) (emphasis added).⁶

b. A suit seeking damages serves a public benefit and is expressly authorized by the statute

A private plaintiff may seek damages—and still serve a public benefit—under the Private AG Statute. The title of the statute is “Private Remedies” and the text expressly provides for damages. As this Court stated in *Ly*:

The Private AG Statute, section 8.31, subdivision 3a, further provides that “any person injured by a violation” of the laws entrusted to the attorney general to investigate and enforce *may recover damages* together with costs and attorney fees: “In addition to the remedies otherwise provided by law, any person injured by a violation” of . . . [Minn. Stat. § 325F.69] *may bring a civil action and recover damages*, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees” Minn. Stat. § 8.31, subd. 3a.

615 N.W.2d at 310 (emphasis added); *see also Group Health*, 621 N.W.2d at 10 (“Like the wording of the statute, the description of its goal is broad: to enable individuals injured by the prohibited conduct to *sue for damages*”) (emphasis added).

The legislative history, recited in *Ly*, also makes it clear that the statute was intended to allow—even encourage—injured persons to sue for damages. The Court quoted the author of the bill, Senator Borden, as stating that the goal was to:

⁶ The Court expressed concern in *Ly* that if the public benefit is not taken into account, “‘every artful counsel could dress up his dog bite case’ to come under an attorney’s fees statute.” *Ly*, 615 N.W.2d at 312 (quoting *Liess*, 354 N.W.2d at 558 (quoting *Boland v. City of Rapid City*, 315 N.W.2d 496, 503 (S.D. 1982))). But a focus on the nature of the wrongful conduct ensures that the typical dog bite case—which does not involve “fraud, false pretense, false promise, . . . or deceptive practice,” *see* Minn. Stat. § 325F.69—would not fall under the Private AG Statute. The “dog bite” quote also must be read in context. *Liess*, the case quoted in *Ly*, involved a successful suit under the Private AG Statute for a one-on-one transaction. *Liess*, 354 N.W.2d at 557.

allow the individual person to *bring a civil action for the damages he sustained . . .* it's a great means of private enforcement. It's simply impossible for the Attorney General's office to investigate and prosecute every act of consumer fraud in this state. . . . [And] if an individual could bring an action, he can do some of the prosecuting, he can do some of the enforcing, he can provide some of the protection for himself and others that the Attorney General's office . . . can not do today

Ly, 615 N.W.2d at 311 (emphasis added).

Ly also quoted Representative Sieben in a 1973 hearing stating that under the bill “a private citizen may take the person to court . . . when the citizen has been defrauded and *he may recover damages plus reasonable attorney's fees or injunctive relief.*” *Id.* (emphasis added).

Moreover, it is well recognized that private damages serve a public benefit by deterring wrongful conduct and ensuring that the wrongdoer pays for the consequences of its unlawful activity. *See generally* Dan B. Dobbs, *THE LAW OF TORTS* 17, 19 (West Group 2000). This Court recognized this principle in *Group Health* in analogizing Minnesota's consumer statutes to the broad standing under the Clayton Act:

Congress sought to create a private enforcement mechanism that would *deter violators and deprive them of the fruits of their illegal actions*, and would provide ample compensation to the victims of antitrust violations.

621 N.W.2d at 11 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982)) (emphasis added).

The Minnesota Court of Appeals has also recognized this concept in the context of the Private AG Statute:

A “public benefit” should be viewed not only as a determination of liability but also as a determination of *the consequences of that liability*. The most significant aspect of the *Burtch* litigation was its *deterrent effect* on mobile-

park owners from future similar violations of residents' rights. . . .
[P]otential future violators must be shown that the consequence of a
violation could be a significant monetary award.

Burtch v. Oakland Park, Inc., 2006 Minn. App. Unpub. LEXIS 672, at *24 (Minn. App.
July 3, 2006) (emphasis added).

