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To the Constitutional Court
Freyung 8
1010 Vienna

St. Polten, on 21.2.2023

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because of:

Various provisions of the Climate Protection Act - KSG, BGBl I
106/2011 as amended, such as § 3 para 2, § 3 para 1 and § 6
KSG 2011.

4-fold

2 inserts

Power of attorney granted according to § 8 RAO or § 30 Ahs. 2 ZPO

INDIVIDUAL APPLICATION
pursuant to Art 140 (1) B-VG

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1. AJeitUJ1g - The climate crisis became a children's crisis

While the climate crisis is forcing inequalities in society at different levels, the most serious inequality is inherent in the crisis itself: The group of the main perpetrators of the crisis only partly coincides with the group of people who have to bear its catastrophic consequences. While, for example, older generations, i.e. today already adults, are both historically and against While, for example, older generations, i.e. adults today, have historically as well as currently been mainly responsible for excessive greenhouse gas (GHG) emissions, younger generations (= children) - due to their age as well as their legally restricted freedom of action - have a negligible influence on GHG emissions. Nevertheless, due to their particular vulnerability, children already bear the **main burden** of the consequences of the climate crisis today, but even more so in the future. These affect their health, their physical and psychological development, and their social and economic development.

Wirtschaftliche security as well as quite general their well-being, which means in the result:¹

The climate crisis is a Kimler crisis.

As a particularly vulnerable group of people, children must be protected from danger. This need for protection is so evident that it was even enshrined in the constitution in the rulings of the Federal Constitutional Law on Children's Rights (BVG Kinderrechte²). Children thus have a subjective right to effective protection from the state. This protection must also apply to the catastrophic consequences of the climate crisis. From the point of view of equality law, it is also forbidden for one group of people to suffer serious disadvantages as a result of a legal regulation for the benefit of another group, and for burdens to be distributed blatantly unequally without justification. As will be shown in the following, the parts of the KSG 2011³ that are under consideration bring about exactly this situation by preventing the adoption of effective climate protection measures and allowing tomorrow's greenhouse gas budget to be completely used up today.

¹ Cf. Dt. BVerfG 24.3.2021, 1 BvR 2656/18, para 117 ff. and 186; *Daniel Hellden et al*, Climate change and child health: a scoping review and an expanded conceptual framework, *Lancet Planet Health* 2021/5, 164.

² [https://www.thelancet.com/journals/lanpl/article/PIIS2542-5196\(20\)30274-6/fulltext](https://www.thelancet.com/journals/lanpl/article/PIIS2542-5196(20)30274-6/fulltext) (Jan. 25, 2023); *Nick Watts et al*, The 2019 report of The Lancet Countdown on health and climate change: ensuring that the health of a child born today is not defined by a changing climate, *Lancet* 2019/394, 1836 et seq.

³ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32596-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32596-6/fulltext) (Jan. 25, 2023).

² Federal Constitutional Law über die Rechte von Kindern, BGBl I 4/2011 (hereinafter: BVG Child Rights).

³ Bundesgesetz zur Einhaltung von Höchstgrenzen von Treibhausgasemissionen und zur Erarbeitung von wirksamen Maßnahmen zum Klimaschutz (Klimaschutzgesetz - KSG), BGBl I 106/2011 i.d.F. BGBl I

58/2017.

In the present application, it is therefore shown that the contested provisions of the KSG 2011 interfere with **and** violate the constitutionally protected legal rights of the applicants.

2. Overview of the factual and legal situation

The dramatic consequences of the climate crisis are already being felt in all areas of life. We are experiencing a well-known increased occurrence of extreme weather events, migration waves, the spread of (sub-)tropical diseases, and an increased likelihood of social unrest.⁴ The climate crisis is being caused by the excessive emission of greenhouse gases (GHG) such as carbon dioxide (CO₂), methane (CH₄) or nitrogen dioxide (NO₂), which accumulate in the earth's atmosphere and absorb the long wave infrared radiation (part of the solar radiation) that is reflected by the earth's surface. As a result, a disproportionately *large* part of the radiation remains within the earth's atmosphere (greenhouse effect), which leads to an increase in the temperature worldwide (earth imbalance).⁵ The slowly but steadily rising temperatures cause drastic and difficult to assess reductions of the world climate, which leads to extreme weather events (droughts, heavy rain, storms, hailstorms, etc.).⁶ The melting of glaciers, the rise of sea levels, the erosion of coastal regions, a drastic loss of biodiversity, climate-induced mass migration movements, food shortages and social unrest caused by all this.⁶ According to the current state of science, the progress of the climate crisis can only be halted by a rapid and complete reduction of GHG emissions.⁷

⁴ Cf. *IPCC, Climate Change 2022 Impacts, Adaptation and Vulnerability - Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2022)* 5 ff; *IPCC, Global Warming of 1.5°C - An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty Summary for Policymakers (2018)* 7 ff; *Umweltbundesamt, Klimaschutzbericht 2022, REP-0816 (2022)*. 26 ff.

⁵ Cf. *Federal Environment Agency, Climate Protection Report 2022, REP-0816 (2023)* 21.

⁶ Cf. *IPCC, Climate Change 2022 Impacts, Adaptation and Vulnerability - Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2022)* 5 ff; *IPCC, Global Warming of 1.5°C - An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty, Summary for Policymakers (2018)* 7 ff; *Umweltbundesamt, Klimaschutzbericht 2022, REP-0816 (2022)*. 26 ff.

⁷ Cf. *IPCC, Climate Change 2021: The Physical Science Basis - Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Summary for Policymakers (2021)* 4 ff; *IPCC, Global Warming of 1.5°C - Summary for Policymakers (2018)* 7 ff.

Accordingly, GHG emission reduction can only succeed if a drastic change to a sustainable and GHG-free economy and lifestyle is implemented immediately.⁸ In order to achieve this goal, it is necessary to implement a large number of effective GHG reduction measures in parallel. On the one hand, these measures must be as effective as possible, and on the other hand, they must not interfere with each other or counteract each other.⁹ To this end, it is essential to define GHG reduction pathways with clear targets, an ongoing and also anticipatory review obligation, and close coordination of the measures taken or planned.¹⁰

The KSG 2011 basically pursues the goal of facilitating the coordinated implementation of effective climate protection measures, which should lead to the fastest possible reduction of GHG emissions in Austria.¹¹ As will be shown in the following, the objective of the KSG 2011 cannot be achieved due to its unconstitutional contents. Due to the ineffectiveness of some of the provisions, which amounts to a "qualified omission", the implementation of effective GHG reduction measures is hindered and partly even prevented. This ineffectiveness is particularly evident in the TI-JG balance of Austria: Since the reference year 1990, TI-IG emissions have only decreased to a negligible extent, with a reduction of 1.9% in 2021 compared to 1990, but a drastic increase of 4.9% compared to 2020.¹²

This discrepancy between the ever **escalating, uncontrollable situation** on the one hand and the continued existence of an ineffective climate protection law on the other violates in particular children's various constitutionally guaranteed rights. They remain in the

⁸ See *Environmental Protection Agency*, Climate Protection Report 2022, REP-0816 (2022) 26 et seq. and 35 et seq.

⁹ Cf. e.g. on rebound effects iZm Elektro-Kfz *Seebauer et al*, Promoting adoption while avoiding rebound: integrating disciplinary perspectives on market diffusion and carbon impacts of electric cars and building renovations 111Austria, Energy, Sustainability and Society 2019, 2 et seq. <<https://energysustainsoc.biomedcentral.com/articles/10.1186/s13705-019-0212-5> > (19 2 2023); on the issue of maladaptation to the climate crisis, see, e.g., *IPCC*, Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers (2022) 27.

¹⁰ Cf. *Schulev-Steindl/Hofer/Franke*, Gutachten im Auftrag des BMK - Evaluierung des Klimaschutzgesetzes (2020) 3 and 17.

¹¹ Cf. § 1 KSG 2011, EBRV 1255 BlgNRXXIV. GP, 2 f.

¹² Cf. *Umweltbundesamt*, Austria's Annual Greenhouse Gas Inventory 1990-2021, REP-0841 (2023) 11 f.

The average lifespan of children is longer than that of older generations. In Eastern Austria, a separate federal constitutional law grants **children special subjective (fundamental) rights of constitutional rank**.¹³ Since none of the applicants has reached the age of 18 at the time of application or is otherwise considered "adult" under the law applicable to them, they are to be regarded as "children" within the meaning of the Federal Constitutional Law on Children's Rights.

As will be shown in the following, children - and thus the applicants - have a constitutionally guaranteed right to the safeguarding of the best interests of the child in the sense of individual rights to protection and care, the best possible development and the safeguarding of their interests with special consideration of intergenerational justice. This is violated by the omission of effective climate protection measures.¹⁴ In addition, the **transfer of the main part of the burdens associated with the climate crisis to children living today**, which is **contrary to the principle of equality before the law**, violates the applicants' right to equality before the law.¹⁵ The provisions challenged here must therefore be repealed as unconstitutional in any case.

It is noted that there is no directly applicable Union law in conflict with the standards applied and thus an encroachment on the sphere of law within the meaning of Art. 140 (1) B-VG is possible.¹⁶

2.1 Separate excerpts from the Climate Protection Act 2011 ("KSG 2011")¹⁷

§ Section 3 of the KSG 2011 reads as follows (the parts to be repealed in the main and contingent applications have been highlighted):

*„„§ 3. (1) The greenhouse gas emission ceilings applicable to the Republic of Austria in **accordance with its obligations under national or European Union law shall be determined in accordance with the provisions of Article 11. The maximum levels may also be determined on a sectoral basis. The preparation of planning bases***

¹³ Cf. Bw1desverfassungsgesetz -Ober dje Rechte von Kindern, BGBl I 4/2011 (hereinafter: BVG Kinde-echte).

¹⁴ Cf. Art 1 BVG Kinclerrechte.

ts Cf. Art 7 Federal Constitutional Act, BGBl li1930 as amended by BGBl I 114/2013 (hereinafter abbreviated to: B-VG); Art 2 Staatsgnmdgesetz uber die allgemeinen Rechte der Staatsburger, RGGI 142/1867 (hereinafter abbreviated to: StGG).

¹⁶ For the application of Union law, see VfSlg 15.771/2000, 16.127/2001 et al.

¹⁷ Bundesgesetz zw- Einhaltung von Hochstmengen von Treibhausgasem issionen und zur Erarbeitung von wirksamen MaBnahmen zum Klimaschutz (Klimaschutzgesetz - KSG 2011), BGBl I 106/2011 idF BGBl I

58/2017 (,,KSG 2011).

for the allocation of maximum amounts of greenhouse gas emissions to sources as of the year 2013 on the basis of a proposal by the Federal Minister of Agriculture, Forestry, Environment and Water Management on the basis of domestically effective measures. The proposal shall also be submitted to the National Climate Protection Committee (§ 4). The final allocation shall be set out in an annex to this Act.

*(2) **Negotiations are to be held to develop all measures to comply with the maximum quantities in the respective sectors. In particular, negotiations should consider possible measures in the following areas: increasing energy efficiency, increasing the share of renewable energy carriers in final energy consumption, increasing overall energy efficiency in the building sector, integrating climate protection into land-use planning, mobility management, waste avoidance, protection and expansion of natural carbon sinks, and economic incentives for climate protection. Measures can also be elaborated in the form of multi-year measure programs and as joint measures of territorial authorities. Responsibility for the implementation of measures in the individual sectors lies with the federal ministers responsible for the 2002 and 2007 climate strategies, and with the federal ministers responsible under the Federal Ministries Act 1986 (BMG), Federal Law Gazette No. 76, as amended from time to time. The negotiations shall be held one month after the submission of a proposal by the Federal Minister of Agriculture, Forestry, Environment and Water Management pursuant to paragraph 1. Negotiations shall be concluded within nine months*** ¹ *before the beginning of a commitment period, i.e. for the commitment period 2013 to 2020 the 31st day of 2012. In the event that the maximum levels of greenhouse gas emissions applicable to the Republic of Austria as of 2013 are exceeded, further negotiations on the strengthening of existing measures or the introduction of additional measures shall be conducted without delay on the basis of an evaluation of the existing measures. These negotiations shall be concluded within six months.*

(3) The result of the negotiations gema/3 Para. 2 shall be recorded separately. The specified alaj3 measures shall be implemented immediately.

(4) The Federal Minister for Agriculture, Forestry, Environment and Water Management shall report to the National Climate Protection Committee (section 4) on the outcome of the negotiations pursuant to section 3 subsection 2 and the measures defined pursuant to section 3 subsection 3.

*§ The Federal Minister of Agriculture, Forestry, Environment and Water Management shall submit an annual written report to the National Council and the National Climate Protection Committee on the progress made in complying with the maximum greenhouse gas emission levels **specified in Article 3(1)**. The report shall be broken down by sector gema/3 the annexes."*

§ Section 3 of the KSG 2011 stipulates in its core the duty of federal ministers to conduct negotiations on the development of effective GHG reduction measures.

