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By B. Prasad, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

UNDERDOG SPORTS, LLC, d/b/a Underdog Fantasy, Petitioner, v. ROB BONTA, in his official capacity as Attorney General of California; and CALIFORNIA DEPARTMENT OF JUSTICE, Respondents.	Case No. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION** **Judge: Hon.** **Department:**

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I. INTRODUCTION

Absent relief from this Court, Attorney General Rob Bonta will issue an opinion later this week that will decimate fantasy sports in California. Attorney General Bonta should be enjoined from doing so, not because he is wrong in his views on the legality of fantasy sports—though he certainly is—but because by statute, the Attorney General can only issue opinions on questions of law and can only answer questions that relate to the duties of the official requesting the opinion. Neither is true here. Thus, Attorney General Bonta lacks authority to issue the opinion and should be enjoined from doing so.

Over several decades, fantasy sports have become an integral part of American sports culture, enjoyed by over 60 million people in the U.S. and Canada annually. Californians are no different, with millions taking up an activity that allows everyone from die-hard sports fans to casual observers to compete by managing fantasy teams of their choosing. Due to its popularity in the State, hundreds of fantasy sports-related businesses operate openly and lawfully in California. Petitioner ("Underdog") operates one of the most popular fantasy sports platforms and counts more than half a million Californians as customers. But within a matter of days—and no later than Thursday, July 3, 2025—Respondent Rob Bonta, the Attorney General of California, will issue an opinion that seeks to cripple this thriving industry and deprive Californians of an activity that they enjoy. With the stroke of a pen the Attorney General will adversely affect billions of dollars in commerce and label Underdog (and many others) as breaking the law.

The Attorney General lacks the authority to issue that opinion. California Government Code § 12519 sets limits on the Attorney General's authority to accept, and issue, requested legal opinions. The Attorney General may only answer pure legal questions ("any question of law") that "relat[e]" to the office of the requesting official. (Gov. Code § 12519.) As the Attorney

General himself has recognized, these conditions are not mere suggestions; they are "textual limitations on [his] responsibility to issue opinions." (Declaration of David Gringer in Support of TRO Application ("Gringer TRO Decl."), Ex. 3 at 2 ("Attorney General Opinions Guidelines").) But they are limits he has disregarded here.

The forthcoming opinion responds to a 2023 request that asks the Attorney General to decide "whether California law prohibits the offering and operation of daily fantasy sports betting platforms." That is not a pure question of law; it is a request for the Attorney General to *apply* California gambling law to the facts and circumstances of a particular industry—a quintessentially mixed question of law and fact. Nor does the request "relat[e]" to the office of the requester: The request does not inquire about the legality of any legislative functions or responsibilities, but rather asks the State's chief law enforcement official to take a position on the legality of conduct that he is responsible for policing. In other words, the request seeks a pre-enforcement shot across the bow—a flexing of executive branch muscle in a way that is *designed* to impair the businesses of Underdog and others in the fantasy sports industry.

Without this Court's immediate intervention, this unlawful gambit may succeed. Underdog faces imminent irreparable harm—from fleeing customers, risk-averse banks and payment processors, and the loss of investment and goodwill—if the Attorney General issues the opinion as planned. Because Underdog received only days' notice of the legal tidal wave that will arrive by Thursday, it timely seeks an *ex parte* temporary restraining order (TRO) to preserve the status quo that has persisted in California for decades.

II. FACTS

A. The Paid Fantasy Sports Industry and Underdog's Fantasy Sports Contests

Underdog offers a platform for millions of customers in the United States and Canada to compete in fantasy sports. Declaration of Dustin Cooper ¶ 8. By accessing Underdog's website

and mobile phone application, Underdog Fantasy customers can use their skill and sports knowledge to compete in a wide range of daily, weekly, tournament-long, and season-long fantasy contests. (Cooper Decl. ¶¶ 6-9.) Participants draft virtual rosters of athletes from multiple teams with the goal of scoring the highest number of points from the collective performance of their drafted athletes. In some formats of fantasy contests, participants manage their virtual rosters over time, selecting which players to start and which players to bench, and trading players expected to underperform based on developing information and strategies. In other formats, the significance of skillfully drafting the best team at the onset is greater, as participants are more limited in the mid-season moves that they can make. (Gringer TRO Decl., Ex. 2 ("Underdog Website Rules").) The potential point values earned for the success of drafted players vary across different contests, requiring successful participants in each contest to develop advanced fluency with its rules.

Regardless of the format of the contest, participants rely upon their analytical skills and their particularized understanding of the athletes, their teams, and other factors like anticipated matchups to increase their chances of winning. The predominant role of skill in fantasy sports contests has been demonstrated by numerous statistical and economic experts and courts.[1]

Underdog has operated in California since 2020, and the state accounts for more than 10% of the Company's annual revenue. (Cooper Decl. ¶ 16.) Underdog Fantasy is part of a well-established digital fantasy sports industry that serves at least 60 million participants every year across the United States and Canada. Fantasy contests are a major part of the broader sports industry, as evidenced by the prevalence of partnerships between major professional sports

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[1] *See Dew-Becker v. Wu* (2022) 2020 IL 124472, ¶ 26 [178 N.E.3d 1034, 1040]; *White v. Cuomo* (2022) 38 N.Y.3d 209, 223 [192 N.E.3d 300, 313].

leagues and fantasy sports platforms and by the proliferation of dedicated weekly fantasy television programming produced by major sports networks like ESPN (*The Fantasy Show*) and NFL Network (*NFL Fantasy Live*). The Fantasy Sports & Gaming Association estimates that approximately 19% of adult Americans participate in fantasy sports. (Fantasy Sports & Gaming Association, *Industry Demographics*, https://thefsga.org/industry-demographics/.)