**c. The enforcement authority of the attorney general is expansive
and includes victim-specific monetary relief**

**i. The attorney general has broad authority pursuant to
statutes and the common law**

As discussed above, the *Ly* decision rests in part on the scope of the attorney
general's authority.⁷

The statutory powers of the attorney general are far-reaching, and include
appearing “whenever, in the attorney general’s opinion, the interests of the state require
it.” Minn. Stat. § 8.01. The attorney general also has broad common-law authority. In
Slezak, cited in *Ly*, the Court stated:

[The attorney general’s] powers are not limited to those granted by statute
but include extensive common-law powers inherent in his office. He may
institute, conduct, and maintain all such actions and proceedings as he
deems necessary for the enforcement of the laws of the state, the

⁷ While the Court discussed the role and duties of the attorney general in *Ly*, the
holding is simply that the Private AG Statute applies if the action “benefits the public.”
615 N.W.2d at 314. There can be no exact match between the unique authority of the
attorney general and that of a private plaintiff. Indeed, it is far-fetched to suggest that a
private party could act on behalf of the attorney general, given the constitutional
implications. Even in section 8.31, the attorney general is granted powers not provided
under the Private AG Statute. For example, a private plaintiff cannot bring an action
without demonstrating that he has been “injured by a violation,” but there is no such
restraint on the attorney general (except where the state sues in its proprietary capacity).
Minn. Stat. § 8.31, subd. 3a. The attorney general—but not a private plaintiff—is also
granted the authority to arrest violators, obtain discovery without commencing an action,
and seek civil penalties. *Id.*, subds. 2 and 3.

preservation of order, and the protection of public rights. . . . [T]he courts will not control the discretionary power of the attorney general in conducting litigation for the state.

Slezak, 110 N.W.2d at 5 (emphasis added); see also *State v. City of Fraser*, 254 N.W. 776, 778-79 (Minn. 1934) (“[T]he discretion of the Attorney General is plenary.”); *State v. Robinson*, 112 N.W. 269, 272 (Minn. 1907) (“The duties are so numerous and varied that it has not been the policy of the legislatures of the states of this country to attempt specifically to enumerate them.”).

The sole restriction on the attorney general’s authority appears to be that he or she act in the public interest. See *Humphrey v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987) (“a government litigator must take positions with the common public good in mind, unlike a private practitioner who seeks vindication of a particular result for a particular client”). As discussed immediately below, this is altogether consonant with seeking monetary relief for injured citizens.

ii. The attorney general has the authority to seek victim-specific monetary relief and this serves the public interest

It is well established that the attorney general has the authority to seek monetary restitution for citizens, even absent statutory authorization. See, e.g., *State v. Alpine Air Prod., Inc.*, 500 N.W.2d 788, 789-90 (Minn. 1993) (affirming restitution for purchasers of air purifiers in attorney general suit); *State v. Nw. Bell Tel. Co.*, 304 N.W.2d 872, 876-77 (Minn. 1981) (affirming common-law authority of attorney general to seek refunds on behalf of telephone subscribers); *State v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. App.

1987) (affirming attorney general authority to seek restitution on behalf of defrauded health club members under common law and doctrine of *parens patriae*).

Minn. Stat. § 8.31 recognizes this authority. Subdivision 3c states: “The courts of this state are vested with jurisdiction to appoint an administrator in actions *brought by the attorney general* under this section, for purposes of . . . collecting, administering, and distributing judgments *obtained by the attorney general for the benefit of persons.*” Minn. Stat. § 8.31, subd. 3c (emphasis added); *see also id.*, subd. 2c (“If a court of competent jurisdiction finds that *a sum recovered under this section for the benefit of injured persons* cannot reasonably be distributed to the victims . . . then the court may order that the money be paid into the general fund.” (emphasis added)).

Such a recovery—for injured persons—benefits the public. For example, in *E.E.O.C. v. Waffle House, Inc.*, the U.S. Supreme Court found that an agency enforcement action seeking reinstatement and damages under the Americans with Disabilities Act for a single employee—“victim-specific relief”—served the public interest. 534 U.S. 279 (2002). The Court stated:

[T]he agency may be seeking to *vindicate a public interest*, not simply provide make-whole relief for the employee, *even when it pursues entirely victim-specific relief.*

Id. at 296 (emphasis added).