§ Section 3 (1) of the KSG 2011 declares that IBG maximum quantities are specified in the annexes to the KSG 2011.¹⁸ Directly building on this, it contains

§ 3 para 2 KSG 2011 the pilicht of - according to the Federal Ministries Act in the respective The Federal Ministers are responsible for negotiating the development of effective GHG reduction measures.¹⁹ With regard to the conduct of negotiations and their conclusion, § 3 para 2 KSG 2011 refers exclusively to already concluded negotiations.

and therefore periods lying in the past (arg , ,commitment period 2013 to

202(!)).²⁰ In the event that the IBG maximum quantities specified in the plants are exceeded, it is further stipulated that a retrospective evaluation of measures already taken is to be carried out and, on this basis, further (mere/3e) negotiations are to be held on the "rigidification of existing measures or the introduction of additional measures".²¹ A review of already planned but not yet implemented future measures with regard to their IBG reduction and potential interaction with other measures is not foreseen.

¹⁸ Cf. § 3 para 1 KSG 2011.

¹⁹ Cf. § 3 para 2 KSG 2011.

²⁰ Cf. § 3 para. 2 KSG 2011.

²¹ Cf. § 3 para. 2 KSG 2011.

§ Section 6 KSG 2011 contains the obligation of the BMK²² to submit a progress report to the National Council as well as to the National Climate Protection Committee on a yearly basis on the compliance with the *gemaj*³

§ Section 3(1)" GHG ceilings to be submitted.²³ Section 6 of the KSG 2011 therefore also clearly refers to the establishment of GHG ceilings in the annexes to the KSG 2011 and is therefore rendered ineffective if no GHG ceilings are established in the annexes to the KSG 2011 for a certain period of time.

Sections 28 and 29 of the Fiscal Equalization Act 2017²⁴ regulate the legal conditions for the purchase of climate protection certificates in the event of GHG emissions exceeding the maximum limit. This creates a mechanism that takes effect in the event of a violation of EU law requirements in the area of GHG reduction. Such a provision is necessary to ensure compliance with EU law and is therefore not to be regarded as unconstitutional.

It is noted that the KSG 2011 is **still in force**, irrespective of the time-limited obligation periods pursuant to Section 10 KSG 2011. It is therefore fully applicable in terms of content and does **not** represent a **dead law** *clar*.

2.2 Volker- and european law basics

The KSG 2011 entered into force on 16.2.2011 and was enacted against the background of both national and EU legal foundations.²⁵ In terms of national law, the Kyoto Protocol²⁶, which was concluded on the basis of the UN Framework Convention on Climate Change (UNFCCC)²⁷, was the relevant legal basis for the obligation to reduce GHG emissions at the time the KSG 2011 came into force, and was ratified by the East with the reservation that it be implemented. The Kyoto Protocol contains extremely low emission limitation and reduction obligations that must be met by the signatory states.²⁸ The Kyoto Protocol was subsequently supplemented by the

²² Federal Minister for Climate Protection, Environment, Energy, Mobility, Innovation and Technology (BMJK).

²³ Cf. § 6 KSG 2011.

²⁴ Cf. Federal Act on Fiscal Equalization for the Years 2017 to 2023 and Other Fiscal Equalization Provisions (Fiscal Equalization Act 2017 - FAG 2017), Federal Law Gazette I 116/2016 as amended by Federal Law Gazette II 133/2022.

²⁵ Vgl. BGBl II 106/2011; EBRV 1255 BlgNRXXIV. GP 2 et seq.

²⁶ Cf. Kyoto Protocol to the United Nations Framework Convention on Climate Change, BGBl III 89/2005 (hereinafter: Kyoto Protocol).

²⁷ Cf. United Nations Framework Convention on Climate Change, Federal Law Gazette 414/1994 as amended by Federal Law Gazette III 154/2022 (hereinafter UNFCCC).

²⁸ Cf. Art 3 Kyoto Protocol!

Paris Climate Agreement 2015, which sets out the commitment of the signatory states to limit the increase in average global temperatures to +1.5°C as far as possible.²⁹ Neither the Kyoto Protocol nor the Paris Climate Agreement are directly applicable at the national level ("non-self executing").

At the level of EU law, the EU burden-sharing decision³⁰ was adopted in 2009 to reduce GHG emissions under the Kyoto Protocol, obliging Member States to reduce (slightly) GHG emissions in those sectors that were not subject to EU emissions trading. The burden sharing decision

The EU burden-sharing regulation³¹ has also been introduced. The burden sharing regulation obliges Austria to reduce its GHG emissions by -36 % until 2030,³² whereas a proposal of the EU Commission, which is currently under negotiation, shall increase this obligation to -48 %.³³ Neither the EU burden sharing decision nor the EU burden sharing regulation contain direct obligations of the MS to create implementing legislation in national law.

2.3 Applicability of the Charter of Fundamental Rights (GRC)

Since the entry into force of the Treaty of Lisbon on 1.12.2009, the CFR is part of the primary law of the European Union. From Art 51 GRC follows the direct applicability for the MS in the implementation of Union legislation. Although the KSG 2011 was not enacted directly on the basis of the EU burden-sharing decision or the EU burden-sharing regulation and an implementation of these legal acts into national law was not mandatory, the KSG 2011 is to be considered in the light of Art. 51 GRC as being within the scope of the implementation of Union law.

²⁹ Cf. Art 2 para 1 Paris Climate Convention.

³⁰ Cf. Decision No. 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 2009/140, 136 (hereinafter EU burden-sharing decision).

³¹ Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 setting binding annual national greenhouse gas emission reduction targets for the period 2021 to 2030 as a contribution to climate action to meet the commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, OJ L 156/2018, 26 (hereinafter EU Burden Sharing Regulation). ³² Cf. Annex I EU Burden Sharing Regulation.

³³ Cf. annex to the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2018/842 on setting binding national targets for the reduction of greenhouse gas emissions. Greenhouse Gas Emissions in the Period 2021 to 2030 as a Contribution to Climate Change Mitigation Measures to Meet the Commitments of the Paris Convention of Paris, COM(2021) 555 final.

In its (recent) case law on the applicability of the CFR, the ECJ focuses in particular on whether the purpose of the conflicting regulation is the implementation of Union law, what character the regulation has and whether it pursues objectives other than those covered by Union law.³⁴ The KSG 2011 provides in several provisions in the

In accordance with the legislative materials, the KSG 2011 is intended to fulfill Austria's obligations under Union law to reduce GHG emissions.³⁵ According to the intention of the legislator, the KSG 2011 therefore primarily serves the coordinated implementation of Union law within the meaning of Art 51 GRC.³⁶ The GRC is therefore relevant in the present case. applicable.

According to the case-law of the Constitutional Court, the rights guaranteed by the CFR may also be asserted in constitutional proceedings in the field of application of Union law.³⁷ The areas of law at issue serve the implementation of Union law as defined by the case-law of the ECJ on Art. 51 GRC, which is why the GRC constitutes a standard of review for the Constitutional Court in this case.³⁸

2.4 Relevant national and Union law target provisions

Sections 1 and 3 of the Federal Constitutional Law on Sustainability (BVG Nachhaltigkeit)³⁹ enshrine the **state objective of** comprehensive sustainability in the sense of the sustainable use of natural resources and the guarantee of environmental protection in order to safeguard the living conditions of human beings.⁴⁰ In this way, the constitutional legislator made it clear that there is a constitutionally established **public interest** in the preservation of these state objectives.⁴¹ It is true that there is no need for the

§§ In accordance with Art. 1 and 3 of the Federal Constitutional Law, sustainability of verbierte state goals does not have absolute priority in the context of the consideration and weighing of interests, however, they must in any case be taken into account and balanced against other public interests in accordance with Art. 2 of the Federal Constitutional Law and Art. 7 of the Federal Constitutional Law.

³⁴ See ECJ 6.3.2014, RsC-206/13, *Siragusa*, para 25; see also ECJ 10.7.2014, RsC-198/13, *Hernandez*, Rn37; 7.9.2017, RsC-117/17, *Demarchi Gino*, Rn20.

³⁵ Cf. § 2 first sentence, § 3 para. 1 first sentence and para. 2 seventh sentence as well as § 7 first sentence KSG 2011; see also EBRV 1255 BlgNR XXIV GP 2 et seqq.

³⁶ See in particular the EU Burden Sharing Regulation, which directly implements the obligations under the Paris Climate Change Convention, Federal Law Gazette III 197/2016 as amended by Federal Law Gazette III 151/2022, client.

³⁷ Cf. VfSlg 19.632/2012.

³⁸ Cf. VfSlg 19.632/2012.

³⁹ Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Securing

Water and Food Supply, and Research, BGBl I 1 1/2013 idFBGBl I 82/2019 (hereinafter k "11fz: B VG Nachhaltigkeit).

⁴⁰ Cf. §§ 1 and 3 BVG Sustainability.

⁴¹ Cf VfGH 29.CXi.2017, E 875/2017-32, E 886/2017- 31, Rn 205 mwN.

must be weighed up.⁴² It should be pointed out that only recently the German Federal Constitutional Court in the decision "Klimaschutz" (Climate Protection Decision) to the effect of § 1 and 3 BVerfGG Sustainability and the State objective of Article 20 a of the German Basic Law (GG), leaving from this a **constitutional mandate** for climate neutrality, whereupon the court assumed a justifiability of this legal norm.⁴³

In a similar way as § 1 para 3 BVerfGG sustainability, Art 37 GRC contains a Union objective provision, according to which a "*high level of environmental protection and improvement of the quality of the environment*" must be included in legislation and "*must be ensured in accordance with the principle of sustainable development*".⁴⁴ Art 37 GRC thus establishes the **principle of sustainability** also in the field of Union law as a central principle within the meaning of Art 52 (5) GRC.⁴⁵ The principle of subsidiarity according to Art 37 GRC requires in particular that natural resources are used with special regard to intergenerational justice and that future generations are given an intact environment in the way they found it.

3. To the concrete facts

The applicants are a group of children with Austrian citizenship living in Austria, who are of different ages, but none of whom has reached the age of 18.⁴⁶ What all of them have in common is that they are children with interests, needs, worries and concerns that correspond to their respective age groups. However, they are particularly concerned about one issue: the destruction of their lives by the climate crisis and the resulting, overwhelming uncertainties about their future. In particular, they are afraid that, due to the failure to reduce greenhouse gas emissions in the present, they will have to live in a not too distant future in which they will have to fear for their health, their safety, the possibility of freely shaping their living conditions or their educational and professional opportunities, in short, for their children's well-being,

⁴² Cf VfGH 29.06.2017, E 875/2017-32, E 886/2017- 31, para 205 mwN.

⁴³ Cf. Dt BVerfG 24.3.2021, 1 BvR 2656/18 et al.

⁴⁴ Cf Art 37 GRC

⁴⁵ Cf. *Madner* in Holoubek/Lienbacher (eds.), GRC-Kommentar Art 37 Rz 14 ff (as of 1.4.2019).

⁴⁶ Cf. volume of the applicants' proofs of citizenship (Annex ./.2).

have to fear. In the following, a brief insight into the personal background of the applicants is given:

At this point, the personal background of the applicants was discussed in more detail. ejected. For data and privacy protection reasons, this information has been Removed from.

1. **Levi** [REDACTED]
2. **Pranziska** [REDACTED]
3. **Lena** [REDACTED]
4. **Barsam** [REDACTED]
5. **Laur-enz** [REDACTED]
6. **Smilla** [REDACTED]
7. **Matilda** [REDACTED]
8. **Lilith** [REDACTED]
9. **Emma** [REDACTED]
10. **Vincent** [REDACTED]
11. **Ben** [REDACTED]
12. **Wilhelmina** [REDACTED]

The applicants:imlen know that GHG emissions in Austria have decreased only minimally since 1990 and that Austria is far from meeting the GHG reduction path that would be required to comply with the 1.5°C target of the Paris Climate Agreement.⁴⁷ According to Section 1 of the KSG 2011 and the legislative materials, the aim of the KSG 2011 is "to enable the coordinated implementation of effective measures for climate protection" and to reduce GHG emissions in Austria as quickly as possible in order to achieve climate neutrality in time.⁴⁸ According to its content

⁴⁷ Cf. Art 2 para 1 lit a Paris Climate Convention; *Umweltbundesamt*, Austria's National Inventory Report. 2022, REP-081 (2022) 53 ff; *Umweltbuncksamt*, Klimaschutzbericht 2022, REP-0816 (2022); *Steininger et al.*, + 1.5°C: How much more greenhouse gases can we emit? - Background paper Ztl global and national greenhouse gas budgets, CCCA (2022) 12 ff
<https://wv.rw.ccca.ac.at/fileadmin/00_DokumenteHauptnrenue/02_KlimawissenJPapiere!GHG-Budget_Background_Paper_CCCApdf> (26.1 2023)

⁴⁸ Cf. § 1 KSG 2011; EBRV 1255 BlgNR X, 'CTV. GP 2 ff

However, Section 3 of the Climate Protection Act 2011, which is the subject of the application, has a degree of **ineffectiveness** that is tantamount to a **qualified omission**.⁴⁹ However, against the background of the immense pressure to act in this area, a de facto ineffective climate protection law has effects that reach into the constitutional sphere of the applicants and - as will be explained below - already violate it.

