DAVID N. WOLF (6688)
JASON N. DUPREE (17509)
THOMAS S. PRATT (18233)
Assistant Utah Attorneys General
OFFICE OF THE UTAH ATTORNEY GENERAL
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (385) 441-4218
E-mail: dnwolf@agutah.gov
jdupree@agutah.gov
tspratt@agutah.gov

*Attorneys for Defendants*

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

| | |
|---|---|
| MOUNTAIN LION FOUNDATION, WESTERN WILDLIFE CONSERVANCY, and WILDLIFE FOR ALL, each non-profit corporations representing themselves and their members and supporters,<br><br>Plaintiffs,<br><br>vs.<br><br>STATE OF UTAH, by and through the UTAH DEPARTMENT OF NATURAL RESOURCES; JOEL FERRY, in his capacity as Executive Director of the UTAH DEPARTMENT OF NATURAL RESOURCES; the UTAH DIVISION OF WILDLIFE RESOURCES and the UTAH WILDLIFE BOARD,<br><br>Defendants. | **DEFENDANTS' MOTION TO DISMISS**<br><br>Case No.: 230907889<br><br>Judge Adam Mow |

Pursuant to Utah Rule of Civil Procedure 12(b)(1) and (6), Defendants submit this Motion to Dismiss, seeking dismissal of Plaintiffs' Complaint.

## STATEMENT AND GROUNDS FOR RELIEF REQUESTED

This case is about the State's policy decisions on how to regulate cougar hunting. In the 2023 general legislative session, the Legislature passed House Bill 469. HB 469 removed some restrictions on cougar hunting. For example, HB 469 streamlined the permitting process to hunt cougars, expanded the cougar hunting season, permitted the use of trapping devices to take cougars, and removed limits for the number of cougars each individual hunter could hunt. Then, Defendant Utah Wildlife Board met in June 2023 to contemplate further cougar hunting regulations. The Board ultimately declined to adopt any additional cougar hunting restrictions.

Plaintiffs are conservation organizations who disagree with the State's recently adopted policy allowing for fewer restrictions on hunting cougars in Utah. Plaintiffs frequently engage in public policy advocacy. In shaping policy on wildlife management, the State has often discussed policy positions with Plaintiffs, and considered Plaintiffs' positions. Plaintiffs maintain that they have the best solutions as to what the State *should* do. But through the legislative and rulemaking processes, the State has decided to go in another direction.

Plaintiffs claim that it violated the Utah Constitution for the Legislature and executive agencies to make the determinations that it did. Plaintiffs ask this Court to review those legislative and agency determinations. However, the political question doctrine precludes judicial review in this case. The Utah Constitution commits the issues of wildlife management and hunting regulation to the legislative and executive branches. And those issues involve policy determinations not suitable for resolution by the judiciary. Accordingly, this Court should dismiss Plaintiffs' Complaint under the political question doctrine.

Second, there is something strange about Plaintiffs' claims. Plaintiffs claim a violation of their right to hunt. However, Plaintiffs are not hunters nor desire to ever hunt. Plaintiffs are not claiming that HB 469 nor Defendants have imposed restrictions on Plaintiffs' hunting activities. Rather, Plaintiffs are asking this Court to require Defendants to impose more hunting restrictions on hunters. In other words, Plaintiffs want someone else's hunting rights to be further restricted. That does not state a claim for a violation of the individual's constitutionally protected right to hunt. On that basis, Plaintiffs' claims fail as a matter of law, and should be dismissed.

## STATEMENT OF FACTS

***Hunting Restrictions Reflect Policy Choices Based on Weighing Several Competing Interests***

Regulating cougar hunting requires policy decision-makers to weigh several competing interests, benefits, costs, and risks. First, the Utah Constitution preserves the right to hunt.[1] For over a century, cougars have been historically hunted in various types of hunts.[2] Hunters participate in public hunts of cougars.[3] At times, cougars have been hunted in bounty hunts.[4] But even though cougars are hunted, cougars are highly adaptable to differing situations.[5] This adaptability enables cougars to survive, even in the face of potential threats.[6]

Second, cougars kill and eat other animals that are subject to conservation efforts, such as mule deer, bighorn sheep, and elk.[7] In the past, Defendants have adopted policies to reduce cougar populations in specific areas in order to increase survival in mule deer or bighorn sheep populations, as cougars presented a threat to those populations.[8] Cougars also present a threat to

[1] Utah Const. art. V, sec. 1.
[2] Compl. ¶ 2.
[3] *Id.* ¶ 50.
[4] *Id.* ¶ 2.
[5] *Id.* ¶ 1.
[6] *Id.*
[7] Compl. ¶ 23.
[8] *Id.* ¶ 32.

livestock.[9] At times, an increase of cougar hunting was needed in response to livestock depredation from cougars.[10] Young cougars sometimes hunt small pets.[11]

Finally, the State must also consider the risks posed by cougars encountering humans. Cougars sometimes wander across highways and encounter humans.[12] Cougar attacks do occur.[13] In the last century, there have been many cougar attacks in North America, with 27 of those attacks being fatal.[14] Young cougars tend to pursue livestock or pets and travel to human-inhabited areas, leading to increased human-cougar interactions.[15]

***Defendants Are Tasked to Use Their Expertise to Set Wildlife and Hunting Policy***

With the balancing of competing interests in mind, Defendants are charged with creating wildlife management policy. Defendant Department of Natural Resources is created by statute.[16] The department is comprised of almost two dozen divisions, councils, and boards.[17] Defendant Utah Division of Wildlife Resources is housed within the Department of Natural Resources.[18] The Division of Wildlife Resources is "the wildlife authority for Utah."[19]

The Division of Wildlife Resources is "[s]ubject to the broad policymaking authority of the Wildlife Board."[20] Defendant Wildlife Board consists of seven members.[21] As required by statute, the members of the Wildlife Board have expertise in wildlife management, habitat management, business, and economics.[22]

---

[9] *Id.* ¶¶ 2, 51.
[10] *Id.* ¶ 2.
[11] *Id.* ¶ 47.
[12] *Id.* ¶ 49.
[13] Compl. ¶ 52.
[14] *Id.*
[15] Compl. ¶ 51.
[16] Utah Code § 79-2-201(1).
[17] Utah Code § 79-2-201(2).
[18] Utah Code § 23A-2-201.
[19] Utah Code § 23A-2-201(1)(b).
[20] Utah Code § 23A-2-201(2)(a).
[21] Utah Code § 23A-2-301.
[22] Utah Code § 23A-2-301(2).