The Minnesota Court of Appeals quoted this language in *State v. Cross Country Bank, Inc.*, where the attorney general sought, *inter alia*, an injunction and restitution for credit card holders. 703 N.W.2d 562, 569 (Minn. App. 2005). The Court of Appeals further stated:

The state is asserting a state interest that is based on the facts involving individual card holders. *See Standard Oil Co.*, 568 F. Supp. at 565 (stating that when the state acts in its quasi-sovereign capacity in a *parens patriae* action, “the state becomes, in effect, the embodiment of its citizens. *A harm to the individual citizens becomes an injury to the state*, and the state in turn becomes the plaintiff.”).

It is not dispositive that the attorney general seeks victim-specific relief or that the claim is based on the facts that could permit an individual to obtain relief through a private tort claim. That was the situation in *Waffle House* as well. The state’s purpose in bringing the claim is to secure protection of a public interest. The United States Supreme Court specifically recognized that *future violations may be best deterred by seeking victim-specific monetary relief, rather than non-victim-specific injunctive relief*. *See Waffle House*, 534 U.S. at 295; 122 S. Ct. at 765 (noting that “punitive damages may often have a greater impact . . . than the threat of an injunction.”).

Id. at 570 (emphasis added).⁸

5. Minnesota Became a Minority State Under *Ly*, and Subsequent Federal Court Decisions Created New Law, Eviscerating the Private AG Statute

a. Minnesota stands in a small minority of states that impose a public benefit requirement

Only a handful of states—no more than seven—require a showing of public benefit (or public interest) for a private party to sue under their consumer laws. Carolyn L. Carter and Jonathan Sheldon, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 742

⁸ Thus, an attorney general suit seeking restitution for the benefit of injured persons does not convert a public enforcement action into a private lawsuit. For example, if the state sues under the *parens patriae* doctrine, the state asserts a “quasi-sovereign” interest of its own. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982). This is a “set of interests that the State has in the well-being of its populace,” including the state’s interest “in the health and well-being—both physical *and economic*—of its residents in general.” *Id.* at 602, 607 (emphasis added).

(National Consumer Law Center 7th ed. 2008) (“Almost all states reject a public interest requirement.”).

In *Ly*, this Court stated that “[o]ther state courts have similarly held that a public purpose must be demonstrated.” 615 N.W.2d at 312 n. 18. *Ly* does not mention that these are a small minority. Moreover, the only two states mentioned in *Ly*—Illinois and Washington—provide questionable support.

As *Ly* notes, an intermediate Illinois appellate court found that a plaintiff must allege conduct that “implicates consumer protection concerns.” *Id.* at 312 n. 18 (quoting *Brody v. Finch Univ. of Health Sciences*, 698 N.E.2d 257, 268-69 (Ill. App. Ct. 1998)). *Ly* fails to note, however, that the Illinois court also stated that a plaintiff need *not* prove “a public injury, a pattern, or an effect on consumers generally,” a requirement expressly “dispensed” by Illinois statute. *Brody*, 698 N.E.2d at 269.

And the Washington precedent cited in note 18 of *Ly*—*Lightfoot v. McDonald*, 544 P.2d 88 (Wash. 1976)—was *repudiated* by the Washington Supreme Court *before* the decision in *Ly*. *Lightfoot* established a public interest test similar to that subsequently adopted in *Ly*. See *Lightfoot*, 544 P.2d at 90 (“ . . . an act or practice of which a private individual may complain must be one which also would be vulnerable to a complaint by the Attorney General under the act.”). But in 1980—two decades *before Ly*—the Washington Supreme Court rejected that test:

The “Attorney General” test for sufficiency of public interest appears to have been little utilized or understood and apparently has yielded conflicting results.