B. The Request for an Attorney General Opinion

Under Government Code Section 12519, the Attorney General is permitted to issue a written opinion upon request from certain public officials, including Members of the Legislature, "upon any question of law relating to [that official's] respective office[]." (Gov. Code § 12519.) On November 2, 2015, California Assemblymember Marc Levine asked then-Attorney General Kamala Harris to issue an opinion regarding the legality of daily fantasy sports[2]; however, neither she nor her successor Xavier Becerra issued such an opinion.[3] On October 5, 2023, then-Senator Scott Wilk submitted a request to the California Attorney General's Office to provide a "legal opinion as to whether California law prohibits the offering and operation of daily fantasy sports betting platforms with players physically located within the State of California, regardless of whether the operators and associated technology are located within or outside of the State." (Gringer TRO Decl., Ex. 1 ("Opinion Request").)

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[2] (Levin, Letter to Attorney General Kamala Harris (Nov. 2, 2015), https://www.legalsportsreport.com/wp-content/uploads/2015/11/AG-Letter-Nov-2.pdf.)

[3] (Thomas-Akoo, *Source says all paid fantasy sports to be banned in California*, .io (June 26, 2025), https://next.io/news/regulation/source-says-all-paid-fantasy-sports-banned-california/.)

Attorney General Bonta accepted then-Senator Wilk's opinion request, and it is currently listed as "pending" on his office's website as Opinion No. 23-1001. (California Attorney General, *Legal Opinions of the Attorney General-Monthly Opinion Report*, https://oag.ca.gov/opinions/monthly-report.) Subsequently, the Attorney General's office received submissions from representatives of the daily fantasy sports industry that addressed various types of fantasy sports contests. (*See* Pet. ¶ 53.) The Attorney General has also met with market participants and collected other facts regarding the operation of fantasy sports contests. *See id.* Indeed, representatives of the Department of Justice have told stakeholders that these submissions have been "helpful" in developing the Attorney General's understanding of the underlying facts as a necessary component in answering the question presented. (*See* Pet. ¶ 54.)

Senator Wilk left the state Legislature at the end of 2024, due to term limits. (*See* Wilk, *A Heartfelt 'Thank You' to the SCV* (2024) The Signal, https://signalscv.com/2024/11/scott-wilk-a-heartfelt-thank-you-to-the-scv/). The Attorney General did not issue an opinion responding to Senator Wilk's request before his departure.

Within the last few business days, however, it has become clear that Opinion No. 23-1001, which has been "pending" for more than 18 months, is about to be issued. There is public reporting that the Attorney General "is soon expected to deem all online fantasy sports platforms illegal in the state," and that the opinion explaining the reasoning behind this decision will be released "[w]ithin a matter of days." (Zavala, *Online fantasy sports platforms may soon be illegal in California* (June 25, 2025) KCRA3, https://www.kcra.com/article/online-fantasy-sports-platforms-california/65196468 [noting that the opinion is expected to be released "by July 3rd"].)

Underdog subsequently confirmed, through a conversation between the Attorney General's office and Underdog's counsel, that the opinion is indeed about to be released this

week. (Gringer TRO Decl. ¶ 3.) Moreover, the opinion will be "very broad" in its applicability, finding *all* daily fantasy sports to be illegal under California law. *Id.* Although "daily fantasy sports" is not itself a defined term, (*see infra* 14), any opinion prohibiting all daily fantasy sports would purport to encompass a significant portion of Underdog's fantasy contests. And that is the plan. The Attorney General's office confirmed that after releasing the opinion, the goal would be to use the threat of an enforcement action—under the interpretation of California law that the Attorney General will impermissibly announce in the opinion—to pressure Underdog into agreeing to leave California entirely. (Gringer TRO Decl. ¶ 4) The Attorney General's office is looking to Texas Attorney General Ken Paxton, whose release of a legal opinion on fantasy sports led to a company pulling its paid fantasy sports products from the state nearly a decade ago, as its model. (*Ibid.*) Upon learning that it would be irreparably injured by the issuance of the opinion, Underdog took immediate action, filing this lawsuit within two business days.

III. LEGAL STANDARD

A temporary restraining order preserves the status quo "until a final determination of the merits of the action." (*People v. Uber Techs., Inc.* (2020) 56 Cal.App.5th 266, [270 Cal. Rptr. 3d 290, 304], as modified on denial of rehearing Nov. 20, 2020 [quoting *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528].). To proceed on an ex parte basis, a petitioner must "make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).). "The ex parte hearing concerning a TRO is no more than a review of the conflicting contentions to determine whether there is a sufficiency of evidence to support the issuance of an interlocutory order to keep the subject of litigation in status quo pending a full hearing to determine whether the applicant is entitled to a preliminary

injunction." (*Landmark Holding Grp., Inc. v. Superior Ct.* (1987) 193 Cal.App.2d 525, 528 [238 Cal.Rptr. 475, 476].).

"[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue [a restraining order]. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the [restraining order] were denied as compared to the harm that the defendant is likely to suffer if the [order] were issued." (*Church of Christ in Hollywood v. Superior Ct.* (2002) 99 Cal.App.4th 1244, 1251 [121 Cal.Rptr. 2d 810, 815], alteration in original.)