The Wildlife Resources Act provides that the Division of Wildlife Resources "may determine the facts relevant to the wildlife resources of this state."[23] "Upon a determination of the facts, the Wildlife Board shall establish the policies best designed to accomplish the purposes and fulfill the intent of the laws pertaining to wildlife. . . ."[24]

***Plaintiffs in This Case Have No Intention of Hunting***

Plaintiffs in this case are not hunters.[25] Plaintiffs do not seek to hunt.[26] Quite the opposite. Plaintiff Mountain Lion Foundation wants to prevent "over-hunting."[27] Plaintiffs come to this Court to obtain a judicial declaration that will reduce cougar hunting in Utah.[28] Simply put, Plaintiffs seek cougar protection.[29]

Plaintiff Western Wildlife Conservancy advocates for cougar conservation in Utah.[30] Plaintiffs actively participate in the Legislature's development of cougar policy in Utah.[31] For decades, the Utah Legislature has heard and considered Western Wildlife Conservancy's positions on cougar management.[32] The Legislature has frequently engaged with Western Wildlife Conservancy in discussing cougar management issues.[33] Defendants have listened to testimony and comments from Plaintiffs on matters related to cougars.[34] Plaintiffs have also participated in the "public process" for developing the quotas for past cougar hunts.[35]

---

[23] Utah Code § 23A-2-102(1).
[24] Utah Code § 23A-2-102(1).
[25] *See* Compl. ¶¶ 6-14.
[26] *See id.*
[27] Compl. ¶ 6.
[28] *Id.* ¶ 14.
[29] *Id.* ¶ 9.
[30] *Id.* ¶ 7.
[31] Compl. ¶ 9.
[32] *Id.* ¶ 7.
[33] *Id.*
[34] *Id.*
[35] Compl. ¶ 9.

***HB 469***

On March 17, 2023, Governor Cox signed House Bill 469.[36] HB 469 took effect on May 3, 2023.[37] HB 469 enacted several measures to deregulate cougar hunting in Utah. First, HB 469 simplified the permitting process. Prior to HB 469, in order to hunt cougars, a hunter would first have to obtain a hunting license, and then would have to apply for a second separate, specific cougar hunting permit. HB 469 streamlined the process. Now, under HB 469, a hunter need only obtain a single hunting license, which then authorizes hunting cougar.[38]

HB 469 expanded the cougar hunting season. Before HB 469, the cougar hunting season began in mid-December and ended in early June.[39] HB 469 now allows for cougar hunting year-round.[40] Prior to HB 469, cougar hunters were limited to two cougar kills per year.[41] HB 469 removed that limit.[42] HB 469 also now permits the use of traps and snares to hunt cougars.[43]

HB 469 also removed some regulatory authority from the Wildlife Board as it relates to cougar hunting, but only in one narrow way. HB 469 removed cougars from the list of animals for which hunting could be part of a cooperative wildlife management unit ("CWMU"). A CWMU is a generally contiguous area of land that is open for hunting of certain animals, and registered with the Wildlife Board. [44] CWMUs are established to "provide income to landowners," "create satisfying hunting opportunities," and "provide access to public and private lands for hunting."[45]

---

[36] The Complaint states that HB 469 was from the 2022 General Session. *See* Compl. ¶¶ 3;7. However, the bill was part of the 2023 General Session. https://le.utah.gov/~2023/bills/static/HB0469.html
[37] Compl. ¶ 3. At times, the Complaint states that HB 469 took effect in 2022. *See* Compl. ¶¶ 33, 35. However, the allegation in paragraph 3, that it took effect on May 3, 2023, is correct.
[38] Compl. ¶ 37.
[39] *Id.* ¶ 33.
[40] *Id.* ¶ 36.
[41] Compl. ¶ 37.
[42] *Id.*
[43] *Id.* ¶ 36.
[44] Utah Code § 23A-7-101(1).
[45] Utah Code § 23A-7-103.

Prior to HB 469, a CWMU could include an area of land open for hunting of cougars. However, HB 469 removed cougars from this list.

On June 8, 2023, Defendant Wildlife Board met to consider whether it would adopt additional rules and regulation relating to cougar hunting.[46] The Wildlife Board declined to adopt any additional cougar hunting restrictions.[47]

***Plaintiffs' Claims***

Plaintiffs bring four causes of action in their Complaint. All of their causes of action claim a violation of the right to hunt under Article I, Section 30 of the Utah Constitution.

The first cause of action is a facial challenge against HB 469. Plaintiffs' claim that HB 469 violates Article I, Section 30 because it removed some of Defendants' authority to regulate cougar hunting.[48] Plaintiffs' second, third, and fourth causes of action claim that Defendants' decision to decline to adopt further cougar hunting regulations violates the right to hunt.