Anhold v. Daniels, 614 P.2d 184, 187 (Wash. 1980). The Washington Supreme Court then fashioned a new test, which included whether the defendant’s conduct had the potential for repetition. *Id.* at 188. On facts similar to *Ly*—the sale of a partnership in a restaurant to a *single* inexperienced investor—the Washington Supreme Court stated that the new test would be satisfied if defendants solicited only *one* other person. *Id.*

Six years later (and still long before the *Ly* decision), the Washington Supreme Court “substantially changed” the public interest test yet again and adopted a multi-factored analysis. *Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.*, 719 P.2d 531, 535, 537-38 (Wash. 1986). The court stated that the public interest should be determined “from several factors, depending on the context in which the alleged acts were committed.” *Id.* at 537; *see also id.* at 538 (“not one of these factors is dispositive, nor is it necessary that all be present”). The court stated:

Since the time of *Lightfoot* our public interest requirement has been subject to harsh criticism. . . . Indeed, Washington is very clearly in the minority in requiring a public interest showing of a private plaintiff.

Id. at 536. The court acknowledged that of 42 states with a private right of action under consumer statutes, “only 6 have ever required a public interest showing of a private plaintiff under any circumstances,” and only two—Washington and Georgia—“unequivocally require a showing by all private plaintiffs of public interest impact.” *Id.*

b. Many—but not all—federal decisions in Minnesota expand the public benefit doctrine far beyond this Court’s precedent

In the wake of *Ly*, subsequent decisions from the federal court in Minnesota moved this state further out of the mainstream. A number of these federal decisions

establish a bright-line test, requiring, for example, that plaintiffs seek relief other than damages. Not surprisingly, Appellant PMUSA relies heavily on these federal decisions. *See, e.g.*, App. Br. at 15-16.⁹

In *Behrens v. United Vaccines, Inc.*, for example, cited *passim* by Appellant, the federal magistrate found no public benefit even though a distemper vaccine sold to mink farmers was marketed to others in the same allegedly deceptive manner. 228 F. Supp. 2d 965, 972 (D. Minn. 2002) (Erickson, Mag.). The magistrate stressed that the plaintiffs sought no equitable relief. *Id.* The magistrate failed to note that there was no equitable relief in *Collins* (and focused instead on the school's remedial conduct which, as discussed above, was not pursuant to an injunction). *Id.* at 970. The magistrate discussed only the decision of the Court of Appeals in *Collins*, as this Court's decision had not yet issued. *Id.*¹⁰

Similarly, in *Pecarina v. Tokai Corp.*, the federal court found no public benefit—despite advertisements to the public at large—because plaintiffs sought only damages in a personal injury suit. 2002 U.S. Dist. LEXIS 9047, at *15 (D. Minn. May 20, 2002)

⁹ *Amicus* Minnesota Defense Lawyers Association similarly urges this Court to adopt a test that, in fact, mirrors these federal cases. *See* Minn. Def. Law. Ass'n Br. at 9-10 (proposing test based on “objective standards”). The Defense Lawyers also urge that the test be “uniformly applicable in all cases,” *id.* at 8, despite acknowledging that the present case is “unique and particular,” *id.* at 3.

¹⁰ The facts in *Behrens* were strikingly similar to *Untiedt*. In *Untiedt*, a husband and wife sued the manufacturer of a defective cattle vaccine and won damages and fees under the Private AG Statute. 1994 Minn. App LEXIS 1313, at *7, 9. As discussed above, the *Untiedt* decision was cited with approval in *Ly*.

(Montgomery, J.). *Pecarina* was decided before this Court’s decision in *Collins*—but after the Court of Appeals decision, which the federal court did *not* cite.

Even *after* this Court’s decision in *Collins*, some federal decisions—including cases cited by Appellant—continue to find no public benefit on the basis that the plaintiff sought damages, *without* citing *Collins*. See, e.g., *PCS Prof’l Claim Serv., LLC v. Brambilla’s Inc.*, 2007 U.S. Dist. LEXIS 82830, at *17-19 (D. Minn. Nov. 6 2007) (Frank, J.) (focusing on the personal remedy sought by plaintiff and failing to mention *Collins*); *Kalmes Farms, Inc. v. J-Star Indus., Inc.*, 2004 U.S. Dist. LEXIS 683, at *18 (D. Minn. Jan. 16, 2004) (Frank, J.) (finding that the product was no longer in production and stating, while failing to mention *Collins*, that “The Court also finds that Kalmes Farms’ decision to seek only money damages is persuasive in determining whether the suit was brought for the benefit of the public.”).

