

CAUSE NO. DC-16-02593

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|--|---|------------------------|
| DRAFTKINGS, INC.,                        | § | IN THE DISTRICT COURT  |
| a Delaware Corporation                   | § |                        |
| <i>Plaintiff,</i>                        | § |                        |
|  | § |                        |
| v.                                       | § | DALLAS COUNTY, TEXAS   |
|  | § |                        |
| KEN PAXTON, Attorney General of the      | § |                        |
| State of Texas, in his Official Capacity | § |                        |
| <i>Defendant.</i>                        | § | 68TH JUDICIAL DISTRICT |

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**DEFENDANT’S MOTION TO TRANSFER VENUE,  
ORIGINAL ANSWER, AND PLEA TO THE JURISDICTION**

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This lawsuit reflects a corporation’s attempt to protect its preferred business model: profiting from paid online daily fantasy sports (“DFS”) in Texas. It challenges the Attorney General’s Opinion—issued in response to a request under Texas Government Code §402.042—that “odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling” in violation of Texas Penal Code §47.02. Tex. Att’y Gen. Op. KP-0057 (2016) (“Opinion”), *see also* Plaintiff’s Original Petition (“Pet.”) at pp. 56–57. The Opinion concluded that a court of competent jurisdiction would likely hold that DFS are illegal when the house takes a cut. *Id.*

Plaintiff DraftKings, Inc. (“DraftKings”) alleges that the Attorney General overstepped his authority in issuing the Opinion, because DraftKings disagrees with the result reached. DraftKings filed this suit in Dallas County, Texas alleging that the “Attorney General’s actions pose direct, immediate, and particularized harm to DraftKings.” Pet. at p. 2.

## SUMMARY OF ARGUMENT

As set forth herein, venue is proper in Travis County, and improper in Dallas County, for the following reasons:

- *First*, this action in substance seeks a writ of mandamus to the Attorney General. Mandatory venue for such suits lies in Travis County. TEX. CIV. PRAC. & REM. CODE §15.014.
- *Second*, this action in substance seeks injunctive relief. Mandatory venue for such suits lies in the county where the defendant is domiciled. TEX. CIV. PRAC. & REM. CODE §65.023. The Attorney General—in his official capacity—is domiciled in Travis County.
- *Third*, even if venue is not mandatory in Travis County, the Court should grant the motion to transfer venue to Travis County, because no substantial part of the events or omissions giving rise to this suit occurred in Dallas County. Instead, such events occurred in Travis County.

The Court also lacks jurisdiction over this case, for the following reasons:

- *First*, the injunctive relief sought in this case must be sought through mandamus, and only the Texas Supreme Court has jurisdiction to issue a writ of mandamus to the Texas Attorney General in his official capacity.
- *Second*, the Court lacks jurisdiction to issue declaratory relief because—as a civil court—it lacks jurisdiction over the criminal provisions DraftKings seeks construction of here, and further because DraftKings has failed to allege a valid waiver of the Attorney General’s sovereign immunity.
- *Third*, DraftKings’s constitutional claims do not confer jurisdiction, because they are both invalid and unripe.

As a result, the Court should transfer venue to Travis County. Even if the Court concludes that venue is proper in Dallas County, it should dismiss this action in its entirety for want of jurisdiction.

## MOTION TO TRANSFER VENUE

### I. FACTUAL AND LEGAL BACKGROUND

#### A. Gambling under Texas law

Article III, §47(a) of the Texas Constitution provides, “[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State,” subject to certain exceptions. TEX. CONST. art. III, §47(a). In particular, a lottery is defined as including (1) the offering of a prize, (2) by chance, and (3) the giving of consideration for an opportunity to win the prize. *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936). In accordance with article III, §47(a), the Legislature has prohibited such lotteries through Chapter 47 of the Texas Penal Code. See TEX. PENAL CODE §§47.01 *et seq.*; see also *Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.) (noting Legislature’s adoption of chapter 47 pursuant to article III, §47). Among these prohibitions, a person commits a criminal offense if the person “makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest.” TEX. PENAL CODE §47.02(a)(1).

Under Penal Code Chapter 47, a “bet” means “an agreement to win or lose something of value solely or partially by chance.” *Id.* §47.01(1). As a matter of settled Texas law, under this “partial chance” standard, any element of chance is sufficient. *Odle v. State*, 139 S.W.2d 595, 597 (Tex. Crim. App. 1940) (“The legal meaning of the term ‘bet’ is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill, or both combined.” (citations omitted)). A bet specifically excludes “an

offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]” TEX. PENAL CODE §47.01(1)(B). It is a defense to prosecution if “no person received any economic benefit other than personal winnings.” *Id.* §47.02(b)(2).

### **B. The Attorney General Opinion**

Under Texas Government Code §402.042, “the attorney general shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person.” Committees of the State Legislature are expressly recognized as authorized requestors. TEX. GOV’T CODE §402.042(b)(7). Because Attorney General opinions are advisory in nature, they are framed as conclusions of what a court of competent jurisdiction would likely conclude. *E.g.*, *Patterson v. Planned Parenthood of Houston and Se. Tex., Inc.*, 971 S.W.2d 439, 442-43 (Tex. 1998) (contrasting Attorney General’s advisory power with direct powers of judicial branch). Such opinions are not framed as conclusive determinations of law. *See, e.g.*, Opinion. Nor are they considered as such by Texas Courts. *See, e.g.*, *Holmes v. Morales*, 924 S.W.2d 920, 924, (Tex. 1996); *see also infra* n.20 and accompanying text.

On November 12, 2015, the Attorney General received such a request from the Honorable Myra Crownover, Chair of the Texas House of Representatives Committee on Public Health.<sup>1</sup> Representative Crownover requested the Attorney General’s

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<sup>1</sup> Letter from Hon. Myra Crownover, Chair, House Comm. on Pub. Health, to Hon. Ken Paxton, Tex. Att’y Gen. at 1 (received Nov. 12, 2015), available at <https://www.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2015/pdf/RQ0071KP.pdf>. *See also* Pet. Ex. A at n.1.

opinion whether “[d]aily fantasy sports leagues such as DraftKings.com and FanDuel.com are permissible under Texas law, and [whether i]t is legal to participate in fantasy sports leagues where the house does not take a ‘rake’ and the participants only wager amongst themselves.” Pet. at p. 49 (Opinion) (quoting Request Letter). In response, the Attorney General discussed the applicable framework under the Penal Code, the case law, and a description of fantasy sports play from the Nevada Attorney General’s Office. Pet. at p. 49. The Attorney General concluded that a court of competent jurisdiction would probably hold that, when the house takes a “cut” or a “rake,” DFS contests constitute illegal gambling under the Texas Penal Code.

### **C. DraftKings’s Allegations**

By this action, DraftKings seeks putative declaratory relief under Texas Civil Practice and Remedies Code §§37.003 and 37.004, provisions of the Uniform Declaratory Judgment Act (“UDJA”). In particular, DraftKings seeks the following declarations:

- DraftKings DFS contestants are “contestants in a bona fide contest for the determination of skill” for which a prize or award is offered, and thus do not make a “bet” under Tex. Penal Code §47.01 and do not violate Texas Penal Code §47.02(a);<sup>2</sup>
- DraftKings’s DFS contestants do not commit an offense because, rather than making a bet on the outcome of “a game or contest,” the outcome of DraftKings’s DFS contests depends on a series of complex interconnected performance metrics from a host of athletes, and

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<sup>2</sup> Or, as phrased elsewhere in the Petition, a declaration that “Contestants In DraftKings’s DFS Contestants Are ‘Actual Contestants In A Bona Fide Contest For The Determination Of Skill,’ And Thus Do Not ‘Bet’ On ‘The Partial Or Final Result Of A Game’ Under Texas Law.” Pet. at 36 (capitalization original).

therefore DraftKings’s DFS contests do not violate Tex. Penal Code §47.02(a);<sup>3</sup>

- [N]o governmental entity may use or rely on the Attorney General’s opinion regarding DFS in any criminal prosecution, civil statutory suit, common-law suit, or any other interference or related legal action against DraftKings or its operations.<sup>4</sup>

Pet. ¶121(a)–(c).