**LEGAL STANDARD**

Defendants seek dismissal of Plaintiffs' claims pursuant to Utah R. Civ. P. 12(b)(1) and (6). First, Defendants seek dismissal under Rule 12(b)(1) because Plaintiffs' Complaint presents nonjusticiable political questions, and this Court thus lacks jurisdiction over Plaintiffs' claims. Rule 12(b)(1) directs dismissal of a case where there is a "lack of jurisdiction over the subject matter." "In the absence of any justiciable controversy between adverse parties, the courts are without jurisdiction." *Williams v. Univ. of Utah*, 626 P.2d 500, 503 (Utah 1981). Political questions are "nonjusticiable." *Skokos v. Corradini*, 900 P.2d 539, 540-41 (Utah Ct. App. 1995).

[46] Compl. ¶ 65.
[47] *Id.* ¶ 66.
[48] Compl. ¶¶ 59, 60.

Accordingly, courts lack subject matter jurisdiction over "nonjusticiable political questions" because there is an "absence of a justiciable controversy." *Id.*

Next, Defendants move to dismiss because Plaintiffs fail to state a claim under Rule 12(b)(6). Rule 12(b)(6) requires the court to dismiss a complaint where the pleadings "fail[ ] to state a claim upon which relief can be granted." Utah R. Civ. P. 12(b)(6). In deciding the propriety of a rule 12(b)(6) motion, trial courts are obliged to address the legal viability of a plaintiff's underlying claim as presented in the pleadings. *Williams v. Bench*, 2008 UT App 306, ¶ 20. Dismissal is justified when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim. *Capri Sunshine, LLC v. E & C Fox Invs., LLC*, 2015 UT App 231, ¶ 11 (citation omitted). "Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal." *Miller v. W. Valley City*, 2017 UT App 65, ¶ 12 (citation omitted). And "the court need not accept legal conclusions or opinion couched as facts." *Id.* (citation omitted).

## ARGUMENT

### A. Plaintiffs' Claims Are Nonjusticiable Political Questions

Plaintiffs' Complaint presents controversies that directly involve policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches. The political question doctrine excludes those types of issues from judicial review. Therefore, this Court should dismiss Plaintiffs' Complaint under the political question doctrine.

The political question doctrine "prevent[s] interference by Utah state courts into the powers granted to the executive and legislative branches of our state and local governments." *Skokos*, 900 P.2d at 541. The political question doctrine is rooted in the constitution's separation of powers premise. *Id. See also Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

The Utah Constitution explicitly establishes separation of powers between the legislative, judicial, and executive branches at the state level. Utah Const. art. V, § 1. Article V, section 1 of the Utah Constitution describes the three branches of Utah government and states that "no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." This provision "states the general separation of powers principle," and "very specifically prohibits the exercise of certain functions of one branch by one charged with the exercise of certain powers of another branch." *In re Young*, 1999 UT 6, ¶ 7.

Accordingly, the political doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the" Legislature or executive branch. *Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230 (1986). The doctrine recognizes that "certain questions are political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 871 (N.D. Cal. 2009), aff'd, 696 F.3d 849 (9th Cir. 2012). "A nonjusticiable political question exists when, to resolve a dispute, the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *E.E.O.C. v. Peabody Western Coal Co.,* 400 F.3d 774, 785 (9th Cir. 2005).

In *Baker*, the U.S. Supreme Court set forth six independent factors, any one of which demonstrates the presence of a nonjusticiable political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or

> [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 210.

"To find a political question, [a court] need only conclude that one factor is present, not all." *Bancoult v. McNamara*, 445 F.3d 427, 432-33 (D.C. Cir. 2006) (citation omitted). The Utah Supreme Court has endorsed the six-factor *Baker* test to determine whether a political question exists, *see Matter of Childers-Gray*, 2021 UT 13, ¶ 64, and Utah courts look to federal case law when interpreting and applying the political question doctrine. *Skokos*, 900 P.2d at 541-42; *Roussel v. State of Utah*, Third District Court Case No. 220901658, Nov. 9, 2022 Memorandum Decision and Order (dkt. 98).

Plaintiffs' claims fail under each of the first three prongs of the *Baker* test. Essentially, Plaintiffs' Complaint presents three issues for this Court to adjudicate: 1) whether HB 469 removed too much of Defendants' authority to regulate cougar hunting; 2) whether it was impermissible for Defendants to decline to adopt more cougar hunting restrictions; and 3) whether HB 469 and Defendants' actions will lead to too much cougar hunting.

These are political questions to be decided by the legislative and executive branches. These are not justiciable issues. Article I, Section 30 commits the issues of cougar hunting restrictions to the Legislature in the first instance, and to the executive branch if acting under legislative statute. There is no judicially discoverable and manageable standard for this Court to determine how much regulatory authority the Legislature is required to give Defendants, how far Defendants must restrict cougar hunting, and how much cougar hunting is too much hunting. Finally, it is a policy decision for the Legislature and Defendants to determine how to manage competing interests in shaping hunting policy. That precludes judicial review of the Legislature's

and Defendants' discretionary policy decisions. Accordingly, Plaintiffs' Complaint should be dismissed.

1. There Is a Textually Demonstrable Constitutional Commitment of Hunting Regulations to the Legislature and Executive Branches

Plaintiffs' claims fail because Article I, Section 30 commits the issues of hunting restrictions to the Legislature or the executive branch acting pursuant to legislative statute. The first *Baker* factor examines whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker,* 369 U.S. at 217. "This factor recognizes that, under the separation of powers, certain decisions have been exclusively committed to the legislative and executive branches of the . . . government, and are therefore not subject to judicial review." *McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1358-59 (11th Cir. 2007). "The existence of 'a textually demonstrable constitutional commitment of the issue to a coordinate political department' turns on an examination of the constitutional provisions governing the exercise of the power in question." *Kivalina*, 663 F. Supp. 2d at 872 (citing *Powell v. McCormack,* 395 U.S. 486, 519-520 (1969)).