A moving party needs to demonstrate that "there a reasonable probability [it] will prevail on the merits." (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 125 [214 Cal.Rptr. 177, 181].) While the trial court has discretion as whether "to grant or deny a request for a preliminary injunction, it … must exercise its discretion 'in favor of the party most likely to be injured.'" (*Robbins v. Superior Ct.* (1985) 38 Cal.3d 199, 205.) In other words, "[i]f the denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Ibid.*)

IV. ARGUMENT

Underdog is likely to succeed on the merits of its petition for writ of mandate because Respondents' decision to accept an opinion request on the legality of daily fantasy sports and to issue the forthcoming opinion violates the clear limits of Section 12519 of the California Government Code. The Attorney General has a ministerial duty to decline an opinion request outside the scope of its statutory authority, and even if he had discretion in carrying out that duty, he has abused it here. Moreover, Underdog has standing—under both a beneficial interest and

public interest theory—to seek a writ of mandate, and its claims are ripe for consideration by this Court, in light of the imminent and irreparable injury Underdog faces.

Additionally, the balance of harms overwhelmingly favors Underdog's requested injunctive relief. Underdog is facing an existential threat to its continued operations in California if Respondents issue the opinion, but Respondents will suffer no cognizable harm if this Court preserves the status quo by requiring Respondents to adhere to the limits of their statutory authority during the pendency of this petition.

A. Underdog Is Likely to Succeed on the Merits

Relief under a writ of mandate is available "in two circumstances": "mandamus may issue to compel the performance of a ministerial duty or to correct an abuse of discretion." (*Crestwood Behav. Health, Inc. v. Baass* (2023) 91 Cal.App.5th 1, 15 [308 Cal.Rptr.3d 15, 24], rehearing denied May 23, 2023)

To obtain relief under a writ of mandate for the first circumstance, a petitioner must demonstrate "(1) no plain, speedy, and adequate alternative remedy exists [citation]; (2) a clear, present, … ministerial duty on the part of the respondent; and (3) a correlative clear, present and beneficial right in the petitioner to the performance of that duty." (*Loeber v. Lakeside Joint Sch. Dist.* (2024) 103 Cal.App.5th 552, 567 [323 Cal.Rptr.3d 18, 30], review denied Sept. 11, 2024.)

The first of these requirements is the simplest here: Underdog has no alternative remedy to ensure the Attorney General adheres to the limits of his authority under Section 12519 because a writ of mandate is the only tool that can compel compliance with those limits and thereby prevent the Attorney General from issuing Opinion No. 23-1001. And for the reasons discussed below, Underdog has plainly made the required showing with respect to the second and third requirements. Moreover, in light of the risk of imminent harm to Underdog, the issues raised in

its petition are ripe—indeed, any delay in considering would result in Underdog losing its ability to obtain meaningful relief in stopping the opinion from being issued.

For the second circumstance, when a court reviews a public official's decision for an abuse of discretion, "the court may not substitute its judgment for that of the public [official's]." Instead, "the judicial inquiry ... addresses whether the public entity's action was arbitrary, capricious or entirely without evidentiary support, and whether it failed to conform to procedures required by law." (*Crestwood Behav. Health, Inc. v. Baass*, *supra*, 91 Cal.App.5th 1, 16.) This second circumstance is alternatively met because the Attorney General's failure to comply with the limits prescribed in Section 12519 is an abuse of discretion.

1. *The Decision to Accept a Request for, and to Imminently Issue, an Opinion on the Legality of "Daily Fantasy" Sports Violates the Attorney General's Duty to Adhere to the Clear Limits of Section 12519.*

    a. Respondents have a ministerial duty to comply with the limitations of Section 12519.

A ministerial duty "is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal duty and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [129 Cal.Rptr.2d 811, 814].) Officials required by statute to carry out a legal responsibility have a ministerial duty to perform it according to the express statutory terms. (*Lockyer v. City & Cnty. of San Francisco* (2004) 33 Cal.4th 1055, 1069 [17 Cal.Rptr.3d 225, 231] [finding local officials "exceeded their authority by taking official action in violation of applicable statutory provisions" and issuing a writ of mandate as the remedy]; *see First Indus. Loan Co. of Cal. v. Daugherty* (1945) 26 Cal.2d 545, 550 ["A ministerial officer may not … vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and

which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute."].)

The California Attorney General has a ministerial duty to issue legal opinions only under the conditions set forth in California Government Code § 12519. Section 12519 provides that: "The Attorney General shall give the Attorney General's opinion in writing to any Member of the Legislature, the Governor, [or certain other officials] when requested, *upon any question of law relating to their respective offices*." (Gov. Code § 12519, emphasis added.) The Attorney General concedes that these terms indeed constrain his authority, writing in publicly available guidelines that "[t]he Government Code imposes certain textual limitations on the Attorney General's responsibility to issue opinions under section 12519." (Attorney General Opinions Guidelines at 2.)