DraftKings further asserts violations of the United States Constitution’s guarantee of Due Process under the Fifth and Fourteenth Amendments, made enforceable through 42 U.S.C. §1983, and the due course of law guarantee under Article I, §19 of the Texas Constitution. Pet. Counts II, III. Finally, DraftKings alleges a violation of the Fourteenth Amendment’s guarantee of Equal Protection, made enforceable under 42 U.S.C. §1983, and the Texas Constitution’s equal rights guarantee, set forth at Article I Section 3. Pet. Counts IV, V.<sup>5</sup>

## **II. CIVIL PRACTICE AND REMEDIES CODE §15.014 PROVIDES FOR MANDATORY VENUE IN TRAVIS COUNTY.**

This action challenges an Attorney General opinion that has already been issued. The substantive relief DraftKings requests—prevention of any reliance upon that Opinion—requires that the Opinion be withdrawn. *Am. Nat. Bank of Austin v.*

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<sup>3</sup> Or, as phrased elsewhere in the Petition, a declaration that “DraftKings’s DFS Contests Never Turn On The Result Of A Single Game Or Contest Or On The Performance Of A Participant In A Single Game Or Contest.” Pet. at 37 (capitalization original).

<sup>4</sup> Or, as phrased elsewhere in the Petition, a declaration that “Neither The Attorney General Nor Any Other Governmental Entity May Rely On The Attorney General’s Opinion To Support Any Prosecution Or Civil Action Against DraftKings.” Pet. at 38 (capitalization original).

<sup>5</sup> With respect to Counts II-V, it is unclear what relief DraftKings requests besides attorney’s fees. *See generally* Pet. ¶¶121–23 (“Conclusion and Prayer,” requesting declaratory judgments under Civil Practice & Remedies Code §37.003, and attorney’s fees).

*Sheppard*, 175 S.W.2d 626, 627 (Tex. Civ. App. 1943, writ ref'd w.o.m. (Jan. 5, 1944)) (“To undo what has already been done necessarily requires affirmative action; that of the Attorney General in withdrawing his opinion[.]”). This is—as a matter of Texas law—a suit for mandamus relief. *Id.*<sup>6</sup> And “[a]n action for mandamus against the head of a department of the state government shall be brought in Travis County.” TEX. CIV. PRAC. & REM. CODE §15.014. As a result, mandatory venue in this case lies in Travis County under Section 15.014.

### **III. MANDATORY VENUE LIES IN TRAVIS COUNTY PURSUANT TO TEXAS CIVIL PRACTICE AND REMEDIES CODE §65.023.**

The Court should transfer venue because Travis County, Texas, is the mandatory venue for this suit, which, in substance, sounds in equity because it requires either mandamus or injunctive relief.

#### **A. The legal standard.**

Civil and Practice Remedies Code §65.023(a) provides that an injunction suit shall be tried in the district or county court in the county of the defendant’s domicile. TEX. CIV. PRAC. & REM. CODE §65.023(a). This venue provision is mandatory. *In re Continental Airlines, Inc.*, 988 S.W.2d 733, 736 (Tex. 1998); *see Burton v. Rogers*, 504 S.W.2d 404, 407 (Tex. 1973). It applies when the primary relief sought by a plaintiff is injunctive relief. *In re Continental Airlines, Inc.*, 988 S.W.2d at 736. However, when injunctive relief is merely ancillary or incidental, it does not apply. *See Shuttleworth v. G&A Outsourcing*, 2009 WL 277052, at \*3 (Tex. App.—Houston [1st Dist.] 2009, no

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<sup>6</sup> *See infra*, Plea to the Jurisdiction, Part II.

pet.) (mem. op.). Courts look to a plaintiff's requested relief and the pleadings to determine whether the suit is an injunction suit under this provision. *Id.*; *Karagounis v. Bexar County Hosp. Dist.*, 70 S.W.3d 145, 147 (Tex. App.—San Antonio 2001, pet. denied) (“The true nature of a lawsuit depends on the facts alleged in the petition, the rights asserted and the relief sought, and not on the terms used to describe the cause of action.”).

When a suit alleges *ultra vires* conduct and is brought against a State official acting under the guise of State authority, the suit “is, for purposes of venue, a suit against the State.” *Burton*, 504 S.W.2d at 406. The residence of a state official is Travis County. *Id.*; *Gulf Coast Business Forms, Inc. v. Tex. Employment Comm’n*, 498 S.W.2d 154 (Tex. 1973); *Fitts v. Calvert*, 374 S.W.2d 274 (Tex. Civ. App.—Fort Worth 1963, writ dism’d); *Sims v. White*, 292 S.W.2d 648 (Tex. Civ. App.—Dallas 1956, no writ).

**B. This is an injunction suit because the substantive affirmative relief DraftKings seeks is injunctive in nature.**

Despite being labeled as a suit for only declaratory relief, DraftKings’s suit—in substance—is a suit for injunctive relief, even assuming the Court does not hold that this case is an improperly filed petition for writ of mandamus.

On March 4, 2016, DraftKings filed its suit in Dallas County, Texas, styling its Original Petition as one for declaratory judgment. *See* Pet. The various claims are asserted only against the Attorney General in his official capacity. *Id.* at ¶3. In its prayer, DraftKings labels all of its requested relief as requests for declarations. Pet. ¶121. But the label belies the true nature of the requested relief.

DraftKings asks the Court to “declare that no governmental entity may use or rely on the Attorney General’s opinion regarding DFS in any criminal prosecution, civil statutory suit, common-law suit, or any other interference or related legal action against DraftKings or its operations.” Pet. ¶121(c). This is an uninhibited request for affirmative injunctive relief (including against a host of officials who are not defendants in this suit). *See Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 576 (Tex. App.—Austin 2000, no pet.) (discussing that a prohibitive injunction forbids conduct).<sup>7</sup> This request, irrespective of its label, is enough to require application of §65.023 to DraftKings’s suit.

Examining DraftKings’s factual pleadings also leads to the same conclusion: injunctive relief is central to how it asks the Court to resolve its complaints regarding possible future prosecution. *See, e.g.*, Pet. ¶¶102–03. The crux of DraftKings’s complaint against the Attorney General is that his actions regarding the Opinion are merely “an opening volley in a campaign [] to distort Texas law and drive lawful DFS operators out of the State.” *Id.* at p. 5; *see also id.* at ¶¶71–86. Alluding to some unspecified future and further actions, it contends that if the Attorney General’s actions are “left unchecked,” DraftKings will be forced out of Texas. *Id.* at p. 6. The nature of DraftKings’s allegations make clear that it contends that a declaratory

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<sup>7</sup> *See, e.g., Clint Indep. Sch. Dist. v. Marquez*, No. 14-0903, 2016 WL 1268000, at \*4-5 (Tex. Apr. 1, 2016) (In finding the parents failed to exhaust their administrative remedies to assert school law claims, the Court looked at “the true nature” of the claims asserted. In so doing, it determined the parents’ artful pleading in casting their school law claims as constitutional law claims did not permit them to avoid the exhaustion requirement. The Court stressed that the nomenclature of the pled causes of action are not the controlling factors in determining the true nature of a party’s claims); *see also Dallas Co. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (pre-trial analysis of pleadings requires inquiry into the “real substance” of what plaintiffs request).

judgment without injunctive relief will not fully resolve the case. *See id.* at ¶85 (alluding to “potential enforcement actions”), ¶¶87–91 (contending that the Attorney General abused his authority and lacks authority to issue the Opinion here), ¶¶102–03 (contending that the Attorney General or any other government entity should be prevented from relying on the Opinion for any actions against DraftKings).