By its text, Article I, Section 30 of the Utah Constitution commits the issues of hunting and wildlife management to the Legislature and executive departments acting pursuant to legislative statute. It states:

> (1) The individual right of the people to hunt and to fish is a valued part of the State's heritage and shall be forever preserved for the public good.
> (2) The right under Subsection (1) includes the right to use traditional methods to hunt and to fish, subject only to statute, and rules and regulations adopted as provided by statute, to:
> (a) promote wildlife conservation and management;
> (b) provide reasonable regulation of hunting and fishing activities; and
> (c) preserve the future of hunting and fishing.
> (3) Public hunting and fishing shall be the preferred means of managing and controlling wildlife.
> (4) This section does not affect:
> (a) the law relating to trespass or property rights;

(b) the State's sovereign authority over the State's natural resources; or
(c) the State's obligation to manage lands granted to the State under the Enabling Act.

Article I, Section 30 preserves the "individual right of the people to hunt and to fish." Section 30 then provides that the right to hunt is not absolute. Section 30 explicitly maintains that the right to hunt is "subject *only* to statute, and rules and regulations adopted as provided by statute." (emphasis added).

The constitution's explicit mention of the power to regulate hunting by statute, and rules adopted as provided by statute, is a clear case of a textually demonstrable constitutional commitment of hunting and wildlife policy to the Legislature or executive branch when acting pursuant to legislative statute. Moreover, the text makes it clear that the right to hunt is *only* subject to legislative statute or executive action pursuant to statute. The inclusion of the limitation "only" furthers the commitment of these issues solely to the province of the Legislature, or rules adopted as provided by legislative statute.

In light of the constitution's text, Plaintiffs' facial challenge to HB 469 presents a nonjusticiable political question. In Plaintiffs' first cause of action, their facial challenge, Plaintiffs claim that HB 469 removed too much regulatory authority from Defendants. But Article I, Section 30 commits the issue to the Legislature of how much rulemaking power that agencies will have in terms of hunting regulations. Article I, Section 30 affirms the Legislature's power to legislate in this area in the first instance. Next, executive agencies may also enact "rules and regulations," but only when "adopted as provided by statute." The constitution specifically provides that executive agency rulemaking power is limited (and determined) by the authority granted in legislative statute. The issue of how much rulemaking authority granted to executive agencies in regulating wildlife management is committed to the Legislature by the plain text of

Article I, Section 30. Plaintiffs' facial challenge thus presents a political question, and the Court should dismiss this claim.

Furthermore, Plaintiffs' second, third, and fourth causes of action claim that Defendants violated the constitution by declining to adopt further cougar hunting regulations. Section 30 commits to the discretion of executive branch agencies what, if any, "rules and regulations" the agencies will "adopt[] as provided by statute." The issue of what hunting restrictions an executive agency will enact is constitutionally committed to the legislative and executive branches, and is thus not a justiciable issue.

And to the extent that any of Plaintiffs' claims complain that HB 469 and Defendants' actions will lead to "over-hunting" of cougars, that is an issue committed to the Legislature and executive branch. HB 469 is a statute concerning hunting and wildlife management. HB 469 simplified the cougar hunting permitting requirements, removed restrictions to cougar hunting, and allowed for additional methods of cougar hunting. Furthermore, Defendants' decision to decline to adopt further hunting restrictions is an executive policy decision on what rules to adopt (and not adopt) concerning hunting and wildlife management. Section 30 commits these issues of hunting and wildlife policy to the Legislature or executive branch when acting pursuant to legislative statute. Thus, the Legislature's enactment of HB 469 and Defendants' rulemaking decisions on hunting and wildlife management issues are nonjusticiable political questions beyond the judiciary's power to review. For this reason, Plaintiffs' Complaint should be dismissed.

2. <u>There Is a Lack of Judicially Manageable Standards for Resolving the Issues Presented in Plaintiffs' Claims</u>

As an alternative basis for dismissal, Plaintiffs have not satisfied the second prong of the *Baker* test, which requires "judicially discoverable and manageable standards for resolving" the issues before the Court. *Baker*, 369 U.S. at 217. Where there are "no judicially discernible and

manageable standards for adjudicating" the issues in the case, then the question is nonjusticiable. *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

First, as to Plaintiffs' facial challenge to HB 469. There is no judicially discoverable and manageable standard for this Court to determine how much regulatory authority the Legislature is required to give Defendant Department of Natural Resources, a department created by statute.

Second, Plaintiffs claim that HB 469 and Defendants' actions will lead to "overhunting" of cougars. The requested relief by Plaintiffs in this case is for this Court to order Defendants to sustainably manage the cougar population and order Defendants to reduce the number of cougars killed by Utah hunters.[49] Plaintiffs claim that HB 469 and Defendants' actions do not adequately "protect cougar populations;"[50] rather, HB 469 will lead to a dramatic decrease in the cougar population.[51]

In order to adjudicate Plaintiffs' claims, this Court would have to determine whether HB 469 and Defendants are reducing the cougar population to an unacceptable level. But this determination can only be made through a comparative analysis – the Court would first have to determine what is the "appropriate" level of a cougar population, and then determine whether HB 469 reduces the cougar population below that level. Those are nonjusticiable political questions. There is no judicially manageable standard for this Court to determine what is the "acceptable" level of cougar population in Utah, and whether HB 469 causes an "unacceptable" decrease in the cougar population.

[49] Compl. ¶ 14.
[50] *Id.* ¶ 5.
[51] *Id.* ¶ 41.

Put another way, in order for this Court to determine the issue of whether HB 469 causes "overhunting," the Court would have to first determine what constitutes an appropriate amount of cougar hunting. There is no judicially manageable standard for that.