It should be noted that the cost risk of the opposing proceedings is not assumed by the applicants themselves, but by CLAW - fuitiative for Klimarecht.⁵⁰ This applies to both the legal fees and the flat-rate fees, as well as to the payment of any expert fees that may be incurred. In principle, there is no obligation to reimburse costs in proceedings before the Constitutional Court.⁵¹ Against this background, the parents of the applicants have also given their consent to the reciprocal representation and prosecution. Thus, it is to be noted that the **minor children cannot suffer any disadvantage as a result of the proceedings against them**. Against this background, the prerequisites for obtaining a guardianship court approval pursuant to § 167 ABGB are not present.

4. **Priif object**

In the following, those nuns are challenged by the applicants who are the subject of the review by the Constitutional Court according to the request for annulment (item 7).

4.1 **Main application**

The applicants:inside request the Repeal of the following wording of the Federal Act on the Compliance with I-Impact Limits on Greenhouse Gas Emissions and the Drafting of of effective measures for climate protection (Climate Protection Act KSG 2011) in BGBl I. No 106/2011 as amended. No 58/2017 ("KSG 2011").

The deletions refer to the wording of § 3 KSG 2011:⁵²

⁴⁹ This can be seen, among other things, in Austria's GHG balance, which shows only a minimal reduction in GHG emissions since 1990. Cf. *Umweltbundesamt*, Austria's National Inventory Report 2022, REP- 081 (2022) 53 ff; *Umweltbundesamt*, Klimaschutzbericht 2022, REP-0816 (2022).
o See Annex ./1.

⁵¹ Cf. § 27 VfGG

⁵² Henror lifting of the word sequences was done by the applicants:umen.

„Allocation tier specified high levels of greenhouse gas emissions;

Verl'mullungen zur Erarbei.tmg von NlaflIwhme11

§ 3.

*(2) **Negotiations shall be held** to develop measures to comply with the ceilings in the respective sectors. **Negotiations** shall take into account, **in particular**, possible measures in the following areas: increasing energy efficiency, increasing the share of renewable energy sources in final energy consumption. Increasing the overall energy efficiency in the building sector, integrating climate protection into spatial planning, mobility management, waste avoidance, protection and expansion of natural carbon sinks, and economic incentives for climate protection. Measures can also be developed in the form of multi-annual programs of measures and as joint measures by local authorities. The responsibility for **conducting negotiations in** the respective sectors lies with the federal ministers responsible for **the 2002 and 2007 climate strategies**, and with the federal ministers responsible under the Federal Ministries Act 1986 (BMG), Federal Law Gazette No. 76, as amended. **Negotiations shall be commenced one month after the submission of a proposal by the Federal Minister for Agriculture, Forestry, Environment and Water Management pursuant to paragraph 1. Negotiations shall be concluded within a full month before the start of a commitment period, which for the commitment period 2013 to 2020 shall be March 31, 2012.** In the event that the maximum levels of greenhouse gas emissions applicable to the Republic of Austria as of 2013 are exceeded, **further negotiations on the strengthening of existing measures or the introduction of additional measures are to be conducted without delay on the basis of an evaluation of the measures taken.** These negotiations must be concluded within six months.*

The core of the challenge to the main application is the mere obligation to negotiate and the time-limited (with the end of the year 2020) obligation periods. § Section 3 (2) KSG 2011 does not impose this mere obligation to negotiate in sentence 1. For this reason, the repeal of the following wording is requested by the applicants:

- in § 3 para 2 first sentence KSG 2011 the Aufhebung of the Woiilaut "have **Verhandlungen stattzuf'mdeu.**";

§ 3 para 2 second sentence KSG 2011, § 3 para 2 fourth sentence KSG 2011 and § Section 3 (2) seventh sentence of the KSG 2011 are inseparably linked⁵³ with this nonuation onGnmd of the direct reference. Therefore, the applicants:ilrnen request the repeal of the following word sequences:

- in § 3 para 2 second sentence KSG 2011 the wording "**In the negotiations**".
- in § 3 para 2 fourth sentence KSG 2011 the wording **for the Fiihrug of haaudings**";
- in § 3 para 2 seventh sentence KSG 2011 in BGBl I 106/2011 as amended by BGBl I 58/2017 furthermore the wording „**w eitere**".

With regard to Section 3 (2) seventh sentence KSG 2011, it should be noted that the word "further" refers to the general obligation to negotiate, which is to be distinguished from negotiations on the establishment and implementation of emergency measures. For this reason, the unconstitutionality of § 3 para 2 first sentence KSG 2011 is exclusively in untrem1ble connection with the \ 'ort „weitere":

§ Section 3 (2) fifth and sixth sentence KSG 2011 are on the one hand iii are inextricably linked to the legal duty of association stipulated in Section 3 (2) first sentence KSG 2011 and, on the other hand, nominate the acceptance of the same in time-limited periods of obligation. The repeal of this unconstitutionality must therefore, due to the inseparable connection and in order to avoid a "content-empty and unamendable" torso, take place⁵⁴ as a whole and is requested as such.

- § 3 para 2 fiinfte and sixth sentence KSG 2011 to the whole with the wording: **Negotiations shall be held one month after the submission of a proposal by the Federal Minister for Agriculture, Forestry, Environment and Water Management pursuant to Section 8 (1). Negotiations shall be held within nine months of each proposal.**

⁵³ VfSlG 13965/1994rnwN; 16542/2002; 16.911/2003.

⁵⁴ Cf. VfSlg 16.279/2001, 19.431/2011.

**Moimten in front of Start of a commitment period,
the is for the commitment period 2013 to 2020 is May 31,
2012.";**

The core of the proposal is also a retrospective basis for action in the event that GHG ceilings are exceeded and the associated negotiation and setting of emergency measures. This is standardized in § 3 para 2 seventh sentence KSG 2011. Therefore, the applicants request the suspension of the following consequences:

- in § 3 para 2 seventh salt KSG 2011 the wording "**on the basis of an evaluation of the measures taken**".

4.2 Contingency request

In eventulon, the Vetfassungsgelichtshof may amend the following Woltfootolgen in folgenden Gesetzesbestimmungen des Federal Law on the Observance of maximum amounts of greenhouse gas emissions and for the development of effective measures for climate protection (Climate Protection Act - KSG 2011) in BGBl I 106/2011 as amended by BGBl 58/2017 ("KSG 2011") in each case on the grounds of a violation of rights guaranteed under the Constitution (see also item 6.2):

The deletions relate to the wording of sections 3 and 6 of the KSG 2011:⁵⁵

„Sharing of the fixed hoc11st amount11 voll greenhouse gas emissio11e11;

Negotiations for the development of A,JafInalunen

*§ (1) The greenhouse gas emission ceilings applicable to the Republic of Austria pursuant to national or European Union obligations shall be **determined in accordance** with **the Annexes**. The maximum quantities may also be determined on a sectoral basis. The preparation of planning bases for the allocation of maximum greenhouse gas emissions to sectors for commitment periods starting in 2013 shall be based in each case on a proposal by the Federal Minister for Agriculture, Forestry, Environment and Water Management on the basis of domestically effective measures. This*

⁵⁵ The applicants were responsible for the lifting of the word sequences.

proposal shall also be submitted to the National Climate Protection Committee (§ 4). The final allocation shall be recorded in an annex to this Act.

(2) **Negotiations shall be held in order** to determine the measures to be taken in order to comply with the maximum quantities in the respective sectors. **In the negotiations**, particular consideration shall be given to possible measures in the following areas: increasing energy efficiency, increasing the share of renewable energy sources in final energy consumption, increasing overall energy efficiency in the building sector, integrating climate protection into land-use planning, mobility management, waste prevention, protecting and expanding natural carbon sinks, and economic incentives for climate protection. Measures can also be developed in the form of multi-annual measure programs and as joint measures of the local authorities. The responsibility for **funding the measures** in the respective sectors lies with the federal ministers responsible for the 2002 and 2007 climate strategies, subsidiarily with the federal ministers responsible under the Federal Ministries Act 1986 (BMG), Federal Law Gazette No. 76, as amended. **Negotiations shall be held one month after the submission of a proposal by the Federal Minister for Agriculture, Forestry, Environment and Water Management pursuant to paragraph 1. The losses shall in each case be made within nine months prior to the beginning of an obligatory period, i.e. for the obligatory period from 2013 to 2020 on March 31, 2012.** In the event that the maximum levels of greenhouse gas emissions applicable to the Republic of Austria as of 2013 are exceeded, **further negotiations shall be conducted immediately on the basis of an evaluation of the measures taken with a view to determining the effect of existing measures or the introduction of additional measures.** These negotiations shall be concluded within six months.

Progress Report

§ 6. the Federal Minister of Agriculture, Forestry, Environment and Water Management shall report to the National Council and to the Federal Parliament on the progress made in complying with the maximum greenhouse gas emission levels **laid down in Article 3(1).**

National Climate Change Committee annually with a written report. The report shall be broken down by sector gema/3 the appendices."

The core of this motion is an amendment of the main motion in item 4.1. Thus, the mere obligation to negotiate, the time-limited (with the end of the year 2020) obligation periods as well as the retrospective basis of action for the negotiation of emergency measures are challenged. The application differs from the main application in that it also includes a wording of Section 3 (1) first sentence of the KSG 2011 as well as a wording of Section 6 first sentence of the KSG 2011.

§ Section 3 (1) first sentence KSG 2011 stipulates that the basis for the negotiation of climate protection measures shall be exclusively the maximum GHG quantities specified in the Annexes and thus limits the scope of the obligation. Thus, the petitioners challenge the following wording:

- 111 § 3 para. 1 first sentence KSG 2011 the W011laut „**shall be as per the Annexes set.**”;

§ Section 6 first sentence KSG 2011 directly refers to this described and no longer to be updated Basis and is thus inseparably connected⁵⁶ with this provision. Furthermore, this wording is itself unconstitutional due to the reference to an unconstitutional, declarative statement about the determination of GHG maximum quantities in the annexes to the KSG 2011. For this reason, the applicants also request its repeal:

- in § 6 first sentence KSG 2011 the wording „**der gemaO § 3 Abs. 1 festgelegten**”;

In addition, as stated in item 4.1, the applicants also request the following follows:

§ Section 3(2) of the KSG 2011 stipulates in the first sentence a pure obligation to negotiate. For this reason

\The following wording is requested to be repealed by the applicants:

⁵⁶ VfSlG 13.965/1994 mwN, 16.542/2002, 16.911/2003.

- 10 § 3 para 2 first sentence KSG 2011, the wording "**Verhandlungen haben zu take place**";

§3 Abs 2 KSG 2011, § 3 Abs 2 vierter Satz KSG 2011 § 3 Abs 2 siebter Satz KSG 2011 are inseparably connected⁵⁷ with this due to the direct reference. Therefore, the applicants also request the deletion of the following word sequences:

- in § 3 para 2 second sentence KSG 2011 the wording "**In the negotiations**".
- in § 3 para 2 fourth sentence KSG 2011 the wording "**for the conduct of negotiations**";
- in § 3 para 2 seventh sentence KSG 2011 in BGBl I 106/2011 as amended by BGBl 58/2017 furthermore the wording „**weiter**".

Regarding § 3 para 2 seventh sentence KSG 2011, it is to be noted that <by>the word "**further**" reference is made to the general obligation to negotiate, which is to be distinguished from negotiations on the setting and implementation of emergency measures. For this reason, the unconstitutionality of § 3 para 2 first sentence KSG 2011 is only in inseparable connection with the word "**further**":

§ Section 3 (2) fifth and sixth sentence KSG 2011 are, on the one hand, in inseparable connection with the pure obligation to negotiate standardized in Section 3 (2) first sentence KSG 2011 and, on the other hand, regulate the acceptance of the same in time-limited obligation periods. The revocation of this provision must therefore be made in its entirety due to the inseparable connection and in order to avoid a "content-empty and inapplicable torso"⁵⁸ and is requested as such.

- § Section 3 (2) fifth and sixth sentences of the KSG 2011 shall be amended to read as a whole: **Negotiations shall be commenced one month after the submission of a proposal by the Federal Minister of Agriculture, Forestry, Environment and Water Management in accordance with paragraph 1. The negotiations shall be held within nine months.**

.months before Start of a commitment period, which is is
mi- den
 Commitment Period 2013 his 2020 the March 31, 2012, close8eu.";

⁵⁷VfSIG 13965/1994rnwN, 16.542/2002, 16.911/2003.

⁵⁸ Cf. VfSlg 16.279/2001, 19.431/2011.