Regardless of how DraftKings labeled its suit at filing, it is a suit for equitable relief, regardless of whether it is framed as a writ of mandamus or an injunction suit. *See In re Continental Airlines, Inc.*, 988 S.W.2d at 737 (discussing that Section 65.023 applies to suits requesting injunctive relief); *Karagounis*, 70 S.W.3d at 147 (true nature of a lawsuit is not determined by terms plaintiff used to describe it). Both the factual pleadings and requested relief support this conclusion. *See Shuttleworth*, 2009 WL 277052, at \*3 (discussing that requested relief and pleadings are determinative of whether Section 65.023 applies). Therefore, the mandatory venue provision applicable to injunction suits applies to this case.<sup>8</sup>

Because §65.023 applies to DraftKings’s suit, venue is mandatory in Travis County, Texas. Section 65.023 requires that this injunction suit be brought in the county of the defendant’s domicile. TEX. CIV. PRAC. & REM. CODE §65.023(a); *In re Continental Airlines, Inc.*, 988 S.W.2d at 736. Here, that county is Travis County, Texas because for venue purposes, this is really a suit against the State and the domicile of the Attorney General, as a state official, is Travis County, Texas. *See*

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<sup>8</sup> It is worth noting that judicial orders requiring parties not to initiate litigation in other courts is, traditionally, conceived of as injunctive in nature. *E.g.*, *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986) (discussing extraordinary nature, and limitations on, suits seeking enjoin parties from litigating issues in separate forum).

*Burton*, 504 S.W.3d at 406. The (“The residence for venue purposes of a State Official is Travis County.”). The Court should grant the motion to transfer venue.

**IV. THE COURT SHOULD TRANSFER VENUE PURSUANT TO CIVIL PRACTICE AND REMEDIES CODE §15.002(A).**

Even if the mandatory venue provisions do not apply, the Court should transfer venue pursuant to §15.002(a) of the Texas Civil Practice and Remedies Code. DraftKings filed its challenge to the Opinion in Dallas County, asserting that a substantial part of the events giving rise to this claim occurred in Dallas County. The alleged basis of venue being proper in Dallas County is that: (1) customers in Dallas allegedly closed their accounts in the days following the Opinion’s publication, (2) the Opinion allegedly threatens DraftKings’s “ability to attract new investment partners and customers in Dallas,” (3) the Opinion has “implications for DraftKings’s existing business partnerships in Dallas County, and (4) a “substantial share of DraftKings’s existing Texas customers reside in Dallas County.” *See* Pet. ¶5. Because none of these venue facts, even if true,<sup>9</sup> constitute “all or a substantial part of the events” giving rise to the claims, the Court should transfer venue to Travis County.

Under §15.002(a), venue is proper in a county where “all or a substantial part of the events or omissions giving rise to the claim occurred.” TEX. CIV. PRAC. REM. CODE §15.002(A). The language of the rule departs from an older rule that allowed venue in a county where *any* part of the cause of action accrued. *See Chiriboga v. State Farm Mut. Auto Ins. Co.*, 96 S.W.3d 673, 681 (Tex. App.—Austin 2003, no pet.).

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<sup>9</sup> The Attorney General denies each of these allegations.

Under the current rule, the alleged basis must be a “substantial part” of the cause of action at issue. *Id.*

In determining whether the alleged facts constitute a “substantial part” of the cause of action, courts “look to the nature of the dispute and whether the forum has a ‘real relationship’ to it when determining whether a particular event was a ‘substantial part’ of a claim.” *Id.* at 682 (citations omitted). “Events or omissions that might only have some tangential connection with the dispute in litigation are not enough.” *Cottman Transmission Systems, Inc. v. Martino*, 36 F.3d 291, 294 (3d Cir. 1994) (analyzing federal equivalent of Texas’s venue provision);<sup>10</sup> *see also Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) (fact that the plaintiff “feels the effects of a defendant’s conduct in that district does not mean that the events or omissions occurred in that district.”); *id.* (citing *Woodke v. Dahm*, 70 F.3d 983, 985–86 (8th Cir. 1995)). Substantiality is intended to preserve an element of fairness for the defendant and to ensure the suit is not filed in a location “having no real relationship to the dispute.” *Cottman*, 36 F.3d at 294.

The case of *Eddins v. Parker* illustrates these principles and applies them in a case with analogous venue facts, 63 S.W.3d 15 (Tex. App.—El Paso 2001, no pet.). In *Eddins*, a woman sued her doctor for medical malpractice after she suffered an ectopic pregnancy in Harris County. *Id.* at 16. Because her doctor performed her initial examination and sonogram in Grayson County, Texas, he filed a motion to transfer

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<sup>10</sup> When the Texas legislature adopts a statute with wording substantially similar to a federal statute, Texas courts presume that the legislature was aware of the federal courts’ construction of the federal statute and intended to adopt it. *Chiriboga*, 96 S.W.3d at 682 (stating that Texas courts look to federal venue law to inform their analysis).

venue and the court granted it. *Id.* at 17. After the doctor won the jury trial, the woman appealed the trial court’s decision sustaining the venue challenge. *Id.*

The court of appeals affirmed the trial court’s transfer of venue from Harris County to Grayson County because Grayson County was “the only county in which all or a substantial part of the events or omissions giving rise to the claim occurred.” *Id.* Grayson County was the only county where the doctor treated the patient. It did not matter for the court’s analysis that the woman suffered effects in Harris County, was properly diagnosed in Harris County, had surgery in Harris County, or almost died in Harris County. *See id.* at 19. The location of the *effects* of the defendant’s conduct did not matter. What mattered to the court was where the defendant’s actions and omissions occurred—in that case, Grayson County. *Id.*

Just as the plaintiff in *Eddins* argued that the effects of the defendant’s conduct were felt in Harris County, DraftKings here argues that the effects of the Attorney General Opinion are felt in Dallas County. But just as the court rejected that the effects were a “substantial part of the events and omissions giving rise to the claim” in *Eddins*, the Court should reject that argument here as well. Here, DraftKings complains of the Attorney General’s issuance of a legal opinion and the reasoning in that opinion. All of the following acts occurred in Travis County:

- The Attorney General received a request to render an advisory opinion on the legality of DFS operations;
- The Attorney General considered the question and researched the law;
- The Attorney General issued an advisory opinion answering the question.

*See generally* Pet. Ex. A (reflecting that the Opinion was issued from the Attorney General’s Office in Austin, Travis County, Texas, and was dispatched to Hon. Rep. Myra Crownover, at her office in Austin, Travis County, Texas).

DraftKings complains that the Attorney General overstepped his authority in answering the question (and further complains that he got the answer wrong). Thus, the material facts giving rise to the causes of action are what the Attorney General did and the correctness of it. Both the legal reasoning and issuance of the Opinion undisputedly happened in Travis County. Nothing material to the analysis in this case occurred in Dallas County.

DraftKings’s allegations have only a tangential relationship, at best, to the facts that matter in this lawsuit. DraftKings’s specific allegations and the Attorney General’s response are as follows:

1. “Multiple customers based in Dallas County closed their accounts with DraftKings in the days following the publication of the Attorney General’s opinion letter.”<sup>11</sup>

The Attorney General denies this allegation. Even if this allegation were true, however, customers closing their accounts does not constitute “a substantial part of the events or omissions giving rise to the claim.” *See* TEX. CIV. PRAC. REM. CODE §15.002(a). Customers closing their accounts has nothing to do with the Attorney General’s authority and the Attorney General’s analysis.

2. “The Attorney General’s actions threaten DraftKings’s ability to attract new investment partners and customers in Dallas.”<sup>12</sup>

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<sup>11</sup> *See* Pet. ¶5 (capitalization added).

<sup>12</sup> *See* Pet. ¶5 (capitalization added).

The Attorney General denies this allegation. Further, even if it were true, DraftKings’s ability to attract new investors or customers has nothing to do with what this case is about—the Attorney General’s authority to issue opinions, and the correctness of the legal conclusion that paid DFS is illegal under Texas law when the house takes a cut.