In lawsuits challenging pollution and emission levels, courts have routinely concluded that there are no judicially discoverable and manageable standards for the courts to determine what is an acceptable level of emissions. For example, in *Iowa Citizens for Cmty. Improvement v. State*, two organizations sued the State of Iowa, seeking to force the state to enact legislation that will compel farmers to take steps that will have the effect of significantly reducing levels of nitrogen and phosphorus in a particular river. 962 N.W.2d 780, 785 (Iowa 2021). The plaintiffs alleged that nitrate levels in the river were too high, causing health risks and preventing recreational activities such as swimming and kayaking. *Id.* at 786.

The Supreme Court of Iowa noted that the plaintiffs suggested that the court "could simply tell [the Iowa] legislature to pass laws that would bring nitrate levels in the Raccoon River consistently below 10 mg/l." *Id.* at 797. The court found that this presented a nonjusticiable political question. Requiring the state to bring nitrate levels to a certain level was "a specific outcome. But there are no judicially discoverable and manageable standards to aid a court in deciding whether that outcome is better than any other outcome." *Id.* The court thus remanded to the district court with instructions to dismiss the complaint because it presented a nonjusticiable political question. *Id.* at 785.

Similarly, in *Comer v. Murphy Oil USA, Inc.*, the plaintiffs sued oil, coal, and electric companies, claiming that "defendants' activities are among the largest sources of greenhouse gases that cause global warming." 839 F. Supp. 2d 849, 854 (S.D. Miss. 2012), *aff'd*, 718 F.3d 460 (5th Cir. 2013). The district court picked up on the heart of the plaintiffs' complaint – "that

plaintiffs ask the Court to determine that the defendants' levels of emissions are 'unreasonable.'" *Id.* at 864.

The court found that this presented a nonjusticiable political question because there are no judicially manageable standards to address that issue. The court noted that it could not "determine whether the defendants' emissions unreasonably endanger the environment or the public without making policy determinations that weigh the harm caused by the defendants' actions against the benefits of the products they produce." *Id.* This is because "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 864-65 (citation omitted). On the other hand, "Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions." *Id.* at 864 (citation omitted). The court thus concluded that the claims presented constitute nonjusticiable political questions, because there are no judicially discoverable and manageable standards for resolving the issues presented. *Id.* at 865.[52]

The same reasoning applies here to Plaintiffs' claims. Plaintiffs claim that, as a result of HB 469 and Defendants' actions, cougar hunting levels are too high and unreasonable. Like the plaintiffs in *Iowa Citizens* and *Comer*, who sought a judicial order enforcing a certain level of pollution levels or emission levels, Plaintiffs here ask for court intervention to reach a specific outcome – to reduce the amount of cougar hunting and to maintain a certain level of cougar population. But requiring Defendants to maintain the cougar population at a certain level, or maintain cougar hunting at a certain amount, presents nonjusticiable political questions. There are

[52] In November 2022, a Third District Court judge relied on the political question doctrine and dismissed a constitutional challenge to Utah's development and combustion of fossil fuels. *See Roussel v. State of Utah*, Third District Court Case No. 220901658, Nov. 9, 2022 Memorandum Decision and Order (dkt. 98). The court found that there were no judicially discoverable and manageable standards for resolving the issues before the court, adopting the rationale from the myriad of cases on reduction of fossil fuels to prevent climate change. *See, e.g., Aji P. by & through Piper v. State*, 480 P.3d 438, review denied sub nom. 497 P.3d 350 (Wash. 2021).

no judicially manageable standards for this Court to determine whether that specific outcome is better than any other outcome.

This Court cannot determine whether HB 469 and Defendants' actions unreasonably endanger the cougar population without making policy determinations weighing the harms and benefits. As the Complaint concedes, the presence or absence of cougars has harms and benefits to various interests and industries. Cougars kill and feed on animals that are subject to conservation efforts. Cougars prey on livestock, which then affects Utah's agricultural economy. Utahns seek to hunt cougars in public hunts. Courts are not equipped to weigh any alleged harm caused by HB 469 against its benefits, and lack the expertise to set wildlife policy. Rather, the Legislature designated the Wildlife Board, which is comprised of experts in a multitude of fields (including economics), to be better suited to make these determinations. Plaintiffs' claims should be dismissed.

Even if this Court were capable of deciding the correct amount of cougar hunting, there is no judicially manageable standard of determining the best way to achieve that specific outcome of enforcing a certain level of cougar hunting. *See Iowa Citizens*, 962 N.W.2d at 797 ("Even if courts were capable of deciding the correct *outcomes*, they would then have to decide *the best ways to get there.*"). In the second, third, and fourth causes of action, Plaintiffs take issue with the fact that Defendants did not adopt further cougar hunting restrictions in June 2023. If Defendants' inaction was impermissible, then it must be the case there were some hunting regulations Defendants were required to enact. Which then presents the nonjusticiable question for the Court: what regulations and restrictions would Defendants be constitutionally required to impose? Bag-limits for each hunter, or limits on the total number of hunting permits issued? Changes to the length of hunting season, or changes to designation of the geographic areas where cougar hunting is restricted? And, what impact would these changes have on other wildlife?

There is no judicially manageable standard for this Court to decide what cougar hunting regulations Defendants *should* have enacted in June 2023. To resolve these issues, "the court must make a policy judgment of a legislative nature, rather than resolving the dispute through legal and factual analysis." *Peabody Western Coal,* 400 F.3d at 785. These are not issues proper for judicial determination. These are political questions requiring legislative discretion and agency expertise. The political question doctrine excludes from judicial review these types of disputes. Plaintiffs' Complaint should be dismissed because it fails the second *Baker* factor.