Furthermore, the core of the proposal in question is a retrospective basis for action in the event that maximum GHG levels are exceeded and the associated emergency measures are taken. This is exclusively standardized in § 3 para 2 seventh sentence KSG 2011. The applicants therefore request the repeal of the following wording:

- in Section 3 (2) seventh sentence of the KSG 2011, the wording "**on the basis of an evaluation of the measures taken**".

5. Legitimation to file an application

The basis for the right to file an application pursuant to Article 140 (1)(c) of the Federal Constitution (B-VG)⁵⁹ is a direct encroachment of the contested law or the contested sections of the law on the constitutionally guaranteed legal rights of the applicants. Such an encroachment exists if it is "*clearly determined according to the nature and extent of the law*"⁶⁰ and currently affects the legally protected interests of the applicants.⁶¹

5.1 On the legal affectedness of the applicants with regard to the main motion

A prerequisite for the admissibility of an individual application is that the applicants are affected in their **legal sphere** and not merely in their economic or other interests. Section 3 (2) KSG 2011, which is contested in this case, affects the applicants in particular in the following respects

- ⁶²their constitutionally guaranteed right to the protection of the best interests of the child in Fon11 of the individual rights to protection and care, to the best possible development and to the protection of their interests, in particular from the point of view of intergenerational justice,
- their constitutionally guaranteed right, deriving from Art. 1 second sentence of the BVG, to have the best interests of the child taken into account in all measures affecting them,
- their constitutionally guaranteed rights under Art. 7 B-VG and Art. 2 StGG.

Right to equality before the law

⁵⁹ Federal Constitutional Law (B-VG), Federal Law Gazette 1/1930 as amended by Federal Law Gazette I 222/2022.

⁶⁰ See VfSlg 11.868/1988; 15.632/1999; 16.616/2002; 16.891/2003.

⁶¹ See VfSlg 11.868/1988; 15.632/1999; 16.616/2002; 16.891/2003.

⁶² Federal Constitutional Law on the Rights of Children, BGBl I 4/2011 (hereinafter abbreviated to: BVG Kinderrechte).

directly legal.⁶³ The **direct legal relevance** is based in particular on the following considerations:

5.1.1 Legal concern due to the violation of the subjective right to the protection of the best interests of the child iSd Art I BVG Child Rights iVm § 1 BVG Sustainability or Art 24 para 1 GRC iVm Art 37 GRC

The Federal Children's Rights Act (BVG Kinderrechte) came into force on 16.2.2011 and has constitutional status. Its primary purpose is to implement the UN Convention on the Rights of the Child (CRC)⁶⁴ and it contains various (fundamental) rights, all of which relate to the lives of children, i.e. natural persons who have not yet reached the age of 18 or who have not already reached the age of majority under the law applicable to them. Since the applicants have neither reached the age of 18 nor are they otherwise considered to have reached the age of majority in the legal sense, <las BVG Kinderrechte is fully applicable to them.⁶⁵

a) On the genuine, i protection, duties pursuant to Art 1 BVG Children's rights

Art 1 of the Federal Constitutional Law on the Rights of the Child (BVG Kinderrechte) established special, child-specific basic rights under constitutional law, since children - due to their physical, psychological and legal dispositions, which are related to their age and development - form a **vulnerable group of people** and are therefore **particularly worthy of protection**.⁶⁶ The rights to protection and care, to the best possible development and to the safeguarding of children's interests, especially from the point of view of intergenerational justice, represent concrete expressions of the **best interests of children**. This is the guiding principle underlying all the legal positions conferred by the BVG on children's rights.⁶⁷ All in all, the BVG represents a self-contained catalog of fundamental rights, which contains individual rights of different character and expression.

⁶³ Cf. Art I first sentence BVG Children's rights.

⁶⁴ 1JbEink:ommen über die Rechte des Kindes, BGBl 1993/7 idF BGB] 437/1993.

⁶⁵ Cf. volume of the applicants' proofs of statehood (**Annex .1**).

⁶⁶ Cf. *Grabenwarter*, Zur Frage der Integration der Garantien der Kinderrechtskonvention in das österreichische Bundesverfassungsrecht, in Berka/Grabenwarter/K. Weber (eds.), Studien zur Kinderrechtskonvention und ihrer Umsetzung in Österreich (2014) 27 (60); *Fuchs*, Kinderrechte in der Verfassung: Das BVG - Ober die Rechte von Kindern, in Lienbacher/Wielinger (eds.), Jahrbuch Öffentliches Recht 2011 (2011) 91 (102); see also *Handig/Ohmer*, Gebietet Generationengerechtigkeit Klimaschutz? Zum soziale Grundrecht auf Wahrung des Kindeswohls nach Art I BVG Kinderrechte, RdU 2022, 225 (225).

⁶⁷ See also *Mayer/Kucsko-Stadlmayer/Stoger*, Bwldesverfassungsrecht¹¹ Rz 1388/1; *Berka*, Constitutional Law⁸ (2021) para 1406a.

which in their effect *go beyond "general constitutional commitments and an objective state duty to protect, in particular in the form of state objective provisions"*.⁶⁸ Article 1 of the Federal Constitutional Law on the Rights of the Child therefore provides children with a **subjective right to the safeguarding of the best interests of the child in all its facets**, based on their special need for protection. This includes at least the right to protection and care, to the best possible development and fulfillment, as well as to the protection of children's interests, in each case with special consideration of intergenerational justice.⁶⁹ The subjective right to safeguard the best interests of the child is therefore subject to the review competence of the Constitutional Court as a **constitutionally guaranteed right**.⁷⁰

In contrast to the duties to protect⁷¹ derived from rights of freedom, the **special feature of Art 1 BVG Kinderrechte** is that it nonnates a **genuine duty to protect which is directly guaranteed by constitutional law and which is primarily directed towards safeguarding the best interests of the child**.⁷² In all matters relating to the welfare, development, fulfilment or interests of children, the State shall give primary consideration to the best interests of the child and shall also ensure that risks to and impairments of the same are prevented to the best possible extent.⁷³ If the legislator nonns mal3nalities which directly or indirectly affect children, he must thus take into account the best interests of the child **as the primary consideration**.⁷⁴ If the child's well-being is threatened by a foreseeable or imminent danger, the legislature is also obliged to enact **(simple) legal measures to safeguard fundamental rights**.

⁶⁸ Cf. *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in: Lienbacher/Wielinger (eds.), Jahrbuch Öffentliches Recht 2011 (2011) 91 (97).

⁶⁹ Cf VfGH 1.12.2018, G 308/2018; 9.10.2015, G 152/2015 tmd 11.12.2014, G 18/2014; see also *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in Lienbacher/Wielinger (eds), Jahrbuch Öffentliches Recht 2011 (2011) 91 (97 i).

⁷⁰ Cf VfGH 1.12.2018, G 308/2018; 9.10.2015, G 152/2015 and 11.12.2014, G 18/2014; see clazu also *Fuchs*, Kindenechte in der Verfassung: Das BVG über die Rechte von Kindern, in Lienbacher/Wielinger (eds), Jahrbuch Öffentliches Recht 2011 (2011) 91 (97 f).

⁷¹ See, e.g., duties of protection related to Article 8 ECHR: ECtHR 28.1.2000, McGinley and Egan, No. 21.825/93 and 23.414/94; cf. also *Berka*, Verfassungsrecht⁸ (2021) Rz 1221 ff.

⁷² See idZ insb die Ausführungen in VfGH 1.12.2018, G 308/2018; 9.10.2015, G 152/2015 und 11.12.2014, G 18/2014; see also *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in: Lienbacher/Wielinger (eds.), Jahrbuch Öffentliches Recht 2011 (2011) 91 (97 ff); *Grabenwarter*, Zur Frage der Integration der Gamtien der Kinderrechtekonvention in das österreichische Bundesverfassungsrecht, in Berka/GrabenwartwK. Weber (eds.), Studien zur Kinderrechtskonvention und ihrer Umsetzung in OsteI Teich (2014) 27 (59 f).

⁷³ Cf VfGH 1.12.2018, G 308/2018; 9.10.2015, G 152/2015 uncl 11.12.2014, G 18/2014; see also *Lazs/Schon*, Das Kindeswohl in der Rechtsprechung von VfGH und VwGH, RZ 2021, 211 (212); *Handig/Ohner*, Gebietet Generationengerechtigkeit Klimaschutz? Zurn soziale Grundrecht auf Wahrung des Kindeswohls nach Art 1 BVG KindeITechte, RdU 2022, 225 (228); *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in Lienbacher/Wielinger (eds), Jahrbuch Öffentliches Recht 2011 (2011) 91 (98 f).

⁷⁴ Cf VfGH 1.12.2018, G 308/2018; 9.10.2015, G 152/2015.

To enact **regulations** that provide for an effective **defense against danger in** a manner that does justice to the constitutionally guaranteed right to protection of children.⁷⁵

Against the background of the intergenerational justice expressly mentioned in Article 1 of the Federal Constitutional Law on Children's Rights, it should be noted that the "safeguarding of the best interests of the child" represents a **continuous state obligation** to take all necessary measures to prevent foreseeable impairments of the best interests of the child as far as possible.⁷⁶ The taking of "one-off measures" will therefore in many cases not be sufficient to satisfy this obligation. If a dangerous situation for the child's well-being, which is already gradually materializing, persists and if the realization of serious negative effects on the child's well-being is already foreseeable, the state must counteract it continuously with measures that are as effective as possible.

The protection of fundamental rights vennittelte by Art 1 BVG children's rights is idZ insofar as

„autizipativ“, as not only current, but rather also future future impairments of the child's well-being are to be included in the assessment of the current violation of fundamental rights.⁷⁷ In view of these spheres of fundamental rights, an omission or partial omission of the primary duty to protect can also constitute a violation of the subjectively protected rights. This is particularly important in situations such as the present one, in which the best interests of the child can only be safeguarded by continuous action in the present - namely, by stopping the family-reversible emission of GHGs.

In summary, this means that, on the one hand, the welfare **of** children must be safeguarded and, on the other hand, **selective defense measures** must be taken for those cases in which the welfare of the child - taking into account the **ge11erati011e11grecJ1ty** - is at risk of being impaired. Therefore, the state refrains from taking effective

⁷⁵ Cf. *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in Lienbacher/Wielinger (ed.), Jahrbuch Öffentliches Recht 2011 (2011) 91 (102); see also *Grabenwarter*, Zur Frage der Integration der Garantien der Kinderrechtskonvention in das österreichische Bundesverfassungsrecht, in Berka/Grabenwarter/K. Weber (eds.), Studien zur Kinderrechtskonvention und ihrer Umsetzung in OstelTeich (2014) 27 (59 f).

⁷⁶ Cf. *Holoubek*, Grundrechtsschutz vor neuen Herausforderungen, 21st OJT Vol. VI (2022) 155 ff and 158 ff. See *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in: Lienbacher/Wielinger (eds.), Jahrbuch Öffentliches Recht 2011 (2011) 103; see also *Handig/Ohner*, Gebietet. Generational Justice Climate Protection? Zurn soziale Grundrecht auf Wahrung des Kindesvwhls nach Art 1 BVG Kinderrechte, RdU 2022, 225 (229 f).

⁷⁷ Cf. *Holoubek*, Gnmclrechtsschutz vor neuen Herausforderungen, 21st OJT Vol1/1 (2022) 155 ff uncl 158. ff

climate protection measures, or does it take manifestly inadequate (sham) measures?

If the applicant takes measures and the best interests of the child are thereby impaired currently or, in all probability, in the future, he or she violates the **duty to protect** pursuant to Article 1 of the Federal Constitutional Children's Rights Act (BVG Kinderrechte) and violates the constitutionally guaranteed rights of the applicants. This violation of rights must be able to be **asserted** by the affected children pursuant to Art. 1 BVG Children's Rights. Otherwise ilmen were granted a **subjective right to protection**, <lessen violation of which, however, they could not assert in the case of a state omission.

b) To d.en genuine Sdwizyflchten gem Ari 24 GRC

Furthermore, the "**rights of the child**" regulated in Art. 124 GRC⁷⁸ are comparable to the subjective rights granted by Art. 1 BVG Children's **Rights**. According to Art 51 GRC, the scope of application of the GRC is limited to such national situations which concern the "*implementation of the law of the Union*".⁷⁹ According to recent case law of the ECJ, the applicability of the CFR depends in particular on whether the regulation in question is aimed at the implementation of Union law, what character the regulation has and whether it pursues objectives other than those covered by Union law.⁸⁰ In the present case, both the wording of § 2 first sentence, § 3 para 1 first sentence, para 2 seventh sentence and § 7 first sentence KSG 2011 as well as the legislative material pertaining to the KSG 2011 explicitly state that the KSG 2011 aims at the coordinated implementation of obligations under national and European Union law on GHG reduction by enabling effective climate protection measures.⁸¹ The obligations under Union law idZ aim at the implementation of requirements under national law, \:which is why the KSG 2011 primarily serves the coordinated implementation of - binding and directly applicable - Union law.⁸² The coordinated sharing of GHG reduction obligations and burdens between the federal government and the Länder is essential for effective implementation.