Three textual limits are relevant here. First, a legal opinion issued by the Attorney General must address only "question[s] of law." (Gov. Code § 12519.) The Attorney General has confirmed that he will not accept any requests for opinions "that require factual investigations or that would require the resolution of a factual dispute." (California Attorney General, *Legal Opinions of the Attorney General - Frequently Asked Questions*, https://oag.ca.gov/opinions/faqs ("OAG Legal Opinions FAQ").) Accordingly, an opinion request that poses a mixed question of law and fact is beyond the appropriate scope of Attorney General opinions because mixed questions require factual investigations to permit "the application of the rule to the facts and [the] consequent determination whether the rule is satisfied." (*People ex rel. City of Com. v. Argumedo* (2018) 28 Cal.App.5th 274, 280 [239 Cal. Rptr. 3d 128, 133].) Second, the Attorney General "shall give [his] opinion in writing *to* any Member of the Legislature" who has "requested" the opinion. (Gov. Code § 12519, emphasis added; *see also* Attorney General Opinions Guidelines, *supra*, at 1, emphasis added ["Section

12519 directs the Attorney General to provide opinions *only to* the public officials and agencies listed in the statute, and not to private individuals[.]"]). Third, under Section 12519, the Attorney General may not accept a request for an opinion when the request is not "relat[ed] to the [requesting official's] office[]." (Gov. Code § 12519; *see also* OAG Legal Opinions FAQ, *supra* ["When it is apparent that there is no connection [to the requesting official's office], the request will be declined."].)

These limits matter. The Attorney General is the State's chief law enforcement official, [Cal. Const. art. V, §13], and so his authoritative statements about the meaning of California law—when contained in formal, but technically nonbinding, opinions—can have meaningful ramifications. This can be true in court, but the opinions can be even more influential outside of court, as they provide authoritative-seeming statements about what the law does, or does not, require. (*Cf.* Pet. ¶ 59 [recounting how a digital fantasy sports company was forced out of Texas following the release of an attorney general opinion].)

It is therefore essential that the Attorney General not exceed his authority to accept opinion requests that pose only a "question of law." This limit ensures that the Attorney General does not prejudge the outcome of any fact-dependent dispute in a setting devoid of procedural protections. And it prevents the Attorney General from branding particular conduct illegal without having the facts and process necessary to make that determination.

Similarly, requiring the Attorney General to only give opinions "to" a particular public official, and insisting that the public official's request "relat[e] to their respective office[]," (Gov. Code § 12519) ensures that the Attorney General does not needlessly set down new legal markers. Instead, the Attorney General will set out his legal views only when a need arises in relation to the demands of a particular state official's duties, not whenever a member of the public might prefer one. In the context of requests from Members of the Legislature, this limit

preserves the separation of powers by preventing legislators from using an opinion request about a purely executive function to dictate the State's use of executive branch resources. (*See* Cal. Const. art. III, § 3.) The Legislature violates this doctrine if it "intrudes upon what might be characterized as the 'core zone' of the executive functions of the Governor (or another constitutionally prescribed executive officer)," such as the Executive's enforcement power. (*Marine Forests Soc'y v. California Coastal Com.* (2005) 36 Cal.4th 1, 15.)

b. Respondents have failed to comply with their ministerial duty.

Notwithstanding the limits on his authority, the Attorney General accepted a 2023 request for an opinion submitted by then-Senator Scott Wilk that asks the Attorney General to decide whether particular conduct violates California's gambling laws. As relevant here, the request asks for a "legal opinion as to whether California law prohibits the offering and operation of daily fantasy sports betting platforms[.]" (Opinion Request.) The decision to accept that request, and to publish the forthcoming opinion, violates the Attorney General's ministerial duties under Section 12519 twice over.

To start, the opinion request does not pose a question of law. (*See People ex rel. City of Com. v. Argumedo*, *supra*, 28 Cal.App.5th 274, 280 [contrasting legal questions with mixed questions of fact and law].) Instead, it asks about the application of "California law" *to* specific conduct—"the offering and operation of daily fantasy sports betting platforms." (Opinion Request). For the reasons outlined below, answering this question requires both a factual assessment of the characteristics of different fantasy sports contests and an empirical examination of whether skill or chance predominates across each type of contest—neither of which is permissible for an Attorney General opinion. (*See, e.g.,* 109 Ops.Cal.Atty.Gen. 2 (1980) ["The second question necessarily involves questions of fact, thus we are unable to

provide a categorical answer"]; 218 Ops.Cal.Atty.Gen. 5 (1981) [noting the impropriety of opining when presented with sharply contrasting characterization of facts].)

The request falters out of the gates because it asks the Attorney General to express his views about the legality of a category of products—"daily fantasy sports betting platforms"—that does not have a consensus factual, much less legal, definition.[4] There is no agreed upon set of contests that fall under the umbrella of "daily fantasy sports." (Cooper Decl. ¶ 11) And that is in part because the rules and terms of different fantasy contests vary widely. Some contests require ongoing management of the participant's roster over the length of a season, whereas others restrict the changes a participant might make to the roster after the initial drafting, necessitating greater upfront research and time investment in creating the initial roster. (*Id.* ¶ 8; Underdog Website Rules.). The contests vary in prize structures, formats, number of participants, scoring criteria, and sports. (*Id.*) The calculation of which players to draft in a season-long or tournament-format contest will vary wildly from the strategic calculations that go into a short-duration contest. Even within similar sports and formats, the rules for scoring different contests may vary. For example, in one baseball contest, a pitcher's win might be worth 5 points and each strikeout is worth 3; in another, wins are not a factor but WHIP (a metric that assesses a pitcher's walks + hits per inning pitched) and xERA (a pitcher's expected earned run average) are. Like a professional sports team's general manager, a skilled participant must

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[4] The most commonly used definition of "fantasy … sports games" appears in federal law, and it is mirrored in various state statutes that repurposed that definition. (31 U.S.C.§ 5362.) But those definitions have no "daily" component. New York for example, uses the term "interactive fantasy sports" because the duration of the contest is immaterial under that state's laws. (*See* N.Y. Racing, Pari-Mutuel Wagering & Breeding Law §§ 1400 *et seq.* (2024).) In any event, by labeling these products "*betting* platforms," the request at issue here also attempts to prejudge the Attorney General's answer.

weigh the strengths and weaknesses of multiple players and teams to craft the strongest roster under the specific contest rules. (Cooper Decl. ¶¶ 8-9; Underdog Website Rules.)