3. Adjudication of Plaintiffs' Claims Would Require an Initial Policy Determination of a Kind Clearly for Nonjudicial Discretion

Finally, Plaintiffs' Complaint should be dismissed under the political question doctrine for a third, independent reason. Plaintiffs' claims are nonjusticiable because they involve policy questions of a legislative nature. A case should be dismissed as nonjusticiable where the case presents "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 210. This factor asks if "there a required policy determination that is more appropriate for another branch that sets the stage for everything else? If so, courts should not get involved." *Iowa Citizens*, 962 N.W.2d at 798.

Utah courts have long recognized that policy making is committed to the discretion of the Legislature. "The legislative branch of government is charged with the declaration of policy, in response to the expressed wishes of citizens shown by the selection of their representatives and senators. The executive branch is charged with implementation of that policy." *Snow v. Off. of Legis. Rsch. and Gen. Counsel*, 2007 UT 63, ¶ 12. "Simply stated, legislative powers are policy making powers, while executive powers are policy execution powers." *Carter v. Lehi City*, 2012 UT 2, ¶ 38 (citation omitted). And in setting policy, "the legislature considers the wide range of policy considerations of relevance to all who fall within the scope of a particular law." *Id.*

Now compare that to the role (and limits) of the judiciary. "The matters of greatest societal interest—involving a grand, overarching balance of important public policies—are beyond the capacity of the courts to resolve." *Gregory v. Shurtleff*, 2013 UT 18, 299 P.3d 1098, 1132 n.29 (Lee, J., concurring). "[P]ublic policy is a protean substance that is too often easily shaped to satisfy the preferences of a judge rather than the will of the people or the intentions of the Legislature." *Rothstein v. Snowbird Corp.*, 2007 UT 96 ¶ 10. When "the Legislature clearly articulates public policy, and the implications of that public policy are unmistakable," Utah courts "have the duty to honor those expressions of policy in [their] rulings." *Id.* This is because "[o]f all the branches of government," the judiciary is "least suited to decide on the wisdom of allowing the people to supplant their representatives in a particular field of regulation." *Carter*, 2012 UT 2, ¶ 3. The courts' powers are "to hear and determine justiciable controversies." *Timpanogos Planning & Water Mgmt. Agency v. Cent. Utah Water Conservancy Dist.*, 690 P.2d 562, 569 (Utah 1984).

As discussed above, Plaintiffs' Complaint seeks judicial enforcement of Plaintiffs' policy positions regarding cougar conservation, populations, and hunting. Plaintiffs ask this Court to compel Defendants to preserve the cougar population at a certain level. Any ruling this Court makes will have downstream effects as to other animals, ecology, safety concerns, and economic industries. Thus, the Court would have to weigh various competing interests, such as conservation of the animals that cougars feed on, livestock preservation, pet preservation, managing risks of human encounters, and preserving the individual right to hunt. The Court would then be setting policy as to how to balance those competing interests, and which interest should be advanced. "The balancing of those competing interests is the type of initial policy determination to be made by the political branches, and not this Court." *People of California v. Gen. Motors Corp.*, No. C06-05755 MJJ, 2007 WL 2726871, at *8 (N.D. Cal. Sept. 17, 2007).

Courts have often refrained from adjudicating issues that require balancing various environmental factors that present competing social values and utilities. In *Kivalina*, the residents of the City of Kivalina sued oil, energy and utility companies. 663 F. Supp. 2d at 868. The plaintiffs alleged that as a result of global warming, the Arctic Sea ice that protects the Kivalina coast from winter storms has diminished, and that the resulting erosion and destruction will require the relocation of Kivalina's residents. *Id.* The plaintiffs alleged that the defendants contributed to the excessive emission of carbon dioxide and other greenhouse gases which they claimed caused global warming.

The district court noted that in order to adjudicate the case, "the factfinder will have to weigh . . . the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and business at every level." *Id.* at 874. Then, the factfinder would have to weigh the benefits from those choices against the risks. *Id.* at 874-75. In other words, resolving the plaintiffs' "claim requires balancing the social utility of Defendants' conduct with the harm it inflicts." *Id.* at 876. The court found that this presented a policy determination "appropriately left for determination by the executive or legislative branch in the first instance." *Id.* at 877. The court concluded that the political question doctrine precluded judicial consideration of the plaintiffs' claim.

Here, Plaintiffs' claims require this Court to weigh and balance the utility versus the alleged harm caused by HB 469 and Defendants' actions. This is inherently a policy determination. Accordingly, these issues present nonjusticiable political questions.

Furthermore, Plaintiffs' claims require the Court to make a policy determination as to whether the State should adopt "conservative" or "liberal" cougar hunting policies. Indeed,

Plaintiffs claim that "the State should act conservatively,"[53] and Plaintiffs urge the State to adopt "conservative hunting practices,"[54] while Plaintiffs criticize "hunting liberalization efforts" and "the liberalization of hunting methods."[55] But whether the State should adopt conservative hunting practices or liberalize hunting methods is a policy determination for the Legislature. It is not for the judiciary. *See Kanuk ex rel. Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088, 1098 (Alaska 2014) ("The underlying policy choices are not ours to make in the first instance."). [56]

As the Complaint concedes, both the Legislature and Defendants have frequently listened to Plaintiffs' advocacy of Plaintiffs' policy positions and engaged with Plaintiffs in shaping hunting and wildlife policy. As the Complaint further concedes, this is a "public process." Ultimately, Plaintiffs' gripe is that the State has not chosen Plaintiffs' preferred policies, and instead has chosen another route. But that's an issue that is "political as opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary." *Kivalina*, 663 F. Supp. 2d at 871. Plaintiffs' recourse is not with the court, but instead lies with the Legislature and public policy process. *See Tribune Reporter Printing Co. v. Homer*, 51 Utah 153, 169 P. 170, 172 (1917) ("[M]atters of public policy are clearly within the province of the Legislature.").