⁷⁸ Charter of the Gnm Rights of the European Union, OJ C 326/2012, 391 (hereinafter GRC for short).

⁷⁹ Cf. Art 51 (I) GRC; cf. ECJ 26.2.2013, *Case C-617/10, A.kerberg Fransson*, paras 18, 21 and 23; 30.6.2016, *Case C-205/15, Brayov*, para 23; see also ECJ 18.12.1997, *Case C-309/96, Annibaldi*, para 21 ff. for a concretization of this broad formula.

⁸⁰ See ECJ 6 3 2014, *Case C-206/13, Siragusa*, para 25; see also ECJ 10 7 2014, *Case C-198/13, Hernandez*, para 37; 7.9.2017, RsC-117/17, *Demarchi Gino*, para 20.

⁸¹ Cf. § 2 first sentence, § 3 para 1 first sentence, § 3 para 2 seventh sentence and § 7 first sentence KSG 2011; EBRV

⁸² See in particular Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 setting binding national annual greenhouse gas emission reduction targets for the period from 2021 to 2030 as a contribution to climate action!³(EU) No 525/2013, OJ L 156/2018, 26 (hereinafter referred to as Regulation (EU) 2018/842), which directly implements the commitments under the Paris Agreement, Federal Law Gazette III 197/2016, as amended by Federal Law Gazette III 151/2022, client.

imperative, since. GHG savings to the necessary extent can only be achieved by including other areas of competence.⁸³ It follows that the KSG 2011, in accordance with the case law of **the ECJ, is the implementation of Union law, which is** why the GRC pursuant to Art 51 (1) GRC is applicable in the case at hand and its provisions are to be used as the basis for the assessment.

According to Art 24 (1) first sentence GRC, children have a right to such **protection and care** as is necessary for their **well-being**.⁸⁴ The now predominant part of the literature and doctrine is to be followed in that Art 24 (1) first sentence GRC gives children a **subjective right to protection and care**, whereby "well-being" in the sense of the best interests of the child forms the central point of reference and (protection) measure.⁸⁵ This subjective legal right manifests itself in particular in the duty of the MS,

*The state has a duty to take **defensive measures** when the well-being of children is threatened to be affected or is already affected.*⁸⁶ This is accompanied by the state's duty to create an **effective regulatory system** to ensure the protection and care of children.⁸⁷ From Art 24 (1) GRC results - in a way related to Art 1 BVG children's rights - a **genuine duty of the state to protect**, which is mirrored by a **subjective right of children to be protected by active actions of the state** as far as possible from foreseeable or already materializing dangerous situations, which are likely to affect their well-being.⁸⁸

⁸³ See *Schulev-Steindl/Hofer/Franke*, Gutachten im Auftrag des BMK - Evaluierung des Klimaschutzgesetzes (2020) 27 mwN.

⁸⁴ Cf. Art 24 first sentence GRC.

⁸⁵ Cf. *Schmahl*, Gleichheitsgarantien, in Grabenwarter (ed.), Enzyklopadie Europarecht II - Europaischer Grundrechtsschutz² (2022) Rz 104; *Fl. Ichs*, in Holoubek/Lienbacher (eds.), GRC-Kommentar² Art 24 (2019) Rz 27; *Holscheidt*, in Meyer/Holscheidt (eds.), Charter of Fundamental Rights of the European Union⁵ (2019), Art 24 GRC Rz 20; *Frenz*, Handbuch Europarecht IV - Europaische Grundrechte (2009) Rz 3432 f; *Kingreen*, in Calliess/Ruffert (eds.), "EUV/AEUV Kommentar" (2022), Art 24 GRC Rz 3; *Ross*, in Schwarze/Beckerffiatje/Schoo (eds.), EU-Kommentar⁴ (2019), Art 24 GRC Rz I and 5 f; *Streinz*, in Streinz (eds.), EIJV/AEUV - Treaty on European Union and Treaty on the Functioning of the European Union³ (2018), Art 24 GRC Rz 5.

⁸⁶ Cf. *Schmahl*, Gleichheitsgarantien, in Grabenwarter (ed.), Enzyklopadie Europarecht II - Europaischer Grundrechtsschutz² (2022) para **104** (own I emphasis).

⁸⁷ Cf. *Holscheidt*, in Meyer/Holscheidt (ed.), Charter of Fundamental Rights of the European Union⁵ (2019), Art 24 GRC Rz 21; *Schmahl*, Gleichheitsgarantien, in Grabenwarter (ed.), Enzyklopadie Europarecht II - Europaischer Grundrechtsschutz² (2022) Rz 104; see also *Kingreen*, in Calliess/Ruffert (ed.), EUV/AEUV Kommentar⁶ (2022), Art 24 GRC Rz 3; *Ross*, in Schwarze/Becker/Hatje/Schoo (ed.), EU-Kommentar⁴ (2019), Art 24 GRC Rz 5 et seq.

⁸⁸ Cf. *Holscheidt*, in Meyer/Holscheidt (eds.), Charter of Fundamental Rights of the European Union⁵ (2019), Art 24 GRZRz20f.

The scope of protection of Art 24 (1) GRC is therefore open in all those situations in which the well-being of children is or threatens to be impaired. According to the **case law of the Constitutional Court**, the rights of the GRC can be asserted as constitutionally guaranteed rights before the Court of Justice and thus form a **principal standard** in the proceedings for general nunc control pursuant to Art 139 and Art 140 of the Federal Constitution.⁸⁹

c) *Among the relevant provisions that shall be determined*

The obligation to safeguard the best interests of the child in a way that is appropriate for the generations is also supported by Section 1 of the Federal Constitutional Law on Sustainability⁹⁰, which contains a constitutional commitment to *the principle of sustainability in the use of resources in order to ensure the best possible quality of life for future generations*.⁹¹ Thus, § 1 BVG Nachhaltigkeit pursues the purpose of anchoring the "precautionary principle" - originating from environmental law - in the constitutional rank and of safeguarding an official interest in the generation-appropriate management of resources. Although neither the Federal Constitutional Law on the Rights of the Child nor the Federal Constitutional Law on Sustainability - nor the legal order in general - provide any information on this subject, it is not clear whether this is the case. provide information on how the term "sustainability" is used.

If the term "**intergenerational justice**" is to be defined, it can be assumed with the literature that it means at least the **fairness of distribution** regarding the available (material) **resources**, the securing of **(over-)life chances** as well as the preservation or improvement of the **quality of life** for younger and following generations.⁹² As will be shown below, the maximum **GHG budget** that Austria could emit in order to meet the Paris climate targets - with a probability of 66% - is only available to a very limited extent (280 MtCO₂eq). If current GHG emissions are maintained, it will be completely used up by 2025.⁹³ The remaining 'TI-JG-budget of Eastern Austria is therefore to be regarded as a **very**

⁸⁹ Cf. VfSlg 19.632/2012.

⁹⁰ Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Securing Water and Food Supply, and Research, BGBl I 111/2013 as amended by BGBl II 82/2019 (hereinafter referred to as BVG Sustainability).

⁹¹ Cf. Section 1 of the Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Securing Water and Food Supply, and Research, Federal Law Gazette I 111/2013, as amended by Federal Law Gazette II 82/2019 (own elevations; hereinafter abbreviated to BVG Sustainability).

⁹² Cf. Grabenwarter, Zur Frage der Integration der Garantien der Kinderrechtskonvention in das österreichische Bundesverfassungsrecht, in Berka/Grabenwarter/K. Weber (eds.), Studien zur Kinderrechtskonvention und ihrer Umsetzung in Österreich (2014) 27 (59); on the definition of intergenerational justice, see further Heubach, Generationengerechtigkeit- Herausforderung für eine zeitgenössische Ethik (2007) 37 ff.

⁹³ Cf. Steininger et al, +1.5°C: How much more greenhouse gases can we emit? - Background paper on global and national greenhouse gas budgets, CCCA (2022) 12 ff w/d 18

limitedly available resource in the sense of § 1 of the BVG Sustainability Act, whose The "overuse" has catastrophic consequences for younger and following generations. Thus, in accordance with § 1 of the Federal Constitutional Sustainability Act, there is a legitimate constitutional interest in reducing federal GHG emissions as quickly as possible. of the rights of the applicants according to Article 1 of the Federal Constitutional Law on Children's Rights must be taken into account. Section 3 of the Federal Constitutional Law on Sustainability also ties in with this, as it calls for the "preservation of the natural environment as the basis of human life" as a state goal of comprehensive environmental protection.⁹⁴ Since the exceeding of the GHG budget has serious negative effects on the environment, which directly forms the basis of human life,⁹⁵ Article 1 of the Federal Constitutional Law on Children's Rights must also be interpreted in the light of § 3 of the Federal Constitutional Law on Sustainability and this public interest in the preservation of intergenerational justice in connection with climate protection must be included in the assessment of the scope of protection under fundamental rights.

In a similar way, the objective provision of Art. 37 CFR contains objective-legal legislative and constitutional mandates in the field of environmental protection.⁹⁶ Accordingly, a *"high level of environmental protection and the improvement of the quality of the environment"* must be included in legislation and *"ensured in accordance with the principle of sustainable development"*.⁹⁷ The principle of sustainable development - as well as § 1 of the Federal Law on Sustainability - includes requirements *"which aim to take into account the **exhaustibility of resources** and the absorptive capacity of the environment, **also in the interest of future generations**, and to decouple economic growth and environmental pollution"*.⁹⁸ In accordance with this principle, there is therefore an obligation, even in areas of law which are not governed by ion law, to pay particular attention to the

The Federal Government is obliged to ensure that natural resources are used in a manner that is fair to all generations (see above) and to take this into account as a fundamental public interest when making decisions. Art 24 (1) GRC is therefore to be interpreted in the light of Art 37 GRC, whereby the aspects of intergenerational justice in relation to the subjective-legal duty to protect the particularly vulnerable group of children receive additional weight.

<https://www.cccaac.at/fileadmin/00_DocumentsMain_menu/02_Climate_Knowledge/Papers!GHG_Budget_Background_Paper_CCCApdf> (14.12 2022).

⁹⁴ Cf. § 3 paras 1 and 2 BVG Nachh.altigkeit.

⁹⁵ Cf. *IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability - Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022), Summary for Policymakers, 8 ff.*

⁹⁶ Cf. *Madner* in Holoubek/Lienbacher (eds.), GRC-Kommentar² (2019) Art 37 Rz 17.

⁹⁷ Cf Art 37 GRC

⁸ Cf. *Madner* in Holoubek/Lienbacher (eds.), GRC-Kommentar² Art 37 Rz 25 (as of 1.4.2019); own I-emphasis).

The scope of protection of Art 24 (1) GRC thus also includes the protection against impairments of the best interests of the child by the consequences of the climate crisis, if the timely adoption of effective climate protection measures is willmited by the state or ,vurde.

While the concept of generationally equitable GHG management has not yet found any expression in the case law of the Austrian supreme courts, the German Federal Constitutional Court (BVerfG) had to deal with this issue recently in Detajl 211.⁹⁹ In its climate decision of March 24, 2021, the German Federal Constitutional Court stated that "**one generation may not be allowed to consume large parts of the CO2 budget under a comparatively mild reduction burden if, at the same time, this would mean that the 11 subsequent11 generations would have to bear a**

- *The German Federal Constitutional Court did indeed assess the **intert. burden of the granting of a new right in the context of the review of interventions in liberties that will become necessary in the future, but a comparable understanding is also necessary in the context of intergenerational justice.** However, a comparable understanding under elem. aspect of intergenerational justice is also to be taken as a basis for the **duties to protect pursuant to Art 1 BVG Children's Rights and Art 24 para. 1 GRC as well as for the goal of generation-appropriate resource conservation pursuant to § 1 BVG Sustainability and Att 37 GRC.***¹⁰¹

The **constitutionally guaranteed rights of** the applicants according to Art 1 BVG Kinderrechte iVm §§ 1 and 3 BVG Na. The rights guaranteed by the Constitutional Law pursuant to Art. 1 BVG Children's Rights **in conjunction with §§ 1 and 3 BVG Na.** chhaltigkeit or Art. 24 para. 1 GRC in conjunction with Art. 37 GRC are thus affected in all cases in which the state creates (a system of) legal norms which - e.g. due to the subject matter of the regulations, the structure of the regulations or the consequences of the regulations - have a (direct) effect on the welfare of the **child or** serve to avert concrete dangers which (may) impair the welfare of the child.

d) The (Ingefochten11en Normp "ssagen des § 3 Abs 2 KSG 2011 encroach unmittelbar in die Rechtssphäre der Atttragsteller:imtel1

⁹⁹ See VglDtBVerfG 24.3.2021, 1 BvR2656/18.

¹⁰⁰ Cf. DtBVerfG 24.3.2021, 1 BvR 2656/18, para 192 (own emphasis).