The question under consideration for Opinion No. 23-1001, whether "daily fantasy sports" platforms are prohibited, necessarily elides the distinctions between the different kinds of contests that have been labeled "daily fantasy sports." Accordingly, to even *attempt* to answer the question then-Senator Wilk posed, the Attorney General must engage in the kind of factual inquiry that Section 12519 prohibits. And given the more than 18 months it has taken to answer the question, it is obvious that such a factual inquiry has, in fact, taken place.

Opining on the legality of the daily fantasy sports industry requires a further factual inquiry: an examination of the relative role of skill versus chance across the many different kinds of contests that companies like Underdog offer. (*See, e.g.*, *People v. Settles* (1938) 29 Cal.App.2d Supp. 781, 787 [holding that, in California, the primary test of whether a game requiring payment for participation constitutes an illegal lottery is whether "chance or skill … is dominant in determining the result."].). Indeed, Senator Wilk highlighted California's prohibition on operating an unlicensed "game of chance" in framing his question for the Attorney General. (Opinion Request.)

The skill versus chance inquiry is a familiar one. Courts regularly engage in detailed factfinding—including by relying on evidence from statistical experts and from participants in the contest or game—to determine whether skill predominates over chance for a given game or contest. For example, in *Bell Gardens Bicycle Club v. Department of Justice* (1995) 36 Cal.App.4th 717, the court relied on extensive expert testimony in the record, including from a professional poker player and a statistics professor from U.C. Berkeley, to determine whether a form of poker called "jackpot poker" was a game of skill or an "illegal lottery." (*Id.* at 752,

756.) Considering this testimony, the court rejected the conclusion "that poker participants win the jackpot prize through skill and not by chance." (*Id.* at 753.)

Similarly, when questions like the one presented by Opinion No. 23-1001 have arisen in other states, courts have carefully weighed the factual evidence about whether the most successful digital fantasy sports players rely on skill or luck to succeed. In *White v. Cuomo*, *supra*, the Court of Appeals of New York emphasized that "the legislature's *factual determination* that [interactive fantasy sport] contests are a game of 'skill,' not of 'chance'… – and therefore are not 'gambling' – has resounding support." (38 N.Y.3d 209, 223, emphasis added). The court also cited "[s]tudies show[ing] that skilled players achieve significantly more success in IFS [interactive fantasy sport] contests and that rosters of skilled human players were more successful in IFS contests than randomly generated lineups over 80% of the time." (*Ibid.*) The *White* court also relied on an expert opinion arguing that "IFS games 'have an inherent and vast character of skill where chance is overwhelmingly immaterial in the probability of winning' and winning a prize in such contests 'strongly depends more on skill than on chance.' In fact, it is now 'widely recognized' that IFS contests are predominately skill-based competitions." (*Id.* at 224.)

The Illinois Supreme Court engaged in a similar inquiry. In a case about whether daily fantasy sports platforms are illegal, the court explained that the central question it had to answer was "whether head-to-head DFS contests are predominately determined by the skill of the participants in using their knowledge of statistics and the relevant sport to select a fantasy team that will outperform the opponent. Several recent, peer-reviewed studies have established that they are." (*Dew-Becker v. Wu*, *supra*, 2020 IL 124472, ¶ 26.) The *Wu* court cited those peer-reviewed studies and articles in support of its factual determination that "'skill is always the dominant factor' in head-to-head DFS contests involving NBA games." (*Ibid.*) Indeed, the state

Supreme Court rejected the opinion of the state's Attorney General—which had "concluded DFS contests are illegal under Illinois law"—precisely because the opinion had not considered important factual information about the degree to which skill predominates over chance in fantasy sports. (*See id.*, ¶ 27.)

Ultimately, the Attorney General cannot determine as a legal matter whether daily fantasy sports contests are prohibited without at least some consideration of the relevant facts. And indeed, that consideration has already taken place. The Attorney General has received, and considered, submissions from representatives of the digital fantasy sports industry about the details of different various contests and the degree to which skill predominates over chance. (*See* Pet. ¶¶ 53-54.) And he has interviewed market participants about facts pertaining to digital fantasy sports. (*Ibid.*) In other words, he has engaged in the kind of "factual investigation[]" that his own policy proscribes (OAG Legal Opinions FAQ, *supra.*), and that transgresses the limits of Section 12519. And he has done so precisely because the question presented is inherently fact-bound and cannot be answered without assessing how the many formats of fantasy contests operate and the degree of skill participants exert in determining the outcomes of those different contest types.

The Attorney General's actions fail to abide by a second limit in Section 12519: the requirement that the Attorney General "shall give" his opinion "*to* [the] Member of the Legislature" that requested it. (Gov. Code § 12519, emphasis added.) Because Senator Wilk left office in 2024 due to term limits, and is now a private citizen, he is not a "Member of the

Legislature" to whom the Attorney General may "give" his opinion.[5] (*Id.*; s*ee also* Attorney General Opinions Guidelines, *supra,* at 1 [noting "private individuals" may not request or receive Attorney General opinions].) Enforcing that limit makes good sense in light of the mandatory language—the Attorney General "shall give" his opinion "when requested"—in the statute. (Gov. Code § 12519.) If that obligation extended after the requester has left office, then a member of the Legislature on his way out of office could demand answers on a range of controversial issues, and the Attorney General would have to provide them notwithstanding that the answers would no longer relate to the individual's former legislative duties.