Further, a hypothetical future harm cannot be “all or a substantial part of the events or omissions giving rise to the claim” because a hypothetical future harm cannot “give rise to a claim.” See TEX. CIV. PRAC. REM. CODE §15.002(a); see also *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000) (hypothetical injury is insufficient to confer subject-matter jurisdiction because the claim is not ripe). Therefore, DraftKings cannot base venue on this allegation.

3. “[The Attorney General’s actions] further have implications for DraftKings’s existing business partnerships in Dallas County—including its partnership with the Dallas Cowboys—should DraftKings be forced to exit the state.”<sup>13</sup>

The Attorney General denies that DraftKings’s business partnerships in Dallas County—including a relationship with the Dallas Cowboys—has been harmed by the Opinion, that the Opinion has implications for those business relationships, or that “implications for business relationships” constitute “all or a substantial part” of “events or omissions giving rise” to the claim in this case.

Moreover—like the second allegation above—this allegation cannot form the basis of venue because a hypothetical future harm cannot be “all or a substantial part of the events or omissions giving rise to the claim” because a hypothetical future harm cannot “give rise to a claim.” See TEX. CIV. PRAC. REM. CODE §15.002(a); see also *Gibson*, 22 S.W.3d at 852 (hypothetical injury is insufficient to confer subject-matter jurisdiction because the claim is not ripe). Therefore, DraftKings cannot base venue on this allegation.

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<sup>13</sup> See Pet. ¶5 (capitalization added).

4. “A substantial share of DraftKings’s existing Texas customers reside in Dallas County; DraftKings seeks a declaration as to whether the games it continues to provide to those customers violate the law.”<sup>14</sup>

The Attorney General specifically denies that a “substantial share” of DraftKings’s customers reside in Dallas County. More importantly, though, even if this were true, it is not legally significant to the venue analysis. Again, the fact that DraftKings’s allegedly has customers in Dallas is irrelevant to whether the Attorney General overstepped his authority and whether the Opinion properly states the law. The allegation—even if true—that DraftKings has a “substantial” number of customers in Dallas County is irrelevant to whether “all or a substantial part of the events or omissions giving rise to the claim” occurred in Dallas County. *See* TEX. CIV. PRAC. REM. CODE §15.002(a).

5. “The Attorney General’s actions have not only harmed DraftKings’s Dallas operations, but promise further harm if left unchecked, and they have thrown the legality of DraftKings’s entire Dallas operation into doubt.”<sup>15</sup>

The Attorney General denies that the Opinion has harmed DraftKings’s operations, that DraftKings will be harmed further, or that its entire “Dallas operation” is called into doubt. Again, though, even if these facts were true, they are not “substantial” to the legal question of whether the Attorney General overstepped his authority and the correctness of the Opinion.

Further, even assuming DraftKings’s allegations were true, under DraftKings’s reasoning, venue would be proper in nearly *every* Texas county because DraftKings presumably has customers in each county and “business operations” in

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<sup>14</sup> *See* Pet. ¶5 (capitalization added).

<sup>15</sup> *See* Pet. ¶5 (capitalization added).

every county. While a “substantial part of the events and omissions giving rise to the cause of action” can be more than one county, Texas venue law is not so broad that a “substantial” part of the events and omissions occurred *everywhere*.

## V. CONCLUSION

For all the above reasons, the Court should grant the Attorney General’s *Motion to Transfer Venue* and transfer this case to Travis County.

## ORIGINAL ANSWER

### I. ANSWER

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant Texas Attorney General Ken Paxton enters a general denial, denying each and every, all and singular, of the allegations in Plaintiff’s Petition. Further, Defendant demands strict proof for all of Plaintiff’s allegations. Defendant also requests that Plaintiff be held to the appropriate burden of proof as required under applicable law with respect to any and all charges and allegations against Defendant.

### II. AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defenses to the claims raised in Plaintiff’s Petition:

1. Defendant asserts the affirmative defense of sovereign immunity to any and all claims against him to which that defense may apply;
2. Defendant asserts the affirmative defense of official immunity;
3. Defendant asserts the affirmative defense of limitations, to the extent applicable;

4. Defendant asserts that Plaintiff failed to exhaust their administrative remedies, to the extent applicable;
5. Defendant asserts that Plaintiff failed to state a legally cognizable claim; and
6. Defendant reserves the right to amend this Answer to allege affirmative defenses as those defenses may become known.

### **III. PRAYER**

Defendant requests judgment of the Court that Plaintiff takes nothing by this suit and that Defendant recover all costs and such other and further relief to which the Defendant may be justly entitled.

### **PLEA TO THE JURISDICTION**

#### **I. THE LEGAL STANDARD.**

The claimant bears the burden to affirmatively demonstrate the court's subject matter jurisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). Subject-matter jurisdiction is essential to a court's power to decide a case, and can be neither presumed nor waived. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 448 n.2 (Tex. 1996). Whether a court has subject matter jurisdiction and whether the claimant has "alleged facts that affirmatively demonstrate [such] jurisdiction" are questions of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Though factual allegations are construed in the plaintiff's favor when considering a jurisdictional challenge, the court is not bound by

plaintiff's legal conclusions. *Salazar v. Morales*, 900 S.W.2d 929, 932 n.6 (Tex. App.—Austin 1995, no writ).

In reviewing a jurisdictional plea, the court considers the pleadings and any evidence relevant to the jurisdictional issues. *Miranda*, 133 S.W.3d at 227 (Tex. 2004). If the pleadings affirmatively demonstrate an incurable jurisdictional defect, the suit is dismissed with prejudice. *Id.* at 226-27. While a plaintiff does not need to prove its claim in response to a jurisdictional challenge, a plaintiff must plead a viable claim. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015); *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d 1, 13-14 (Tex. 2015) (immunity not waived and court must dismiss claim for lack of jurisdiction where claim is facially invalid).

## **II. THIS DALLAS COUNTY COURT LACKS SUBJECT-MATTER JURISDICTION TO HEAR THE CLAIMS AGAINST THE ATTORNEY GENERAL.**

DraftKings's claims against the Attorney General cannot be heard in Dallas County for the independent reason that the Petition effectively seeks a writ of mandamus against the Attorney General. Because exclusive jurisdiction over a writ of mandamus against the Attorney General rests with the Texas Supreme Court, the Court cannot adjudicate the claims in this case.

Mandamus relief is appropriate, in a case such as this one, where the act sought to be compelled is purely "ministerial" and the petitioner has no other adequate legal remedy. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). "An act is ministerial when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of

discretion.” *Id.* (citing *DePoyster v. Baker*, 34 S.W. 106, 107 (Tex. 1896) (orig. proceeding)).

Texas Government Code §22.002(c) provides:

Only the Supreme Court has the authority to issue a writ of mandamus or injunction . . . against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

Thus, district courts in Texas generally have no jurisdiction to mandamus executive officer respondents like the Attorney General. *See A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (1995) (citing *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975) (orig. proceeding) (seeking to compel the comptroller to issue a warrant for payment of architects’ services); *Corsicana Cotton Mills, Inc. v. Sheppard*, 123 Tex. 352, 71 S.W.2d 247 (1934) (orig. proceeding) (seeking to compel comptroller and treasurer to refund erroneously paid franchise taxes); *Jernigan v. Finley*, 90 Tex. 205, 38 S.W. 24 (1896) (orig. proceeding) (seeking to force comptroller to issue a warrant for county school funds)).

As is clear from the Petition, the Attorney General’s involvement in this lawsuit relates *exclusively* to his role to provide legal advice to members of the legislature, upon request. *See generally*, Pet.; TEX. GOV’T CODE §402.042(b)(7). DraftKings’s entire case centers around the Attorney General’s Opinion on DFS. And the Attorney General does not dispute that he issued the Opinion, pursuant to the relevant provision of the Government Code.