¹⁰¹ Cf. on the necessity of a broader approach to intertemporal burden sharing with reference to the BVG Kinderrechte *Holoubek*, Gru.ndrechtsschutz vor neuen Herausforderungen, 21st ÖIT Vol. 1/1 (2022) 132 f; see

in general on intergenerational justice under consideration of the climate decision of the German Federal Constitutional Court *Handig/Ohner*, Gebietet GenerationengerechtigkeitKlimaschutz? Zurn soziale Grundrecht auf Wahrung des Kindeswohls nach Art 1 BVG Kinderrechte, RdU 2022, 225 (230).

The KSG 2011 came into force on 22.11.2011 - and **thus at the same time after** the BVG Children's Rights - and regulates the *"coordinated implementation of effective measures for climate protection"* according to its declared objective.¹⁰² The legislative materials indicate that the KSG 2011 is primarily intended to enable a *"rapid and significant reduction of greenhouse gas emissions"* and to ensure that *"obligations under national and European Union law in the area of climate protection are shared nationally"* and that a *"mechanism is created that [...] facilitates the development and implementation of effective climate protection measures...] enables the development and implementation of effective climate protection measures by the federal government and the states."*¹⁰³

The **purpose of** the KSG 2011 is therefore to **effectively combat the climate crisis**. This is to be ensured by the implementation of a rapid and significant **reduction of GHG emissions** and the creation of a basis for the **implementation of the most effective climate protection measures possible in Austria**.¹⁰⁴ The target set is the reference value defined in the Paris Climate Agreement, according to which an increase in the global average temperatures **to as low as 1.5°C** in Comparison compared to the pre-industrial era, since the KSG 2011 explicitly refers to the **obligations under international and European Union law that** currently exist.¹⁰⁵ Consequently, the GHG reduction obligations under EU law, which are based on the Paris Convention on Climate Change, are to be reflected in the m1 KSG 2011 and ensure compliance compliance with them.¹⁰⁶ As no other crisis currently affects or threatens to affect children's well-being as much as the climate crisis, the **purpose of** the Climate Change Act 2011 is therefore also to **protect children's livelihoods**, to avert danger and to ensure that the resource "GHG emissions" (measured in CO₂eq), which is only available to a limited extent, is **distributed in a way that is fair for all generations**.

¹⁰² Cf. § 1 KSG 2011.

¹⁰³ Cf. BIR 1255 BlgNRXXIV. GP, 2 f

¹⁰⁴ See *IPCC*, Climate Change 2022: Impacts, Adaptation and Vulnerability - Working Group II Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022), Summary for Policymakers, 5 ff; *IPCC*, Climate Change 2021- The Physical Science Basis. Contribution of the Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2021), Summary for Policymakers, 4 ff; *IPCC*, Climate Change 2022: Mitigation of Climate Change - Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022), Summary for Policymakers, 8 ff.

¹⁰⁵ Cf. § 2 and § 3 para 2 KSG 2011; see further Art 2 para 11 of the Paris Agreement, BGBl III 197/2016 idF BGBl III 151/2022 (hereinafter in short: Paris Climate Agreement); see also *IPCC*, Special Report: Global Warming of 1.5°C- Summary for Policymakers (2018) 4 ff.

¹⁰⁶ Cf. § 2 and § 3 Abs 2 KSG 2011; VO (EU) 2018/842 of the European Parliament and of the Council of 30. May 2018 setting binding national annual targets for the reduction of greenhouse gas emissions in the period 2021 to 2030 as a contribution to climate protection and measures for the purpose of fulfilling the obligations under the Paris Agreement and for the adoption of Regulation (EU) No 525/2013, OJ L 2018/156, 26

(hereinafter in short: Burden Sharing Regulation 2018/842).

associated **burdens**. The purpose of the KSG 2011 is to safeguard the **welfare of children**, especially with regard to the aspect of intergenerational justice.

Thus, the KSG 2011 in general as well as the contested provisions on the "development of measures"¹⁰⁷ in particular are to be qualified as measures to safeguard the best interests of the child.¹⁰⁸ The contested provisions of the KSG 2011 **thus affect children directly in their rechlitspsphifre**.¹⁰⁹

Finally, the applicants' constitutionally guaranteed rights pursuant to Art 1 BVG Kinderrecht.e in conjunction with §§ 1 and 3 BVG Nachhaltigkeit and Art 24 (1) GRC in conjunction with Art 37 GRC are violated in particular by the fact that the contested word parts of the § Section 3 (2) of the KSG 2011 in its current version requires the taking of effective climate protection measures and violate the constitutional duty of the state to protect the applicants.

§ Section 3 (2) KSG 2011 does not stipulate any obligations of the addressees beyond the mere obligation to **conduct negotiations**. Even in the context of the development of measures, which is exclusively subject to negotiation, neither a concretely calculated GHG mitigation potential of the individual measures has to be determined or indicated, nor an assessment has to be carried out as to whether the individual measures mutually offset each other or cancel each other out in their effectiveness.¹¹⁰ The obligation to negotiate, which is repeatedly standardized in § 3 KSG para. 2 KSG 2011, is thus, with regard to its ineffectiveness, similar to a **qualified omission of** state actors, which violates the **active duty to** protect the best interests of the child arising from Art. 1 BVG Children's Rights and Art. 24 para. 1 GRC.

In addition, within the contested consequences of Section 3 (2) KSG 2011, reference is made exclusively to **commitment periods** that have already **passed**, without any current

¹⁰⁷ Cf. heading of § 3 para. 2 KSG 2011.

¹⁰⁸ Cf. Art 1 BVG Children's Rights.

¹⁰⁹ Cf. § 1, § 3 paras 2, 3 and 4 and § 7 KSG 2011; Art 1 BVG Children's Rights; Art 1 BVG Sustainability. no Cf. § 3 para. 2 KSG 2011; on the interactions of measures, see *IPCC*, *Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers* (2022) 27; *Seebauer et al*, *Promoting adoption while avoiding rebound: integrating disciplinary perspectives on market diffusion and carbon impacts of electric cars and building renovations in Austria*, *Energy, Sustainability and Society* 2019, 2 ff. <<https://energysustainability.biomedcentral.com/articles/10.1186/s13705-019-0212-5> > (19.2.2023).

to set valid GHG ceilings or ceilings for the future.¹¹¹ Without the specification of a stringent GHG reduction path, however, it is impossible to fulfill the obligations under national and European Union law in this area, since only the creation of such a basis for orientation can *"the indispensable development and planning of corresponding technologies and practices"* be demanded.¹¹² Only in this way is it possible for *"a planning horizon to emerge before which the incentive and pressure grow to set in motion the urgent, sometimes protracted developments on a large scale"*.¹¹³ The reference to commitment periods that lie exclusively in the past thus counteracts the definition of an absolutely necessary GHG reduction path. In addition, Section 3 (2) KSG 2011 stipulates that emergency measures must be taken retrospectively. Accordingly, emergency measures can only be taken on the basis of an evaluation of measures that have already been taken; the anticipatory-preventive evaluation of planned measures, on the other hand, is ruled out on this basis.¹¹⁴ Thus, the contested parts of § 3 para 2 KSG 2011 fundamentally violate the **ongoing, anticipatory duty** of the legislator to **take active measures** to safeguard the best interests of the child pursuant to Art 1 BVG Kinderrechte and Art 24 GRC.

As a result, a large part of the **GHG budget** still available at the time of the enactment of KSG 201.1 has already been used up and Austria's TI-IG emissions could only be reduced marginally compared to the base year 1990.¹¹⁵ To date, a marginal GHG reduction has only been possible due to economic factors.¹¹⁶ ¹¹⁷ If the current GHG reduction path is maintained, the **share of the global GHG budget attributable to Österreich** will have to be maintained in order to avoid an increase in global average temperatures of no more than 1.5°C with emerg

¹¹¹ Cf. § 3 para. 1 and 2 KSG 2011.

¹¹² Cf. DVBVerfG 24.3.2021, 1 BvR 2656/18, para. 252.
m Cf. DVBVerfG 24.3.2021, 1 BvR 2656/18, Rn 253.

¹¹⁴ Cf. § 3 para. 2 KSG 2011.

¹¹⁵ Cf. *Federal Environment Agency*, Climate Protection Report 2022 (2022) 76

<<https://www.umweltbundesamt.at/fileadmin/site/publications/rep0816.pdf>>(J4.12.2022). Compared with the 78.4 million t CO₂ eq emitted in 1990, 4.8 billion t CO₂ eq less (i.e., 73.6 million t CO₂ eq) was emitted in 2020. This reduction was, however, strongly - if not exclusively - due to the pandemic-related protective measures. According to the most recent projections, GHG emissions in 2021 rose again by 4.2% compared with the pandemic year 2020, almost reaching the 1990 level. See *Umweltbundesamt*, *Nahzeitprognose der österreichischen Treibhausgas Emissionen für 2021* (2022) 5 <<https://www.umweltbundesamt.at/fileadmin/site/publikationen/rep0819.pdf>>. (14.12.2022).

¹¹⁶ Due to the impact of the COVID-19 pandemic and the energy crisis on *the societal and economic life*

¹¹⁷ Cf. *Umweltbundesamt*, *Austria's Annual Greenhouse Gas Inventory 1990-2021*, REP-0841 (2023) 53 et seq.

probability of 66% will be **exhausted** as early as **2025**.¹¹⁸ This means that the applicants will be exposed to severe extreme weather events caused by the climate crisis, such as extended periods of drought, heavy rain, hail and frequent flooding.¹¹⁹ In an equally drastic way, the climate crisis will affect the social life or living conditions of the applicants in case of failure to meet the climate targets. In particular, the effects of mass migration due to the climate crisis and political unrest due to the impact of the climate crisis on the social, health and financial systems are to be mentioned.¹²⁰ Thus, there is no reason for restriction according to Article 7 of the Federal Constitutional Law on Children's Rights, since there is no measure "*which is necessary in a democratic society for national security, public peace and order, the economic well-being of the country, the defense of order and for the prevention of criminal acts, for the protection of health or for the protection of the rights and freedoms of others*".¹²¹ In summary, it results that the legal sphere protected by Art I BVG children's rights and Art 24 GRC is infringed by the wording of § 3 para 2 KSG 2011.

5.1.2 Legal concern due to the violation of the right to equality before the law within the meaning of Alt 7 B-VG and/or Alt 2 StGG

The **general principle of objectivity** arising from the principle of equality requires that legal regulations - quite independently of any comparison between groups of persons or circumstances - must at all times serve a public interest and pursue this interest by appropriate, necessary and proportionate means, otherwise they are to be classified as unobjective and thus unconstitutional.¹²²

¹¹⁸ Cf. *Steininger et al*, +1.5°C: How much more greenhouse gases should we emit? - 1-Intergnmd paper on global and national greenhouse gas budgets, CCCA (2022) 12 ff and 18 <https://www.ceca.ac.at/fileadmin/00_DokumenteHauptmenue/02_Klimawissen/Papiere/TI-IG-Budget_Background_Paper_CCCA.pdf> (12/14/2022).

¹¹⁹ Cf. *M. Stangl et al*, Klimastatl. L5report 2021, CCCA (2022) <https://ceca.ac.at/fileadmin/00_DokumenteMain_menu/02_Climate_knowledge/Climate_status_report!KSB_2021/Climate_status_report_OEsterreich_2021_20220412.pdf> (14.12.2022); *Austrian Panel on Climate Change (APCC)*, Austrian Assessment Report Climate Change 2014 (AAR14) - Summary for Policymakers (2014) 20 et seq. <https://ceca.ac.at/fileadmin/00_DokumenteHauptmenue/03_Activitym1APCC/summaries/SPM.pdf> (Dec. 14, 2022).

¹²⁰ See *Federal Environment Agency*, Climate Protection Report 2021, REP-0776 (2021) 24 f; according to this, in the 23.1 million people will migrate between 2010 and 2019 as a direct result of the climate crisis, and this figure is expected to rise sharply by 2050.

¹²¹ Cf. Art 7 BVG Children's rights.

¹²² See *Berka*, Verfassungsrecht⁸ (2021) RZ 1650; see also VfSlg 20.144/2017.

As already explained in section 5.1.1, the ineffectiveness of the contested provisions of the KSG 2011, which is tantamount to a qualified omission, means that Austria's remaining GHG budget (280 MtCO₂eq) will be completely used up in only two years if the current GHG emissions are maintained.¹²³ This means that, as time goes on, more and more drastic measures for GHG reduction will be necessary, which will affect the applicants in almost all areas of life and will almost certainly drastically restrict their use of freedom.¹²⁴ This **unequal distribution of GHG reduction burdens** contradicts the **requirement of a fair distribution of burdens according to Article 7 B VG and Article 2 StGG**, according to which "*the well-being of all may not be realized at the expense of a few*" and "*everyone who can make a contribution to the realization of the common good [...] is to be called upon*".¹¹⁵

In the field of climate protection, the establishment of legal equality requires that the legislator regulate the adoption of effective climate protection measures in the KSG 2011 in such a way that the burdens associated with the inevitably necessary GHG reduction measures (e.g. the restrictions of freedoms protected by fundamental rights) are distributed **equally** - and thus in an objective manner - among the individual holders of property rights. Younger generations (= children) must therefore not be made to bear the main burden of these restrictions.¹²⁶ This inevitably requires that the **actual effectiveness** of the climate protection measures in terms of their real GHG reduction potential is also ensured in the design of the nomles.