Plaintiffs' Complaint presents issues that revolve around policy choices and value determinations for the legislative and executive branches to resolve. Under the political question doctrine, those determinations are excluded from judicial review. This Court should dismiss Plaintiffs' Complaint.

---

[53] Compl. ¶ 48
[54] *Id.* ¶ 28
[55] *Id.* ¶¶ 54, 55
[56] This prong of the *Baker* test, like the political question doctrine generally, is rooted in the constitution's separation of powers premise, and "preserves the integrity of functions lawfully delegated to political branches of the government and avoids undue judicial involvement in specialized operations in which the courts may have little knowledge and competence." *Skokos*, 900 P.2d at 541.

B. HB 469 and Defendants' Actions Do Not Infringe on the Right to Hunt

Even if this Court were to reach the merits of Plaintiffs' claims, those claims fail as a matter of law. Plaintiffs claim that HB 469 and Defendants violate Plaintiffs' right to hunt. However, Plaintiffs do not allege that their hunting activities or pursuits have been impermissibly restricted in any way. Plaintiffs' claims thus fail on the merits.

1. Plaintiffs Fail to Allege a Violation of Their Right to Hunt

Plaintiffs' claims fail because Plaintiffs have not sufficiently alleged a violation of their right to hunt. Article I, Section 30 preserves the individual right to hunt. It does not grant a right to cougar preservation. Because Plaintiffs do not allege that HB 469 or Defendants have infringed on their right to hunt, Plaintiffs' claims fail as a matter of law.

When addressing a challenge to the constitutionality of a statute, Utah courts "presume the statute to be constitutional, resolving any reasonable doubts in favor of constitutionality." *S. Salt Lake City v. Maese*, 2019 UT 58, ¶ 8 (citation omitted). "In interpreting the state constitution, [courts] look primarily to the language of the constitution itself." *State v. Gardner,* 947 P.2d 630, 633 (Utah 1997). Accordingly, a court's "starting point in interpreting a constitutional provision is the textual language itself." *Grand Cnty. v. Emery Cnty.*, 2002 UT 57, ¶ 29. The "text's plain language may begin and end the analysis." *S. Salt Lake City*, 2019 UT 58, ¶ 23. Courts "need not inquire beyond the plain meaning of the constitutional provision unless [they] find it ambiguous." *Grand Cnty.*, 2002 UT 57, ¶ 29 (citation omitted).

Article I, Section 30 preserves "[t]he individual right of the people to hunt and to fish." Under its plain text, the constitutional provision protects the right of individuals. More specifically, it protects the right of individuals to hunt and to fish.

With that understanding, Plaintiffs fail to state a claim for violation of their right to hunt. Plaintiffs are not hunters. Plaintiffs have no expressed intention of ever hunting. Plaintiffs have

no desire to hunt cougars. Right out of the gate, Plaintiffs fail to sufficiently allege how HB 469 or Defendants' action infringes on their right to hunt.

Nor could they. In Plaintiffs' first cause of action, Plaintiffs bring a facial challenge[57] to HB 469, claiming that HB 469 violates the right to hunt. However, HB 469 does not infringe on the right to hunt. HB 469 did not enact restrictions on hunting. There simply is no merit to the claim that HB 469 violated Plaintiffs' individual right to hunt. Rather, HB 469 allowed for more hunting and furthered the individual right to hunt. HB 469 simplified the cougar hunting permit process, requiring one permit instead of two. HB 469 expanded the cougar hunting season and removed bag-limit restrictions on cougar hunting. Plaintiffs cannot claim that HB 469 infringed on the right to hunt. Based on the plain text of Article I, Section 30, Plaintiffs' facial challenge to HB 469 fails, and the Court should dismiss this claim.

Plaintiffs' remaining claims fail for similar reasons. Defendants' decision to not adopt further cougar hunting restrictions did not restrict Plaintiffs' hunting rights. Plaintiffs have not demonstrated how Defendants have burdened Plaintiffs' right to hunt. Plaintiffs' second, third, and fourth causes of action fail under Section 30's text and should be dismissed.

The true nature of Plaintiffs' claim is not a violation of their right to hunt; rather, Plaintiffs are complaining that the State has not done more to restrict *someone else's* rights to hunt. That's not a burden on Plaintiffs' Article I, Section 30 rights. Plaintiffs thus do not sufficiently state a claim for violation of the right to hunt.

In the voting rights' context, courts have rejected a theory like the one Plaintiffs advance and found no constitutional violation. For example, in *Donald J. Trump for President, Inc. v.*

[57] "A facial challenge . . . requires the challenger to establish that no set of circumstances exists under which the statute would be valid." *State v. Herrera*, 1999 UT 64, 993 P.2d 854, 857 n.2 (cleaned up).

*Boockvar*, the plaintiffs sued the secretary of Pennsylvania and seven Pennsylvania counties. 502 F. Supp. 3d 899, 907 (M.D. Pa.), *aff'd sub nom*. 830 F. App'x 377 (3d Cir. 2020). In the 2020 election, several Pennsylvania counties adopted a "notice-and-cure" procedure, which involved notifying mail-in voters who submitted defective ballots of these deficiencies and allowed them to cure their ballots. *Id.* at 907. The plaintiffs claimed that it was a constitutional violation for the counties, in their discretion, to adopt a notice-and-cure policy because it allowed some persons in the state to cure defective mail-in ballots while others were not. *Id.* at 899.