Although characterized as a request for declaratory relief, it is clear as a matter of law that DraftKings also seeks a writ of mandamus from the Court. That is, this suit seeks to prevent any “governmental entity [from] us[ing] or rely[ing] on the Attorney General’s opinion.” Pet. ¶121(c). DraftKings cannot evade the affirmative nature of the relief sought by framing their request as one for a declaration eviscerating the Opinion’s persuasive value. In order to do that, the Attorney General would have to *withdraw* that opinion. “To undo what has already been done necessarily requires affirmative action; that of the Attorney General in withdrawing his opinion[.]” *Am. Nat. Bank of Austin v. Sheppard*, 175 S.W.2d at 627. “Jurisdiction to compel [this] act[] is vested exclusively in the Supreme Court.” *Id.*

But the Court does not have the authority to issue such a writ against the Attorney General. *See Sheppard*, 175 S.W.2d at 627; TEX. GOV’T CODE §22.002(c); *A & T Consultants, Inc.*, 904 S.W.2d at 672. That authority belongs solely to the Texas Supreme Court. *Id.* Accordingly, the Court lacks subject-matter jurisdiction to entertain this case against the Attorney General.

### **III. THE COURT LACKS JURISDICTION OVER DRAFTKINGS’S REQUEST FOR RELIEF UNDER THE UDJA.**

Under the UDJA provisions DraftKings invokes,<sup>16</sup> “[a] court of record *within its jurisdiction* has power to declare rights, status, and other legal relations whether

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<sup>16</sup> DraftKings also asserts that the Court has jurisdiction under TEX. CONST. art. 5, §8 and TEX. GOV’T CODE §§24.007, 24.008. The Attorney General notes that TEX. CONST. art. 5, §8 does not *itself* confer jurisdiction, but instead recognizes jurisdiction otherwise provided by law. TEX. CONST. art. 5, §8 (“District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.”).

or not further relief is or could be claimed.” TEX. CIV. PRAC. & REM. CODE §37.003 (emphasis added). Further, “[a] person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.” *Id.* §37.004.

The UDJA does not alter the scope of a trial court’s jurisdiction, but is “merely a procedural device for deciding cases *already within* a court’s jurisdiction.” *Tex. Parks & Wildlife Dep’t v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011) (citations omitted) (emphasis supplied); *see also, e.g., City of Longview v. Head*, 33 S.W.3d 47, 51 (Tex. App.—Tyler 2000, no pet. hist.) (“The Uniform Declaratory Judgment Act does not confer any additional subject matter jurisdiction on a court.”). The relief DraftKings requests here is not within the Court’s jurisdiction, both because civil courts lack jurisdiction to construe criminal statutes, and because DraftKings has not alleged a valid waiver of sovereign immunity that would allow suit against the Attorney General as a state official.

**A. Civil courts lack jurisdiction to construe criminal statutes.**

In Texas, it is well-settled that the meaning and validity of a penal statute or ordinance is ordinarily determined by courts exercising criminal jurisdiction. *State v.*

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Similarly, TEX. GOV’T CODE §§24.007, 24.008 are not jurisdictional grants. If those statements conferred jurisdiction over suits against the state, it would be impossible for a court to dismiss claims on sovereign-immunity grounds.

*Morales*, 869 S.W.2d 941, 945 (Tex. 1994). Civil courts lack jurisdiction to interpret penal statutes, except under limited circumstances—namely, if a statute is allegedly unconstitutional *and* the enforcement of the statute threatens irreparable injury to the plaintiff’s protected personal or property rights. *Id.* at 945. Thus, to establish jurisdiction under the limited *Morales* exception, a plaintiff must (1) challenge the constitutionality of a penal statute, and (2) allege irreparable injury to a vested personal or property right. Otherwise, the Court cannot exercise jurisdiction.

As numerous courts applying *Morales* in the gambling context have held, a plaintiff’s failure to satisfy these requirements divests the court of jurisdiction. For example, in *Sterling v. San Antonio Police Department*, a distributor of eight-liner machines “asked for a declaration that his eight-liners were not ‘gambling devices’” under Texas Penal Code §47.01, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.). The court dismissed, noting that, “[a]lthough Sterling insists his challenge is an attack on the constitutionality of [§]47.01, his argument is nothing more than a request for an interpretation of” the law “and a declaration that the use of his machines [] was not illegal. . . . Because this argument does not implicate the constitutionality of [§]47.01, the first element of *Morales* has not been satisfied.” *Id.* at 794. The court further concluded that “Sterling has no constitutionally protected property right to lease gambling devices.” *Id.* at 794 (citing *Roberts v. Gossett*, 88 S.W.2d 507, 509 (Tex. App.—Amarillo 1935, no writ)). The *Sterling* court further concluded that the second prong of *Morales* was not satisfied in that case, because “the harm inherent in prosecution for a criminal offense does not constitute

irreparable harm as required by *Morales*.” *Id.* at 795 (citing *City of Longview v. Head*, 33 S.W.3d 47, 53 (Tex. App.—2000, no pet.).

*Sterling* is in good company—courts across the State have reached this same jurisdictional conclusion in civil suits seeking declaratory relief construing the Penal Code’s gambling restrictions. For example, in *Cornyn v. Akin*, the Eighth Court of Appeals concluded that it lacked jurisdiction under *Morales* because plaintiffs asked only for declaration that their use of eight-liners did not constitute criminal activity, 50 S.W.3d 735, 737–38 (Tex. App.—El Paso 2001, no pet.). As such, the *Cornyn* plaintiffs did not challenge any statute’s constitutionality, and failed to establish the first *Morales* prong. The First Court of Appeals reached a similar result in *Warren v. Aldridge*, where it concluded that the *Morales* requirement to challenge constitutionality of statute was not satisfied where plaintiff “sought an interpretation of the statute and a declaration that use of ‘eight liner’ machines does not constitute criminal activity” under Chapter 47, 992 S.W.2d 689, 691 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see.*). *See also, e.g., Letson v. Barnes*, 979 S.W.2d 414, 418 (Tex. App.—Amarillo 1998, pet. denied) (court lacked jurisdiction under *Morales* where “Barnes simply wants us to interpret portions of that statute and declare that use of the 8–Liners does not constitute criminal activity thereunder”); *Head*, 33 S.W.3d at 53 (court lacked jurisdiction to consider bare allegation that §47.01 in its entirety is unconstitutional, in the context of an Attorney General’s opinion construing the statute).

DraftKings’s Petition does not satisfy either of *Morales*’s jurisdictional requirements. First, it does not challenge the constitutionality of any criminal statute, but instead seeks an *interpretation* of a criminal statute. That is, in challenging the Attorney General’s opinion, DraftKings seeks declaratory relief that the Attorney General’s reading of the Penal Code is wrong. This mirrors the facts of the numerous authorities cited above. Like the plaintiff in *Warren*, DraftKings “d[oes] not challenge the constitutionality of [§]47.01, *et seq.*; rather they s[seek] an interpretation of the statute and a declaration that” their business “does not constitute criminal activity thereunder.” 992 S.W.2d at 691. *See also, e.g., Cornyn*, 50 S.W.3d at 738 (“We find nothing in plaintiffs’ pleading implicating the constitutionality of section 47.01(4)(B).”). The Attorney General is named as a defendant in an attempt to confer jurisdiction, because he reached the opposite result that DraftKings would prefer in discharging his constitutional and statutory authority to issue opinions. This does not satisfy the first *Morales* prong.

Moreover, property rights are created and defined by state law. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *Reese v. City of Hunter’s Creek Vill.*, 95 S.W.3d 389, 391 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The term “‘property right’ refers to any type of right to specific property, including tangible, personal property.” *City of Corpus Christi v. Maldonado*, 398 S.W.3d 266, 270 (Tex. App.—Corpus Christi 2011, no pet.). A property right is “vested” when it “has some definitive, rather than merely potential existence.” *City of Houston v. Guthrie*, 332 S.W.3d 578, 597 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (citation omitted)).

Importantly, “[p]roperty owners do not have a constitutionally protected, vested right to use property in any certain way.” *Consumer Serv. All. of Texas, Inc. v. City of Dallas*, 433 S.W.3d 796, 805–06 (Tex. App.—Dallas 2014, no pet.) (citing *Morrow v. Truckload Fireworks, Inc.*, 230 S.W.3d 232, 238, 240 (Tex. App.—Eastland 2007, pet. dismiss’d)).