Finally, the request for Opinion No. 23-1001 does not comply with the requirement that an opinion "relat[e]" to the requesting official's "respective office[]s." (Gov. Code § 12519.) Again, because Senator Wilk is no longer in office, he no longer has an office for the opinion to "relat[e]" to. (*Id.*) For that reason alone, the statute does not permit a response to the request. But even setting that fatal shortcoming aside, the request does not relate to *any* legislative office because it asks California's chief law enforcement officer to stake out a position about whether a longstanding business activity in the State is legal. That question goes to the core of executive branch power. (*See, e.g.*, *People v. Boyd* (1979) 24 Cal.3d 285, 291 ["[T]he prosecutorial functions [are] vested in the executive branch."].) By requesting a legal opinion about whether specific conduct violates the law, former Senator Wilk stepped outside his legislative

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[5] Public reporting suggests that Republican Assemblyman Tom Lackey may have "follow[ed] up" on Senator Wilk's efforts once Wilk left office. (*See* Zavala, *Online Fantasy Sports Platforms May Soon Be Illegal In California*, *supra*.) But that does not change the Attorney General's authority to respond to the original request. The only relevant request on the Attorney General's website is for Opinion No. 23-1001, submitted by Senator Wilk, who is no longer in office. (*See* California Attorney General, *Legal Opinions of the Attorney General-Monthly Opinion Report*, *supra.*) If the Attorney General issues Opinion No. 23-1001, he could not "give the … opinion in writing to" the "Member of the Legislature" who "requested" it because, again, the requester is no longer in office. (Gov. Code § 12519.)

responsibilities to, in essence, prompt the executive branch to assess its own executive authority. The Attorney General should have recognized this departure and declined this request.

In sum, by accepting opinion request No. 23-1001 and deciding to publish the forthcoming opinion, Respondents have violated their ministerial duty to adhere to the limits on their authority under Section 12519.

c. In the alternative, Respondents have abused any discretion they possess, and Underdog is therefore still entitled to a writ of mandate.

Because the limits on the Attorney General's authority under Section 12519 are clear—and have been acknowledged by the Attorney General himself—his duty to abide by them is ministerial. But even if that duty was discretionary, Underdog would still be likely to succeed in its petition. A writ of mandate can be used "to correct abuses of discretion." (*People for Ethical Operation of Prosecutors etc. v. Spitzer* (2020) 53 Cal.App.5th 391, 407 [267 Cal. Rptr. 585, 598], as modified (Sept. 8, 2020).) In such cases, "[a] reviewing court may issue a writ of mandate that requires legislative or executive action 'to conform to the law,'" but it may not substitute its own discretion. *Bull Field, LLC v. Merced Irrigation Dist.* (2022) 85 Cal.App.5th 442, 456 [301 Cal.Rptr.3d 622, 633], citation omitted; *see also Schwartz v. Poizner* (2010) 187 Cal.App.4th 592, 598 [113 Cal.Rptr.3d 610, 615] ["[A] party seeking review under traditional mandamus must show the public official or agency invested with discretion acted arbitrarily, capriciously, fraudulently, or without due regard for his rights, and that the action prejudiced him."]).

Respondents have abused any discretion they possess by deciding to accept an opinion request, and to publish a forthcoming opinion, that fails to adhere to the limits on Attorney General authority under Section 12519. (*Cf. Morris v. Williams* (1967) 67 Cal.2d 733, 737 ["Administrative regulations that violate acts of the Legislature are void and no protestations that

they are merely an exercise of administrative discretion can sanctify them."].) The plain text of Section 12519 constrains the Attorney General's discretion to issue opinion by requiring that the Attorney General only accept an opinion request and issue an opinion that raises a question of law and that relates to the requesting official's office. By acting outside those constraints, the Attorney General has acted arbitrarily in a manner that threatens Underdog with imminent, irreparable harm. A writ of mandate is thus necessary to compel the Attorney General "to conform to the law." (*Bull Field, LLC, supra*, 85 Cal.App.5th 442, 456.)

2. Underdog has standing, as matter of both beneficial interest and public interest test, to bring the writ petition.

For a party to have standing to seek a writ of mandate, that party must either be (1) "beneficially interested" in the writ of mandate; or (2) demonstrate that the "public right/public duty exception to the beneficial interest for a writ of mandate" applies. (*Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 165-66 [citing Code Civ. Proc., § 1086].) Underdog has standing under both doctrines.

First, Underdog is a "beneficially interested" party in this dispute. (*Doe v. Albany Unified Sch. Dist.* (2010) 190 Cal.App.4th 668, 682 [118 Cal.Rptr.3d 507, 518] [citing Code Civ.Proc., § 1086].) "The requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796-97 [166 Cal.Rptr. 844, 846]; *see also Loeber v. Lakeside Joint School Dist*, *supra*, 103 Cal.App.5th 552, 568 ["The beneficial interest standard 'is equivalent to the federal "injury in fact" test[.]'"]).