The collective effect of these activist federal decisions has been to severely limit, if not entirely eliminate, the availability of a damages recovery under the Private AG Statute. Indeed, it is hard to image a set of rules better designed to defeat the remedial purposes of the consumer protection laws and the Private AG Statute than those that have been judicially created by these federal district court decisions.

Not all federal decisions, however, have strayed. For example, in *Kinetic Co. v. Medtronic, Inc.*, an employer sued on behalf of a putative class of third-party payors seeking reimbursement for medical expenses from defective cardiac devices. 672 F. Supp. 933, 938 (D. Minn. 2009) (Rosenbaum, J.). Suit was filed for damages *after* the devices were recalled. *Id.* at 939. Still, the court found a public benefit, stating: “[T]he

‘public benefit’ requirement is *not onerous*.” *Id.* at 946 (emphasis added). The court noted that this was not a “one-off transaction”; that more than 87,000 defibrillators were allegedly implanted after defendant knew of the defects; and that misrepresentations were made to the public and not disclosed to the FDA. *Id.* The court stated:

Medtronic’s decision to deny third-party payors recompense is an effort to pass off the cost and expense it caused to innocent employers or insurers who must, perforce, either charge the public more to cover the cost of health care, or absorb the cost themselves. As such, *plaintiff’s effort to place this cost where plaintiff alleges it ought be borne may well provide a public benefit.*

Id. (emphasis added).¹¹

Similarly, in *ADT Sec. Servs., Inc. v. Swenson*, the court found a public benefit in a wrongful death suit for damages. 687 F. Supp. 2d 884, 892 (D. Minn. 2009) (Tunheim, J.). After a break-in and murder, next-of-kin sued the provider of a home security system, alleging, among other things, misrepresentations that were part of the defendant’s nationwide practices. *Id.* at 888, 892. Relying on *Collins*, the court rejected the argument that a plaintiff must seek equitable relief to satisfy the public benefit test. *Id.* at 891-92; *see also In re Nat’l Arbitration Forum Trade Practices Litig.*, 704 F. Supp. 2d 832, 839 (D. Minn. 2010) (Magnuson, J.) (stating, in consumer class action, that “Plaintiffs’ continued pursuit of monetary damages for the class against NAF has a public benefit.”).

¹¹ Most of the claims in *Kinetic* were later dismissed on federal preemption grounds, without discussion of the Private AG Statute or public benefit. *Kinetic Co. v. Medtronic, Inc.*, 2011 U.S. Dist. LEXIS 42398 (D. Minn. Apr. 19, 2011).

CONCLUSION

As this Court has recognized, the plain language of the Private AG Statute—and the legislative intent—is to “eliminate financial barriers to the vindication of a plaintiff’s rights”; to “enable individuals injured by the prohibited conduct to sue for damages”; to “encourag[e] aggressive prosecution”; and to “maximize the tools available to stop the prohibited conduct.” Yet, as applied today (particularly in federal court), the statute as conceived by the Legislature is virtually unrecognizable. As the result of a misreading of *Ly*—which itself is deeply flawed—an untold number of Minnesota citizens find themselves without relief.

Amicus MAJ urges this Court to re-affirm the vitality of the Private AG Statute in the vindication of the rights of injured parties, through litigation that serves as an effective weapon against wrongdoers. This will aid the attorney general in her fight to uphold the laws of this state; ensure that wrongdoers—and not innocent victims or the state (especially in this era of severe budgetary constraints)—pay for the consequences of their unlawful conduct; and keep the marketplace competitive for ethical and law-abiding businesses.

Dated: May 20, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. Civ. P. 132.01, subd. 3(c) in that it is printed in a 13-point, proportionately spaced typeface, and contains 6,802 words, excluding the Table of Contents and Table of Authorities. This brief was prepared using Microsoft Word 2003.

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