*Consumer Service Alliance of Texas, Inc., v. City of Dallas*, which DraftKings relies on in its Petition, is instructive here, 433 S.W.3d 796 (Tex. App.—Dallas 2014, no pet.). That case involved an action by credit access businesses, and a related trade association, seeking declaratory relief construing a penal ordinance that “regulates the field of business in which [plaintiffs] operate in Dallas.” 433 S.W.3d at 800 (citation omitted). At least one of the plaintiffs alleged that the ordinance “amount[ed] to a virtual prohibition against [its] business operations in the city of Dallas.” *Id.* at 801 (citation omitted). The Court concluded that the ordinance at issue did not “forbid[] them from engaging in the lending business . . . since the Ordinance on its face only regulates the terms under which appellants may offer their services.” *Id.* at 807. As such, the plaintiffs could not establish harm to vested property rights, “as necessary for the trial court to have equity jurisdiction.”

DraftKings has no vested property right at issue here. First, DraftKings complains only about customers withdrawing funds, and business partners that might cease to do business with DraftKings. Pet. at ¶¶82, 83. Neither of these alleged potential harms implicates a “vested” property right—customer funds do not belong to DraftKings, and any alleged loss of ability to do business in the future, by

definition, has not *vested*. *City of Houston v. Guthrie*, 332 S.W.3d at 597. Moreover, DraftKings does “not have a constitutionally protected, vested right to use property in any certain way.” *Consumer Serv. All.*, 433 S.W.3d at 805–06. It is axiomatic, then, that DraftKings has no “no constitutionally protected property right” to operate a type of DFS service that violates Texas law, or profit from such activity. *Sterling*, 94 S.W.3d at 794 (“Sterling has no constitutionally protected property right to lease gambling devices.”) (citing *Roberts v. Gossett*, 88 S.W.2d 507, 509 (Tex. App.—Amarillo 1935, no writ)). Thus, DraftKings has not alleged a vested property right sufficient to satisfy the second *Morales* prong. Because DraftKings fails to satisfy either element of the *Morales* exception, the trial court lacks jurisdiction to interpret Chapter 47 of the Penal Code as applied to DraftKings’s activities.<sup>17</sup>

This limitation on equity jurisdiction is further supported by the jurisdictional grants in the Texas Constitution, which establish two courts of last resort—the Texas Supreme Court and the Court of Criminal Appeals. Indeed,

A court of equity has no right to inject itself into a field where exclusive and final jurisdiction has been given another and different court to finally determine whether a given state of facts constitutes a penal offense. To hold in this case that the meager facts here shown constitute no offense is plainly an invasion of the jurisdiction of the courts specially created by law to finally adjudicate and determine this very question. It would tend to “hamstring” the efforts of enforcement officers, create confusion, and might result finally in precise contradiction of opinions between the Courts of Civil Appeals and the Court of Criminal Appeals to which the Constitution has intrusted supreme and exclusive jurisdiction in criminal matters.

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<sup>17</sup> There is an additional requirement under *Morales* to seek injunctive relief. 869 S.W.2d at 946-47. As addressed *supra* in the Motion to Transfer Venue, DraftKings claims, at their base, seek injunctive relief. To the extent the court agrees with DraftKings that they do not seek injunctive relief, then the court lacks jurisdiction under *Morales*.

*Roberts*, 88 S.W.2d at 509; *see also Morales*, 869 S.W.2d at 947–48 (same).

The only other authority DraftKings cites in an attempt to overcome *Morales* does not suggest a different result. Pet. ¶6 (citing *City of Austin v. Austin City Cemetery Ass’n*, 28 S.W. 528 (Tex. 1894); *Consumer Serv. All.*, 433 S.W.3d at 807–08), for the proposition that “the proper constriction of a criminal statute that causes direct harm to a business’s economic interests is the proper subject of an action for declaratory judgment.”). That is, *City of Austin v. Austin City Cemetery Association* contemplated a city ordinance which constituted a binding interpretation of a criminal statute, and could be enforced *in terrorem* without being subject to challenge. This case is irrelevant here, because the Attorney General’s opinion is not a binding and enforceable interpretation of the law. It is merely an advisory opinion, issued pursuant to the Attorney General’s constitutional and statutory authority.

**B. The Court also lacks jurisdiction because DraftKings has failed to allege a valid waiver of the Attorney General’s sovereign immunity under the UDJA.**

Even if the Court could properly construe a criminal statute in this case, any relief it might enter would still require that it have jurisdiction over the Attorney General. Here, that purported jurisdiction is premised upon the allegation that the Attorney General exceeded his authority under Government Code §402.042 because he “lacks authority to misinterpret the factual nature of DFS” and to “issue an opinion

letter containing manifestly incorrect interpretations of Texas law.” Pet. ¶188.<sup>18</sup> This claim is barred by sovereign immunity.

The State of Texas, its agencies, and its officers have sovereign immunity from suit and liability unless the Legislature has expressly waived that immunity. *See, e.g., Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997), superseded by statute on other grounds as stated in *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001). Thus, “a UDJA declaratory claim asserted directly against a state agency or official, like other types of claims, will ordinarily be barred by sovereign immunity, thereby divesting the trial court of jurisdiction, unless the Legislature has waived immunity as to the subject matter of the claim.” *Tex. Dep’t. of State Health Services v. Balquinta*, 429 S.W.3d 726, 746 (Tex. App.—Austin 2014, pet. dismissed) (citation omitted). Consequently, a party suing a government official in his official capacity must establish the State’s consent to suit by pointing to a statute that expressly waives the State’s immunity, or by demonstrating the plaintiff otherwise has legislative permission to bring suit. *Tex. Dep’t of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). The Legislature is deemed to have waived State immunity only when “effected by clear and unambiguous language.” TEX. GOV’T. CODE §311.034; *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 641 (Tex. 2004).

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<sup>18</sup> DraftKings also argues that the Attorney General’s Opinion violates the Texas and United States Constitutions. Because these do not amount to viable claims, they are also insufficient to confer UDJA jurisdiction. *See infra* Part IV.

The UDJA does not in and of itself waive the State’s immunity from suit. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73 (Tex. 2009). Accordingly, a plaintiff cannot “circumvent the bar of sovereign immunity by simply characterizing the suit as a declaratory judgment action when sovereign immunity has not been waived for the relief actually sought.” *Koch v. Tex. Gen. Land Office*, 273 S.W.3d 451, 455 (Tex. App.—Austin 2008, pet. denied). The Supreme Court has recognized that an *ultra vires* claim for equitable relief that alleges a state officer is failing “to comply with statutory or constitutional provisions” is not necessarily barred by sovereign immunity. *Heinrich*, 284 S.W.3d at 372–73. Given DraftKings’s allegations under the UDJA, this is the only sort of claim it could mount here. Pet. Count I.<sup>19</sup>

But an *ultra vires* action “must not complain of a government officer’s exercise of discretion” and instead “must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.” *Id.* at 372; see *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d at 9. It is not enough for the claimant to establish that an official “reached an incorrect or wrong result when exercising its delegated authority.” *Creedmor-Maha Water Supply Corp. v. Tex. Comm’n on Envtl. Quality*, 307 S.W.3d 505, 517-18 (Tex. App.—Austin 2010, no pet.). Moreover, the UDJA and the *ultra vires* cause of action cannot be used to obtain a mere interpretation of rights under a statute; rather, the statute is construed to

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<sup>19</sup> See also Pet. at ¶93; 95 (“The Attorney General’s actions warrant declaratory relief in favor of DraftKings, including, but not limited to, a declaration that DFS contests are lawful in Texas, that the Attorney General’s opinion letter is unauthorized by—and conflicts with—Texas law . . . . In the alternative, DraftKings is entitled to a declaratory judgment that the Attorney General has exceeded his statutory authority by issuing a manifestly incorrect legal opinion . . .”).

determine whether the specific acts alleged violate the statute, nothing more. *See Houston Belt & Terminal Railway Co. v. City of Houston*, No. 14-0459, 2016 WL 1312910, at \*5 (Tex. April 1, 2016) (applying *Klumb* for proposition that statutory construction is limited to determination whether alleged acts violate statute, as opposed to opportunity to judicial construction of statute in the abstract).