§ Section 3 (2) of the KSG 2011 constitutes, in particular due to its number of contested provisions, an **ineffectiveness with** regard to the reduction of GHG emissions which contradicts the explicit objective of the KSG 2011. Both the exclusive reference to already past commitment periods and the mere obligation to negotiate - and not to actually take - climate protection measures prove in the final analysis that

¹²³ See above under point 5.1.1; see also *Steininger et al.*, +1.5°C: How much greenhouse gases are we still allowed to emit? - Background paper on global and national greenhouse gas budgets, CCCA (2022) 12 ff and 18.

<https://www.ceca.ac.at/fileadmin/00_DokumenteHauptmenue/02_Klimawissen/Papiere/IHG-Budget_Background_Paper_CCCA.pdf> (12/14/2022).

¹²⁴ Vgl. *dawDtBVerfG* 24.3.2021, 1 BvR2656/18, Rn 116 ff and 182 ff. m Cf *Poschl*, Gleichheit vor elem Gesetz (2008) 175

¹²⁶ Vgl. *dazuauchDtBVerfG* 24.3.2021, 1 BvR2656/18, Rn 117 ff and 186.

GHG reduction takes place only to a minimal extent and at a much too slow rate.¹²⁷ As a result, the **main burden** associated with the urgently needed GHG minimization (e.g. drastic restrictions of the freedom sphere) is shifted to younger generations and thus to the applicants. While the KSG 2011, according to its basic objective, pursues the **public interest of rapid implementation of coordinated and effective climate protection measures**,¹²⁸ , the measures described in

The means taken to achieve this goal under § 3 (1) and (2) KSG 2011 would be fully **misguided**. In any case, an almost complete transfer of GHG reduction burdens to younger generations would have to be regarded as grossly **unsustainable**.

§ Section 3 (2) KSG 2011 therefore violates the legal rights of the applicants and thus constitutes their **legal concern**, since the provisions in their current version violate the **requirement of fairness in the granting of relief**, which is based on the right to equality before **the law**. Furthermore, the provisions in their current form **counteract** the clear **objective of the KSG 2011 to facilitate the coordinated adoption of effective climate protection measures**, which in itself is to be qualified as **contradictory to the general principle of objectivity**. Since all the applicants <live

18 years of age and are therefore children of the "younger" generation, they are directly **affected in their legal sphere** by the current formulation of § 3 para 2 KSG 2011.

In addition to the foregoing, the applicants are also **affected by** the contested provisions in their **legal sphere**, which is denied to them by the **general principle of equality**. The applicants, as children (< 18 years of age) with a focus on the required climate protection, are distinguished as a **comparative group in particular** by the fact that they have a longer **total lifespan on average** than the group of adults (> 18 years of age). It corresponds to the Gnmcharacter of the Klimaktise,

<let it progress slowly but steadily, reaching increasingly further levels of escalation.¹²⁹

Therefore, if climate targets are not met, individuals with a longer total lifespan will be affected both by the consequences of the climate crisis and <by the innumerable

m See in detail above under point 5.1.1; cf. also *Steininger et al.*, +1,5°C: How much more greenhouse gases are we allowed to emit? - Background paper on global and national greenhouse gas budgets, CCCA (2022). 12 ff and 18 <https://www.ccca.ac.at/fileadmin/OO_DokumenteHauptmenue/02_Klimawissen/Papiere/THG_Budget_Background_Paper_CCCA.pdf> (12/14/2022).

¹²⁸ Cf. § 1 KSG 2011; EBRV 1255 BlgNRXXIV GP 2 ff.

¹²⁹ Cf. e.g. *Federal Environment Agency*, Climate Protection Report 2021, REP-0776 (2021) 20 ff.

The freedom restrictions, which they meet due to the drastically increased GHG-reduction need, alone from the circumstance a disproportionately larger load to accept, <let them hunger as living humans on the earth remain.¹³⁰ Over this circumstance have they also no active Verfüugungsgewalt.

It also follows from the general principle of equality within the meaning of Article 7 of the Federal Constitution and Article 2 of the Constitutional Law that the legislator must, as a matter of principle, regulate equal things equally and unequal things unequally, unless differences of fact objectively justify a differentiation.¹³¹ With regard to the burden-sharing in the fight against the climate crisis, all people living in Eastern Europe are in principle to be regarded **as equal in law**. In the light of the principle of fair burden sharing, everyone *who can contribute to the realization of the common good* must be *involved*.¹³² The burdens associated with the fight against the climate crisis (= common good) are therefore to be shared equally among the **total population of Austria** (already living today). In the present case, the invalidity of the contested wording of § 3 para 2 KSG 2011, which is equivalent to a **qualified omission**, leads to the fact that climate protection measures are negotiated without any orientation or coordination, which has led to the fact that GHG emissions in Eastern Austria have not significantly increased since 1990.¹³³ Austria's de facto GHG reduction path is clearly incompatible with the Paris climate target.¹³⁴

§ Section 3 (2) KSG 2011 in its current form imposes a burden shift on younger generations through a mere obligation to negotiate, references to past commitment periods and a retrospective emergency measure basis. This unfairly **unequalizes** what should in principle be **treated** as equal parts of the population as a whole, insofar as younger generations will bear the brunt of the GHG reduction burden associated with addressing the climate crisis. There is no apparent legitimate purpose that would justify this unequal treatment.

¹³⁰ Cf. DtBVerfG 24.3.2021, 1 BvR 2656/18, para 117 ff and 186; *Daniel Hellden et al*, Climate change and child health: a scoping review and an expanded conceptual framework, *Lancet Planet Health* 2021/5, 164.

<[https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196\(20\)30274-6/fulltext](https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(20)30274-6/fulltext)> (Jan. 25, 2023); *Nick Watts et al*, The 2019 report of The Lancet Countdown on health and climate change: ensuring that the health of a child born today is not defined by a changing climate, *Lancet* 2019/394, 1836 et seq.

<[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32596-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32596-6/fulltext)> (Jan. 25, 2023).

¹³¹ Cf. *Berka*, *Verfassungsrecht*⁸ (2021) Rz 1638 et seq.

¹³² Cf. Poschl, *Gleichheit vor dem Gesetz* (2008) 175.

¹³³ Cf. *Federal Environment Agency*, Austria's National Inventory Report 2022, REP-081 (2022) 53 ff.

¹³⁴ Cf. Art 2 Paris Climate Convention; *Steininger et al*, +1.5°C: How much more greenhouse gases are we allowed to emit? - Background Paper on Global and National Greenhouse Gas Budgets, *CCCA* (2022) 12 ff and 18.

<https://www.ceca.ac.at/fileadmin/in/00_Dokumente/Hauptmenue/02_Klimawissen/PapieretTHG/Budget_Background_Paper_CCCApdf> (Dec. 14, 2022).

Since no objective reason for this differentiation is apparent, Sec. 3 (2) KSG 2011 directly affects the applicants in a legal sense by violating their right to equality before the law within the meaning of Art. 7 B-VG and Art. 2 StGG.

5.2 On the direct concern of the applicants in relation to the main request

5.2.1 Direct concern due to the violation of the subjective right to \\\ahrung of the child's welfare iSd Art 1 BVG Kinderrechte iVm §§ 1 and 3 BVG Nachhaltigkeit bzw des At124 Abs 1 GRC iVrn Att 37 GRC

Pursuant to Article 140 (1) (c) of the Federal Constitution, the Constitutional Court decides on the unconstitutionality of laws "*upon application by a person who claims that his or her rights have been directly infringed by such unconstitutionality*".¹³⁵ According to the case law of the Constitutional Court, the right to file an application exists in all cases where "*the law directly interferes with the legal rights of the person concerned and - in the case of its unconstitutionality - infringes them*".¹³⁶ This shall always be the case if the asserted encroachment is "*clearly determined by the law itself in terms of its nature and extent*" and affects the legally protected interests of the applicant not merely potentially, but acutely.¹³⁷ Thus, in the first place, individual applications by applicants who are eligible as **direct** nominee addressees are to be admissible.

The KSG 2011 is a **mandate and negotiation law** whose aim is to "*facilitate the coordinated implementation of effective climate protection measures*".¹³⁸ The primary addressee of the KSG 2011 is the federal government and the federal ministers acting on its behalf. For this reason, the Act does not formally confer any rights or impose any obligations on the parties concerned. Consequently, the applicants are **not the direct addressees** of the KSG 2011,¹³⁹ cla the language of the KSG 2011 does not address the applicants and does not confer any direct rights or obligations on them.

¹³⁵ Cf. Art. 140 para. 1 subpara. 1 liteB-VG.

¹³⁶ See, for example, VfSlg 13.558/1993; 8009/1977.

¹³⁷ See, for example, VfSlg 13.558/1993; 10.511/1985; 8009/1977.

¹³⁸ Cf. *Fitz/Ennockl*, Klimaschutzrecht, in Ennockl/N. Raschauer/Wessely (eds.), Handbook of Environmental Law³ (2019) 757 (787).

¹³⁹ Cf. *Ennackl*, Klimaklagen - Struktmen gerichtliche Kontrolle i.rn Klimaschutzrecht (Teil II), RdU 2022, 185 (188).

However, the Constitutional Court has repeatedly stated that **not only direct addressees** as defined by case law may be directly affected by a statutory provision, but that a direct effect may also exist in all those cases in which the law itself, according to its **purpose**, interferes with the legal sphere of the applicants, which is guaranteed under **constitutional law**.¹⁴⁰ In individual cases, therefore, the **indirect** influence of a statutory provision may also be sufficient to constitute a situation of direct concern within the meaning of Article 140 (1) (1) (c) of the Federal Constitution, provided that, according to its **purpose and content**, the legal sphere of the applicant is also **indirectly shaped or interfered with**.¹⁴¹ In this context, it must be examined whether the KSG 2011, according to its purpose and content, influences the legal sphere of the applicants to the extent that their (fundamental) legal sphere is directly affected.¹⁴² It should also be noted that the KSG 2011 is **not a self-executing law of an exclusive nature**. The revenues envisaged under Section 2 of the KSG 2011 are to include both sovereign measures and private economic administration.¹⁴³ For this reason, the KSG 2011 is not subject to any simplified definition requirements.¹⁴⁴

The primary objective of the KSG 2011 is to facilitate the "*coordinated development and implementation of effective measures for climate protection in Austria*".¹⁴⁵ In its core, the KSG 2011 serves the **purpose of bringing about "a rapid and significant reduction of greenhouse gas emissions", "in order to at least limit further global warming"**.¹⁴⁶ The materials add that Austria has entered into various obligations under national and international law to reduce TIIG emissions, and that the targets set by these obligations had already been regularly missed before the KSG 2011 entered into force, which is why "*additional efforts in climate protection*" were considered indispensable.¹⁴⁷ In this context, the materials clearly refer to the effects of the climate crisis on fundamental rights, underlining the strong intention of the (historical) legislator to prevent this imminent or developing threat by enacting the KSG 2011.

¹⁴⁰ Cf. in this regard, the direct impact of employees <lrough a ban on night work for women directed at the employer, VfGH 12.03.1992, G220/91; G221/91; G222/91, asle the retention of data, VfGH 24 6 2014, G 59/2012-38, G 62/2012-46, G 70/2012-40, G 71/2012-36.

¹⁴¹ Cf. VfSlg 13.038/1992; 19.892/2014.

¹⁴² Cf. VfSlg 13.038/1992; 19.349/2011.

¹⁴³ Cf. VfSlg 13.973/1994; 17.550/2005; with reference to *Korinek!Holoubek*, Grundlagen staatlicher Privatwirtschaftsverwaltung (1994) 104; see also VfSlg 15.625/1999.

¹⁴⁴ Cf. VfSlg 20.199/2017, VfSlg 7717/1975, VfSlg 18.606/2008.

¹⁴⁵ EBRV 1255 BgtNRX- V GP, L

¹⁴⁶ Cf. EBRV 1255 BlgNRXXIV GP, 2 f.