As a digital sports fantasy company, Underdog has a "special interest to be served" here. (*Save the Plastic Bag Coal.*, *supra*, 52 Cal.4th 155, 165.) The Attorney General has decided to accept a request (for Opinion No. 23-1001), and to publish a forthcoming opinion, that directly bears on Underdog's ability to operate in California. The Attorney General has made plain to Underdog that it intends to drive it out of California entirely, completely ending its business operations here. For all of the reasons described below, *infra* sec. B, that opinion threatens Underdog with imminent, irreparable harm. Respondents' actions therefore have "direct and substantial" consequences for Underdog's business and the future of the industry in which it operates. (*Save the Plastic Bag Coal.*, *supra*, 52 Cal.4th 155, 165.) Because the Attorney General's opinion has important implications for how Underdog operates its business in California, Underdog has a "particular right to be preserved or protected over and above the interest held in common with the public at large." (*Id.*)

Second, Underdog has public interest standing to bring this petition because it is "one of public right and the object of the mandamus is to procure the enforcement of a public duty." (*Id.* at p. 166.) In such cases, a petitioner need not show that "[it] has any legal or special interest in the result, since it is sufficient that [it] is interested as a citizen in having the laws executed and the duty in question enforced." (*Id.*) "This exception to the beneficial interest requirement protects citizens' opportunity to 'ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.'" (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1248.) Public interest standing is appropriate here because the purpose of the petition is to require the Attorney General to comply with the public duties set out in California Government Code § 12519. Section 12519 places important limitations on the Attorney General's authority to issue opinions, and it is a matter of public importance—not least because of the countless employees and fantasy sports contest participants who will be affected—that the

state's chief law enforcement official comply with those limits and not inappropriately issue opinions about what California law does, or does not, require.

3. Underdog's claims are ripe for consideration by this Court.

Underdog's claims are ripe for adjudication. The ripeness requirement "prevents courts from issuing purely advisory opinions." (*Communities for a Better Env't v. State Energy Res. Conservation & Dev. Com.* (2017) 19 Cal.App.5th 725, 732 [227 Cal.Rptr.3d 486, 492].) Although the "precise content of the doctrine is difficult to define and hard to apply, generally speaking, a controversy is ripe when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." (*Id.* at p. 733, internal quotations omitted.) By contrast, "unripe cases are those in which parties seek a judicial declaration on a question of law, though no actual dispute or controversy ever existed between them requiring the declaration for its determination." (*Id.*, internal quotations omitted.)

This controversy "has reached, but has not passed," the key inflection point. (*Id.*) It is now clear—indeed, the Attorney General's office has acknowledged—that the Attorney General will issue a sweeping, unfavorable opinion *this week* that will be damaging to Underdog's interests. (*See* Gringer TRO Decl. ¶¶ 2-4.) Accordingly, there is no other window in which both the legal shortcomings of the Attorney General's decision to accept the request for and issue Opinion No. 23-1001 have been clear and the *consequences* of those shortcomings have been knowable and imminent. The facts are thus "sufficiently congealed" and require judicial adjudication to prevent imminent harm to Underdog. (*Communities for a Better Env't*, *supra*, 19 Cal.App.5th 725, 733.) After all, "the [ripeness] requirement should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." (*O.W.L. Found. v. City of Rohnert Park* (2008) 168 Cal.App.4th 568,

584 [86 Cal.Rptr.3d 1, 12]; *see also Nat. Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 432 n. 14 [189 Cal.Rptr. 346, 354]]"If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest."].)

B. The Balance of Harms Favors Underdog

In deciding whether to issue a TRO, "the trial court compares the injury to the plaintiff in the absence of a restraining order to the injury the defendant is likely to suffer if an order is issued." (*Church of Christ in Hollywood v. Superior Court*, *supra*, 99 Cal.App.4th 1244, 1257.) Moreover, to proceed on an ex parte basis, an applicant "must make an affirmative factual showing … of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court, rule 3.1202(c).) This case is not a close question. Absent a TRO, Underdog faces irreparable harm from the Attorney General's forthcoming unfavorable opinion, which will jeopardize Underdog's ability to operate in California and permanently undermine Underdog's business interests. Underdog has made an affirmative factual showing that an expedited ex parte proceeding is necessary—because the Attorney General plans to issue an unfavorable opinion this week, Underdog faces imminent, irreparable harm that can only be prevented by a timely TRO.

On the other side of the ledger, Respondents suffer no injury from the issuance of a TRO. A TRO would simply temporarily delay the issuance of an unlawful opinion to give the Court more time to decide the merits of the underlying petition and preliminary injunction motion. Because the Opinion Request has been pending since October 19, 2023, it is not likely that a few additional weeks would meaningfully impact Respondents.

1. Underdog Will Suffer Imminent and Irreparable Harm Without an Injunction.

A TRO is necessary to prevent imminent and irreparable harm to Underdog. Without such an order, the Attorney General will publish Opinion No. 23-1001 in a matter of days, (Gringer TRO Decl. ¶¶ 2-4), and a string of negative consequences will unfold. Dustin Cooper, Underdog's Chief Business Officer and immediate past Chief Financial Officer, has described these consequences in depth in his accompanying declaration. (*See* Cooper Decl. ¶¶ 2, 15-30.)

First, many of Underdog's customers in California would withdraw money from their accounts on the mistaken belief that Underdog is in violation of California law. (*Id.* ¶ 18.) Relatedly, the legal uncertainty the opinion would create would also cause Underdog to face challenges in obtaining services from the third-party providers, suppliers, and vendors that it relies on to sustain its operations in California. (*See id.* ¶ 19.) These include banks and payment processors, online marketplaces, and marketing and advertising firms that operate in the state. (*Id.* ¶¶ 19-22.) Additionally, the negative perceptions generated by the opinion would undermine Underdog's ability to recruit and maintain talented employees, partner with content creators, and secure celebrity endorsements. (*Id.* ¶ 23.)