Here, DraftKings’s allegation that the Attorney General’s Opinion is unauthorized by law fails on its face, because he has the express statutory authority to issue opinions when requested by a qualified entity. TEX. GOV’T CODE §402.042; *see also* TEX. CONST. art. IV, §22 (“The Attorney General shall . . . give legal advice in writing to the Governor and other executive officers, when requested by them”). DraftKings’s allegation that the Attorney General exceeded his statutory authority because it *disagrees* with that opinion is expressly not a cause of action for which the legislature has waived immunity, because it is merely a claim that the Attorney General “reached an incorrect or wrong result when exercising [his] delegated authority.” *Creedmor-Maha Water Supply Corp.*, 307 S.W.3d at 517–18. The Legislature has not waived immunity for such a cause of action. *Id.*

Nor does Texas law provide for judicial review of Attorney General opinions. In fact, DraftKings acknowledges that such opinions—like the one it disagrees with here—do not bind Texas courts. Pet. ¶102 (“In any legal action against DraftKings, the Attorney General’s opinion cannot bind any Texas court.” (citing *Weaver v. Head*,

984 S.W.2d 744 (Tex. App.—Texarkana 1999, no pet.).<sup>20</sup> This is consistent with the general presumption against judicial review of executive determinations. *See, e.g., Gen. Serv. Comm’n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d at 599 (“Texas law recognizes no right to judicial review of an administrative order...”). DraftKings has failed to identify any statutory right of action to challenge an Attorney General opinion. Thus, even if DraftKings’s claims could be read as an attempt to invoke the *ultra vires* exception to immunity, they do not confer UDJA jurisdiction, because “sovereign immunity bars a UDJA claim that would have the effect of challenging an agency [or official] order that has not been made reviewable by statutory or constitutional provisions.” *Balquinta*, 429 S.W.3d at 746 (citation omitted).

Nor does it matter that Draft Kings labels the relief it requests as declaratory, rather than injunctive. “A litigant couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit, such that a UDJA claim that might otherwise be within a court’s jurisdiction will be independently barred by sovereign immunity if it has the effect of establishing a right to relief against [a governmental entity] for which the Legislature has not waived immunity.” *Balquinta*, 429 S.W.3d at 746 (citations and quotation marks omitted). Because DraftKings has identified no such waiver here, the Court lacks jurisdiction under the UDJA.

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<sup>20</sup> It is widely recognized that Attorney General opinions are advisory in nature and do not bind Texas courts. *See, e.g., Holmes v. Morales*, 924 S.W.2d 920, 924, (Tex. 1996); *Texas Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d at 656 (Tex. App.—Austin 1999, pet. dismissed w.o.j.). Such opinions are considered persuasive and are given due consideration, but do not bind the court. *Henry v. Kaufman County Dev. Dist. No. 1*, 150 S.W.3d 498, 503-04 (Tex. App.—Austin 2004, pet. dismissed by agr.); *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 554 (Tex. App.—Dallas 1998), *aff’d*, 22 S.W.3d 351 (Tex. 2000).

Of course, as explained above, the Attorney General might be subject to mandamus in the Texas Supreme Court if he issues an opinion inconsistent with his statutory and constitutional authority. *See Sheppard*, 175 S.W.2d at 628. But, mandamus to undo a past action will issue only in limited circumstances, based on a “clear abuse of discretion.” *Anderson v. City of Seven Points*, 806 S.W.2d at 793 (orig. proceeding). The only potential “clear abuse of discretion” in the Attorney General’s advisory statements as to how the courts will likely address a legal matter is that he do so outside the statutory process, or at the request of a person not authorized to request an opinion. The voicing of a non-binding legal opinion is, necessarily, discretionary because it falls within the scope of the executive department’s necessary power to take positions regarding the meaning of the law. *See DePoyster v. Baker*, 161, 34 S.W. at 109 (citing *Decatur v. Paulding*, 39 U.S. 497, 497 (1840) (explaining that executive statements regarding the scope of the law are discretionary and cannot be mandamus unless they rise to the level of “refusing to perform a plain duty enjoined upon him by the law”)).

Indeed, to act on the legal theories embodied in an opinion, the Attorney General would have to initiate suit, and ask a court to impose a judicial remedy—in short, exercise the discretion to prosecute civil matters, which is another form of discretion. *See Tex. Nat. Resource Conservation Comm’n v. Lakeshore Utility Co., Inc.*, 164 S.W.3d 368, (Tex. 2005) (holding that Attorney General’s raising of additional penalty amounts following discovery was not invalid exercise of executive power, because it was merely a request to court to exercise judicial power to enforce the

Water Code, not to impose penalties through executive process). By contrast, actions taken in response to attorney general opinions are within the discretion of the actors, not the Attorney General. *See Tex. Alc. Beverage Comm'n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 658 (Tex. App.—Austin 1999, pet. dismissed w.o.j.) (distinguishing *Weaver v. Head* on ground that *Weaver* involved direct attack on constitutionality of statute in light of AG opinion, while *Amusement & Music Operators* attacked process by which Commission exercised its discretion to implement the legal theories articulated in the same administrative order.)

#### **IV. DRAFTKINGS'S PUTATIVE CONSTITUTIONAL CLAIMS DO NOT CURE THESE JURISDICTIONAL DEFECTS.**

In an attempt to cure the Court's lack of jurisdiction over its request for advisory relief, DraftKings asserts claims under the Texas and United States constitutions. But even in the constitutional context, the State and its officials remain immune from suit unless a plaintiff pleads a "viable" constitutional claim. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011). DraftKings has not done so here, and its constitutional claims are no more than an attempt to obtain improper judicial review of an Attorney General opinion, where the Legislature has provided for none.

##### **A. DraftKings has failed to allege a valid Due Process or Due Course of Law claim.**

DraftKings asserts its Due Process and Due Course of law claims based upon the same set of factual allegations. In particular, these claims arise from DraftKings's allegation that it "was never afforded a meaningful opportunity to be heard before the Attorney General issued his opinion," and that "[t]he Attorney General's actions

effectively deny DraftKings its day in court, potentially bestowing a death sentence on DraftKings’s Texas operations before it has had any opportunity to defend itself.” Pet. ¶¶106–07. Where a litigant complains “they have been deprived of vested property rights without due process,” and also raises due course of law claims under the Texas Constitution, “no meaningful difference exists between the terms ‘due process’ and ‘due course of law.’” *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d at 15 (citations omitted).

This protection does not provide for the “process” DraftKings believes it was entitled to here. That is, a due process claim under 42 U.S.C. §1983 requires a plaintiff to first demonstrate it has been deprived of a constitutionally protected interest. *Lollar v. Baker*, 196 F.3d 603, 607 (5th Cir. 1999); *Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). Here, DraftKings does not have a constitutionally protected interest in providing input in the Attorney General’s opinion process. *See generally* TEX. GOV’T CODE §402.042 (providing for Attorney General opinions). Further, DraftKings does not have a constitutionally protected interest in profiting from gambling that is illegal under Texas law. *E.g., Sterling*, 94 S.W.3d at 794; *Roberts v. Gossett*, 88 S.W.2d at 509. As a result, its federal due process claim fails on its face.<sup>21</sup> Because its Due

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<sup>21</sup> Indeed—particularly because they do not bind the Courts of the State, and may only be requested by a limited class of individuals—there is no justification for allowing some sort of “process” by which interested individuals could have input in Attorney General opinions. Due process is a “flexible” concept that “calls for such procedural protections as the particular situation demands,” and requires consideration of three distinct factors: “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [] the Government’s interest, including the function involved and the fiscal and administrative burdens that

Course of Law claim is evaluated under the same standard, that claim fails, too. *Klumb v. Houston Mun. Employees Pension Sys.*, 458 S.W.3d at 15.<sup>22</sup>

It is further apparent that DraftKings does not have a Due Process or Due Course of Law claim given that, as already noted, Attorney General opinions do not bind the Texas courts. *Supra* n.20 and accompanying text; *see also* Pet. ¶102. Moreover, the alleged loss of business in Texas of which DraftKings complains, *see generally* Pet. at ¶¶82,<sup>23</sup> 83,<sup>24</sup> is not redressable through the Attorney General. In order to have standing to assert this due process claim, any alleged injury resulting therefrom must “be fairly...trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” *Heckman v. Williamson County*, 369 S.W.3d 137, 154–55 (Tex. 2012). (alterations original) (citations omitted). Plainly, this alleged “injury” is caused by these independent third parties—DraftKings’s customers and business partners—

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the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263–71 (1970)). The public interest “includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the [deprivation of the protected interest].” *Mathews*, 424 U.S. at 347. This balancing of factors tilts in favor of allowing the Attorney General to issue opinions as provided by statute without undue interruption.