The district court noted that the counties actually lifted a burden on the right to vote in their respective counties by implementing a notice-and-cure procedure. *Id.* at 919. "Expanding the right to vote for some residents of a state does not burden the rights of others." *Id.* (citation omitted). "And Plaintiffs' claim cannot stand to the extent that it complains that the state is not imposing a restriction on someone else's right to vote." *Id.* (citation and quotation marks omitted). The court therefore concluded that the plaintiffs failed to state a claim for a constitutional violation. *Id.* at 920.

In another challenge to that election, the plaintiffs asserted "that the use of 'unmanned' drop boxes is unconstitutional." *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 350 (W.D. Pa. 2020). While some counties in Pennsylvania intended to staff drop boxes with officials, other counties left the drop boxes unattended. *Id.* at 356. The plaintiffs argued that to be "secure," drop boxes must be "attended" by an election official at all times. *Id.* at 360. The plaintiffs thus claimed that the unattended drop boxes allow for an unacceptable risk of voter fraud and when it occurs, it will dilute the votes of all lawful voters. *Id.* at 359.

The court found that the plaintiffs did not establish a burden on their right to vote: "Defendants' failure to implement a mandatory requirement to 'man' drop boxes doesn't directly infringe or burden Plaintiffs' rights to vote at all." *Id.* at 391. The court noted that voting rights

claims are typically "invoked where the government takes some direct action to burden or restrict a plaintiff's right to vote." *Id.* at 393. But in that case, the plaintiffs complained that the state burdened the right to vote by "inaction." *Id.* In other words, the plaintiffs claimed that their right to vote was burdened by the state "not imposing enough regulation to secure the voting process it has adopted." *Id.*

The legal theory of Plaintiffs' claim here is akin to the claims brought in these election cases. Plaintiffs here are not alleging that Defendants' conduct imposes any burden on Plaintiffs' right to hunt. Plaintiffs are not asking the State to remove restrictions. Plaintiffs are asking the State to impose more restrictions on other individuals who seek to hunt cougars.

HB 469 actually lifted burdens on the right to hunt. Expanding the right to hunt for some does not burden Plaintiffs' right to hunt. Plaintiffs' claims cannot stand on the theory that the State is not imposing a restriction on someone else's right to hunt. Plaintiffs here also take issue with the Defendants' inaction – that Defendants did not impose further hunting restrictions in June 2023. But Defendants' decision to not implement further restrictions "doesn't directly infringe or burden Plaintiffs' rights to [hunt and fish] at all." 493 F. Supp. 3d at 391. Plaintiffs have not demonstrated that Defendants have burdened Plaintiffs' right to hunt. This Court should therefore dismiss Plaintiffs' claims.

2. Plaintiffs' Misconstrue the Right to Hunt in Article I, Section 30

Plaintiffs' claims hinge on a deeply flawed interpretation of Article I, Section 30. Plaintiffs first misconstrue the nature of the right protected by Article I, Section 30. As discussed above, it is an individual right to hunt. However, in Plaintiffs' facial challenge to HB 469 (first cause of action), Plaintiffs distort Article I, Section 30 as a right to demand the State "forever preserve cougars." Article I, Section 30 does not enshrine a right to cougar preservation.

This is evident not only from the plain text of constitutional provision, but also its location in the constitution. The right to hunt "resides in article I of the constitution." *State v. Barnett*, 2023 UT 20, ¶ 23. "Article I, titled 'Declaration of Rights,' enumerates some of Utahns' 'inherent and inalienable right[s].' Article I is home to several guarantees of individual liberty." *Id.* (footnote omitted). The right to hunt's placement in the Declaration of Rights confirms that it is an individual right, not a guarantee of cougar preservation.

Second, Plaintiffs misconstrue Article I, Section 30 as a constitutional mandate to regulate hunting. Plaintiffs are incorrect. Article I, Section 30 permits the Legislature to enact statutes to regulate hunting, but does not mandate that the Legislature do so.

While Article I, Section 30 preserves the individual's right to hunt, the constitutional provision makes it clear that such right is not absolute. Subsection (2) provides that the right to hunt is "subject only to statute, and rules and regulations adopted as provided by statute, to: (a) promote wildlife conservation and management; (b) provide reasonable regulation of hunting and fishing activities; and (c) preserve the future of hunting and fishing." In other words, the individual right to hunt may be limited by statutes (or regulations adopted as provided by statute).

But nothing in Article I, Section 30 requires the Legislature to enact these types of statutes, nor requires the Executive to adopt these types of regulations. Article I, Section 30 provides that the right to hunt is subject to these statutes and regulations, but does not require the Legislature to legislate in these areas. Subsection (2) merely defines the limits of governmental action in relation to the right to hunt. With that correct understanding of Section 30, Plaintiffs fail to state a claim that HB 469 or Defendants have violated Article I, Section 30.

## CONCLUSION

For the reasons stated above, the Court should dismiss Plaintiffs' Complaint.

DATED: November 29, 2023

OFFICE OF THE UTAH ATTORNEY GENERAL

*/s/ Jason N. Dupree*
DAVID N. WOLF
JASON N. DUPREE
THOMAS S. PRATT
Assistant Utah Attorneys General
*Attorneys for Defendants*

## CERTIFICATE OF SERVICE

I hereby certify that on **November 29, 2023** the foregoing **DEFENDANTS' MOTION TO DISMISS** was filed using the court's electronic filing system. I further certify that a true and correct copy was served, via email, to the following:

**Joel Ban**
BAN LAW OFFICE, PC
Joel@banlawoffice.com

Jessica L Blome
GREENFIRE LAW, PC
jblome@greenfirelaw.com

*Attorneys for Plaintiffs*

UTAH ATTORNEY GENERAL'S OFFICE

*/s/ Seth A. Huxford*
SETH A. HUXFORD
*Legal Secretary*