Underdog would additionally lose out on significant business opportunities, both inside and outside of California. (*Id.* ¶ 25.) California is such an important market that investors and other industry insiders pay close attention to developments in the state. (*Id.*) The Attorney General's opinion would therefore send a strongly negative signal to current and potential investors and business partners, costing Underdog opportunities to grow its business elsewhere. (*Id.*) The contemplated opinion would also impair Underdog's ability to apply for and maintain licenses for operating fantasy sports and online sports wagering. (*Id.* ¶ 26.)

These harms will persist even if Underdog eventually receives a favorable judgment on the merits of its petition. Some California customers who withdraw funds from their accounts will not return. (*Id.* ¶ 27.) Likewise, lost customers and continued legal uncertainty will likely

cause some third-party service providers, suppliers, and vendors, along with potential investors and business partners, to refrain from investing or reinvesting in Underdog and to instead put their money elsewhere. (*Id.* ¶¶ 28-29.) The financial costs and loss of goodwill that Underdog will incur amidst these disruptions are significant and irreparable. (*See e.g., People v. Uber Techs., Inc.* (2020) 56 Cal.App.5th 266, 305-06 [270 Cal.Rptr.3d 290, 322] [citing *American Trucking Assocs., Inc. v. City of Los Angeles* (9th Cir. 2009) 559 F.3d 1046, 1058] [for the proposition that irreparable harm can result from a company "incurring large costs in restructuring business and losing customer goodwill"].)

Finally, in assessing the likelihood and magnitude of the harm in this case, it is significant that the fantasy sports industry has seen this play before. The fallout from an attorney general's opinion on the legality of fantasy sports is unmistakable: FanDuel and Draft Kings, two of Underdog's competitors, faced such significant financial and legal pressures in the wake of an attorney general opinion in Texas and a cease-and-desist letter in Alabama that they were forced to withdraw all of their paid products from the states.[6] In other words, the stakes for Underdog's business in California are existential, and irreparable harm is likely to flow from the opinion in the absence of an injunction.

2. Respondents Will Not Suffer Harm from an Injunction

Respondents, however, will not suffer any cognizable harm if this Court temporarily enjoins the release of Opinion No. 23-1001. Then-Senator Wilk requested the opinion in

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[6] (*See, e.g.*, Purdum, *FanDuel to cease paid contests in Texas in May; DraftKings files suit* (Mar. 4, 2016) ESPN, https://www.espn.com/sports-betting/story/_/id/14903788/fanduel-texas-attorney-general-reach-settlement-cease-paid-operations-state-1; *Fantasy sports companies to comply with Attorney General and cease operations in Alabama* (Apr. 29, 2016) ABC 33/40, https://abc3340.com/news/local/fantasy-sports-companies-to-comply-with-attorney-general-and-cease-operations-in-alabama.)

October 2023, more than 18 months ago. Indeed, to the extent *anyone* could object to delay, it would have been Senator Wilk as the requester of the opinion. But because he is no longer in the Legislature, any additional delay does not harm him. For Respondents, the fact that the opinion has sat in the Attorney General's queue for so long demonstrates that there is no reason to think that a brief delay (while this Court considers Underdog's petition on the merits) will cause Respondents any injury at all. Underdog, by contrast, only learned about the full scope of the Attorney General's forthcoming opinion the evening of Thursday, June 26, 2025—less than two business days before bringing its petition for writ of mandate and this ex parte TRO application. (*See* Gringer TRO Decl. ¶¶ 2-4.) That difference in urgency between the parties mirrors the difference in the harms they respectively face.

Moreover, Respondents will be hard-pressed to identify any tangible harms given that they have permitted Underdog to operate in California since 2020 without incident. (Cooper Decl. ¶ 16.) More broadly, online fantasy sports platforms have been operating in California for more than thirty years.[7] Respondents will not be harmed by preserving the decades-long status quo for a matter of days or weeks, particularly because an injunction here would not limit any enforcement authority Respondents possess.

Finally, there can be no harm to Respondents (or to the people of California) in preventing Respondents from acting outside the scope of their statutory authority, because "[a]n agency that exceeds the scope of its statutory authority acts ultra vires and the act is void." (*Water Replenishment Dist. of S. California v. City of Cerritos* (2012) 202 Cal.App.4th 1063,

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[7] (Behe, *Fantasy sports leagues put armchair quarterbacks in the game*, TribLIVE (Dec. 14, 2002), https://web.archive.org/web/20210709182225/https://archive.triblive.com/news/fantasy-sports-leagues-put-armchair-quarterbacks-in-the-game [noting that "www.espn.com launched its fantasy games in 1995"].)

1072 [135 Cal.Rptr.3d 895, 903].) As a result, no harm can flow from an injunction against Respondents because the government "cannot suffer harm from an injunction that merely ends an unlawful practice." (*Rodriguez v. Robbins* (9th Cir. 2013) 715 F.3d 1127, 1145.)

V. CONCLUSION

For the foregoing reasons, a temporary restraining order is necessary to preserve the status quo, and the Court should (1) issue a Temporary Restraining Order prohibiting Respondents from issuing Opinion No. 23-1001, or from issuing any similar opinion pertaining to the legality of daily fantasy sports platforms under California law, pursuant to the Attorney General's authority under Government Code Section 12519; and (2) an Order to Show Cause why that relief should not be extended by Preliminary Injunction until a final judgment is entered.

DATED: June 30, 2025

Respectfully submitted,

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