<sup>22</sup> DraftKings gains nothing by overlaying federal §1983 claims as a procedural safety net for its unviable constitutional arguments. Texas courts can dismiss §1983 claims based on Texas pleading rules. Section 1983 claims are subject to dismissal based on neutral rules of state procedure, such as pleading-adequacy requirements for avoiding sovereign immunity. *Tex. Dep’t of Pub. Safety v. Petta*, 44 S.W.3d 575, 582 (Tex. 2001); *see also City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, (Tex. App.—Austin 2014, no pet.) (reversing trial court’s denial of plea because facts alleged in support of § 1983 claim failed to state viable constitutional theory).

<sup>23</sup> “Customers of DraftKings have withdrawn money after the Attorney General’s opinion was issued, citing that opinion as their reason for withdrawing funds.”

<sup>24</sup> “DraftKings’ key business partners that process financial transactions between DraftKings and its customers have indicated that they will imminently cease to process transactions in Texas.”

which are not before the Court. As a result, DraftKings lacks standing to assert these Due Process and Due Course of Law claims against the Attorney General.

**B. DraftKings has not alleged a valid Equal Protection or Denial of Equal Rights claim, either.**

Finally, DraftKings seeks protection under the Equal Protection Clause of the United States Constitution, and the Equal Rights Clause of the Texas Constitution. It alleges that “[t]he Attorney General’s actions reflect his view that DFS contests are unlawful and seek to force DFS providers to shutter operations in Texas, but they do not impose any similar adverse consequences for operators of season-long contests.” Pet. ¶115. This allegation misstates the Opinion at issue, which concluded as follows:

The same framework applies to traditional fantasy sports leagues [and DFS], but the outcome may differ *depending on whether the house takes a rake. Payment of a fee to participate in the league constitutes an agreement to win or lose something of value, and the outcome depends at least partially on chance, thus involving a bet.* However, traditional fantasy sports leagues often differ from daily fantasy sports leagues in that any participation fee is not retained by the "commissioner" of the traditional fantasy sports league and is instead paid out wholly to the participants. And section 47.02 contains a defense to prosecution when “(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.” Thus, to the extent play in a traditional fantasy sports league satisfies the above three elements, the participants in such league may avail themselves of the defense to prosecution.

Pet. Ex. A at 7 (citations omitted) (emphasis added).

“Texas cases echo federal standards when determining whether a statute violates equal protection.” *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004) (citation omitted). The Equal Protection Clause of the Fourteenth

Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 215 (1982)). See also *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d at 98 (“The Texas Constitution contains a similar provision: ‘All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.’” (citing TEX. CONST. art. 1, §3)).

To state an Equal Protection claim, a plaintiff must allege purposeful discrimination that results in a discriminatory effect among those similarly situated. *Hanley v. City of Houston*, 178 F.3d 1290 (5th Cir. 1999). Each element of this showing is required. *Vill. of Arlington Hts. v. Metro. Houston Devel. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 239–42 (1976). In this context, “[d]iscriminatory purpose,’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of its adverse effects upon an identifiable group.” *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted).<sup>25</sup>

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<sup>25</sup> See also, e.g., *City of Paris v. Abbott*, 360 S.W.3d 567, 583 (Tex. App.—Texarkana 2011, pet. denied) (an “equal protection claim may be asserted by a plaintiff as a ‘class of one’ if he alleges that he has been *intentionally treated differently from others similarly situated* and there is no rational basis for the difference in treatment.”) (citing *City of Dallas v. Jones*, 331 S.W.3d 781, 787 (Tex. App.—Dallas 2010, pet. dismiss’d), *Leonard v. Abbott*, 171 S.W.3d 451, 458 (Tex. App.—Austin 2005, pet.

It is plain from the face of the Attorney General’s Opinion that the critical factor in determining whether online fantasy sports leagues constitute gambling under Texas law is *not* their daily versus season long nature, but rather, “whether the house takes a rake.” Pet. Ex. A at 7. It is this conduct that satisfies the “bet” element of Penal Code §47.02(a)(1), *see also id.* §47.01(1). As a result, DraftKings has failed to identify a similarly situated entity that has been treated differently. Pet. ¶¶94-96, 103. This is fatal to an equal protection claim. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). And certainly, DraftKings has also failed to identify any particular “group” that has been singled out for any disparate treatment.

**C. Even if these constitutional claims were valid, they are not ripe.**

Ripeness is a threshold issue that implicates subject-matter jurisdiction and emphasizes the need for a concrete injury for a justiciable claim. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998). “At the time when a lawsuit is filed, ripeness asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote.” *Patterson v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 971 S.W.2d at 443. The ripeness doctrine serves to avoid premature adjudication by assessing whether a case involves uncertain or contingent future events that may not occur as anticipated. *Id.*

The constitutional roots of justiciability doctrines such as ripeness lie in the prohibition on advisory opinions, which stems from the separation of powers doctrine.

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denied)) (emphasis added). To be “similarly situated,” a plaintiff must show that its situation is “directly comparable in all material respects” to its comparator’s. *Jones*, 331 S.W.3d at 787.

See TEX. CONST. art II, §1 (separation of powers); *Texas Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d at 444 (explaining that “we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department”). Texas courts are not empowered to render advisory opinions. *Patterson*, 971 S.W.2d at 443. This includes cases that are not yet ripe. *Id.* (citations omitted). A case is not ripe when its resolution depends on contingent or hypothetical facts, or events that have not yet come to pass. See *Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988) (trial court could not grant relief based on “a hypothetical situation which might or might not arise at a later date. District courts, under our Constitution, do not give advice or decide cases upon speculative, hypothetical or contingent situations”).

DraftKings’s case is not ripe for adjudication, because it does not allege that the Attorney General might prosecute it for any offense named in Chapter 47 of the Penal Code. Instead, DraftKings suggests only that it wishes to continue engaging in activity that the Attorney General has concluded is illegal. It therefore seeks legal advice from the Court regarding whether the Attorney General’s Opinion is right on the law. DraftKings speculates that a declaratory judgment, holding that it is not violating the Texas Penal Code, will put its business partners at ease for purposes of doing business with DraftKings. Pet. ¶84. But this is a contingency, an uncertainty, and a hypothesis upon which a court may not decide the legal issues raised in the Petition that the ripeness doctrine prohibits the Court from resolving.

## CONCLUSION

For the forgoing reasons, venue in this case is improper in Dallas County and is proper in Travis County. But should the Court determine that venue is proper in Dallas County, it should dismiss the case for lack of jurisdiction.

**Dated: May 2, 2016**

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing was filed electronically via the Court's CM/ECF system on this the 2nd day of May, 2016, causing electronic service upon:

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**CERTIFICATE OF CONFERENCE—MOTION TO TRANSFER VENUE**

Counsel for movant and counsel for respondent have personally conducted a conference at which there was a substantive discussion of every item presented to the Court in this motion and despite best efforts the counsel have not been able to resolve those matters presented.

Certified to the 2nd Day of May, 2016, by /s/Sean Flammer  
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