¹⁴⁷ VglEBRV 1255 BlgNRXXIV GP, 3.

to counteract in the best possible way dangers that are already materializing at present.¹⁴⁸ The KSG 2011 thus serves in its entirety both to avert danger and to implement the state's duty to protect as defined in Art. 1 BVG Children's Rights.¹⁴⁹ The KSG 2011 is therefore to be regarded as a direct, simple legal formulation of the **genuine duty to protect** resulting from Article 1 of the Federal Children's Rights Act, which follows from the **subjective right to the best interests of the child in** all its aspects.¹⁵⁰ Likewise, the KSG 2011 is to be regarded as the implementation of the Alt 1 BVG Kinden-echte iVm

§§ 1 and 3 of the BVG, the principle of **intergenerational equity.**

resource utilization.¹⁵¹ **The KSG 2011 is thus in accordance with its purpose in unique in this form.**

However, the **content of** § 3 para 2 KSG 2011 does not correspond to the **purpose of** the KSG 2011, but is diametrically opposed to it. Section 3 (2) KSG 2011 merely establishes an obligation of the Federal Ministers to negotiate fiber climate protection measures.¹⁵² Neither does § 3 para 2 KSG 2011 establish an actual duty to take effective measures, nor does it set parameters with regard to the result to be achieved. As a guideline, Section 2 KSG 2011 merely states that class (climate protection) measures "must *result in a measurable, reportable and verifiable reduction of greenhouse gas emissions or a decrease in carbon sinks*".¹⁵³ There is no obligation to prove the negotiated measures in terms of their real 11 IG reduction potential or possible counteracting effects¹⁵⁴. In the past, this has resulted in the publication by the responsible federal ministers¹⁵⁵ of tables of measures within the meaning of Section 3 (2) seventh sentence of the KSG 2011, but the list published for the period 2019 and 2020 contained, for example, **151 individual measures**, of which **only 16 had a numerically defined reduction potential.**

¹⁴⁸ Vgl EBRV 1255 B1gNRXXIV GP, 2.

¹⁴⁹ Cf. Art I BVG Children's Rights; see in detail the above explanations under point 5.1.1.

¹⁵⁰ See in detail above under point 5.1.1.

¹⁵¹ Cf. *Fuchs*, Kinderrechte in der Verfassung: Das BVG über die Rechte von Kindern, in *Lienbacher/Wielinger* (ed.), *Jahrbuch Öffentliches Recht 2011* (2011) 91 (109).

¹⁵² Cf. § 3 para 2 KSG 2011.

¹⁵³ Cf. § 2 KSG 2011.

¹⁵⁴ This refers to uncoordinated individual measures that can increase the impact of individual measures or, in the worst case, release more CO₂eq than would have been the case without such measures; see e.g. *IPCC, Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary for Policymakers* (2022) 27; *Seebauer et al Promoting adoption while avoiding rebound: integrating disciplinary perspectives on market diffusion and carbon impacts of electric cars and building renovations in Austria, Energy, Sustainability and Society* 2019, 2 ff <<https://energysustainsoc.biomedcentral.com/articles/10.1186/s13705-019-0212-5> > (19 2 2023).

¹⁵⁵ Currently Federal Minister for Climate Protection, Environment Energy, Mobility, Innovation and Technology (B:tv1K).

GHG savings potential was allocated. I-No information was provided for the remaining 135 measures.¹⁵⁶ In the programs of measures preceding this table for the period 2013 and 2014 and for those from 2015 to 2018

No GHG reduction potentials of the listed measures have been determined at all.¹⁵⁷

Furthermore, Section 3 (2) KSG 2011 in its current form exclusively refers to commitment periods for GHG reduction that already lie far in the past.¹⁵⁸ The period referred to in the sixth sentence of Section 3(2) of the Austrian Climate Protection Act 2011 already ended at the end of the year 2020. Since the beginning of the year 2021, there has been no negotiation and no listing of climate protection measures or targets that would be absolutely necessary to ensure a **coordinated, rapid and continuous reduction of GHG emissions** in Austria.¹⁵⁹

Against the background of the above explanations, it is clear that the KSG 2011 aims at a generationally fair distribution of GHG reduction burdens, but the content of § 3 para 2 KSG 2011 obviously counteracts the achievement of this goal. Thereby, the content of the KSG 2011 violates the genuine duty to protect of Art 1 BVG Kinderrechte iVm § 1 BVG Nachhaltigkeit, as it prevents the effectiveness of the urgently needed climate protection measures based on the KSG 2011. The contested parts of § 3 para 2 KSG 2011 therefore **directly** affect the applicants in **legal terms**, since the provisions in their current form prevent the right to the protection of the best interests of the child and thus the entitlement to protection from the dangers associated with climate change and to the use of the resource "GHG emissions" in a manner that is fair to all generations.

Likewise, the direct concern is <limited by the reference of § 3 para 2 KSG 2011 to already past commitment periods, since currently no coordinated measures are taken on the basis of the KSG 2011. The cancellation of temporal

¹⁵⁶ Cf. BAfK, Maßnahmentabelle des Bundes und der Länder gemäß § 3 Abs. 2 vorletzter Satz KSG für die Jahre 2019 and 2020 <https://www.bmk.gv.at/dam/jcr:485Jeabd-a9c7-46e2-b855-928fb75fb5b9/KSG_Massnahmentabelle2019_2020.pdf> (2.1.2023).

¹⁵⁷ See *Blvf/LFUW* (now B:tvJ:K), Maßnahm enprogramm m 2013/2014 des Bundes wld der Länder als Beitrag zur Erreichung of the national Climate Goal 2013-2020 <https://www.bmk.gv.at/themenklima_environment/climate-protection/nat_klimapolicy/climate-protection-law.html> (Feb. 15.2023); *BMLFUW* (nurnehr BivfK), IVIaJ3nahrnenprogramm des Bundes und der Länder nach Klimaschutzgesetz zur Erreichung des Treibhausgasziels bis 2020 - Zweite UmsetzZW1gsstufe für die Jahre 2015 bis 2018 <https://www.bmk.gv.at/thementklimac.u.mwelt!klimaschutz/nat_klimapolitikt klimaschutz.gesetz.html> (15.2.2023).

¹⁵⁸ Siehe § 3 para 2 sixth sentence KSG 2011.

¹⁵⁹ Cf. Aul 2 KSG 2011.

limited obligation spaces violates the applicants' right to the protection of the best interests of the child pursuant to Art. 1 BVerfGG Kinderrechte iVm

§§ 1 and 3 BVerfGG sustainability, as the state fulfills its ongoing obligation to take (climate) protection measures de lege lata. Instead of providing for the development of continuous new programs of measures, Section 3 (2) KSG 2011 in its current form has the exact opposite effect. The applicants' rights are therefore also directly affected by this violation of the state's genuine duty to protect the environment.¹⁶⁰ It must also be taken into account that, due to the imminent danger of climatic **tipping points**,¹⁶¹ "which, if exceeded, could lead to abrupt, serious and irreversible changes" in the climate system,¹⁶² climate protection measures that safeguard the best interests of the child must be taken as a matter of urgency in order to protect children from effects that could drastically and irreversibly impair their well-being.

The violation of the **genuine duty to protect** pursuant to Art. 1 of the Federal Constitutional Children's Rights Act must justify the **direct adverse effect on the** applicants within the meaning of Art. 140 of the Federal Constitutional Act, as these rights of protection were rendered meaningless. However, it cannot be assumed that the constitutional legislator intended to create protective rights of a **purely proclamatory-theoretical character** through Article 1 BVerfGG. In the event of a violation of the rights of protection under Art. 11 1 BVerfGG Children's Rights, it must therefore be assumed that the person concerned is directly affected by the law in order to make it possible to assert them.

In this context, from the point of view of the applicants, the case law of the European Court of Justice in the *Janecek* case must also be taken into account, according to which rights directly guaranteed under European law also necessarily require national possibilities for their assertion.¹⁶³ Thus, the ECJ held that directly affected persons must be granted the right to challenge nationally inadequately implemented measures adopted on the basis of European directives. In the *Janecek* case, for example, the ECJ ruled that Art 7 (3) of Directive 96/62 must be interpreted as meaning that **individuals directly affected by** air pollution control measures must have a right of appeal to the European Court of Justice in the event of a risk of an overstepping of the limit values or of the Alpine regulations.

¹⁶⁰ Cf. already the explanations under point 5.1.J.

¹⁶¹ See *Steffen et al*, Trajectories of the Earth System in the Anthropocene, PNAS 2018, 8252 (8252 ff).
<<https://www.pnas.org/doi/p:10.1073/pnas.1810141115>> (16/12/2022)

¹⁶² Cf. *Federal Environment Agency*, Klimaschutzbericht 2021 (2021), REP 0776, 5, 22.

¹⁶³ Cf. ECJ 25.07.2008, Case C-237/07, *Janecek v. Bavaria*.

The European Court of Justice thus affirmed a subjective right to the preparation of an action plan.¹⁶⁴ The ECJ thus affirmed a **subjective right to the preparation of an action plan**,¹⁶⁵ even if there is a risk that air quality limits will be exceeded, and **even without the explicit establishment of rights**.¹⁶⁶ From the point of view of the applicants, this decision, made in the area of secondary law, is in any case also to be applied to directly applicable primary law such as Art 24 GRC. Article 24 GRC grants children subjective rights of protection, the scope of which is subject to review by the Constitutional Court in the case at hand.¹⁶⁷ The assertion of the fundamental right of the applicants arising from Art 24 (1) GRC to the protection and care necessary for their well-being must therefore be preserved in accordance with the case law of the ECJ.

\Verden.

An **indirect encroachment** is only given if the nature and extent of the encroachment is clearly determined by the challenged provision itself,¹⁶⁸ **without the provision** requiring **further specification** by an act of execution.¹⁶⁹ In the case at hand, Section 3 (2) KSG 2011 in its current form directly violates the applicants' constitutionally guaranteed rights to the protection of the best interests of the child within the meaning of Article 1 of the Federal Constitutional Children's Rights Act (BVG Kinderrechte) due to the limited (meanwhile expired) commitment period as well as the mere obligation to negotiate, since this de facto makes it impossible to take effective climate protection measures. For this effect, no further concretizing act of enforcement is required. The rights arising from Art. 1 BVG Children's Rights iVm

The obligation to protect resulting from § 1 BVG sustainability is directly

§ Section 3 (2) of the KSG 2011 has been violated, which is why the applicants are directly affected by this provision in their legal sphere.

5.2.2 Directly affected by the violation of the right to equality before the law within the meaning of Art. 7 of the Federal Constitution and Art. 2 of the Constitutional Law.

¹⁶⁴ Cf. ECJ 25.07.2008, Rs C-237/07, *Janecek/Bayern*, para 41

¹⁶⁵ Cf. *Wagner*, Revolutionary Decision in Air Quality Law: Subjective Right auf compliance with limits, RdU 2008, 169.

¹⁶⁶ Cf. *Kleewein*, Fischsterben durch bewilligtes Wasserkraftwerk und Umweltbeschwerde, RdU 2017, 211.

¹⁶⁷ Cf. explanations to point 5.1.I.b.

¹⁶⁸ VfSlg 8187/1977.

¹⁶⁹ Cf. *Grabenwarter/Frank*, B-VG Art 140 Rz 44 (as of 20.6.2020).

The applicants are <lurched by the procedurally opposing word sequences of the Furthermore, the applicants' legal rights are directly affected by § 3 para 2 KSG 201 to the extent that the provision in its current form imposes on them both the bulk of the unavoidably required GHG reduction burdens, including the associated future restrictions on freedom, and the burdens related to the disastrous consequences of the increasingly escalating climate crisis.¹⁷⁰ The applicants, as children who have not yet reached the age of **18**, are in any case to be assigned to the defined group of younger generations. Although children as defined by the BVG Kinderrechte are not direct beneficiaries of § 3 para 2 KSG 2011, the current version of the KSG 2011 has the direct consequence that the main part of the burden of the climate crisis will almost certainly have to be borne by younger generations in the future. § Section 3 (2) KSG 2011 in its current version has the direct effect of transferring burdens to the group of younger generations, which will have serious adverse effects on their civil rights.¹⁷¹

Section 3(2) KSG 2011 thus violates the general principle of **objectivity** derived from the principle of equality under Article 7 of the Federal Constitution and Article 2 of the Constitutional Law, as it allocates burdens in a way that puts people at a serious legal disadvantage on the basis of their age, a characteristic that cannot be influenced.¹⁷² This contradicts the **requirement of a fair distribution of burdens**, which is also derived from the principle of equality according to Article 7 of the **Federal Constitution** and Article 2 of the Constitutional Law.¹⁷³

In addition, the applicants can be considered as members of the comparison group of the younger generations" who suffer or are likely to suffer serious legal disadvantages as a result of the above-mentioned imposition of unequal burdens. In accordance with the principle of equitable burden sharing, the burdens associated with the climate crisis were to be shared equally among the generations.

¹⁷⁰ Cf. already in detail under point 5.1.2.

¹⁷¹ See already in more detail under point 5.1.2.; see also Dt BVerfG 24.3.2021, 1 BvR 2656/18, para 117 ff and 186; *Daniel Hellden et al*, Climate change and child health: a scoping review and an expanded conceptual framework, *Lancet Planet Health* 2021/5, 164 <[https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196\(20\)30274-6/fulltext](https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(20)30274-6/fulltext)>(25.1.2023); *Nick Wattset al*, The 2019 report of The Lancet Countdown on health and climate change: ensuring that the health of a child born today is not defined by a changing climate, *Lancet* 2019/394, 1836 ff <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32596-6/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32596-6/fulltext)> (25.1.2023).

¹⁷² See also already in more detail under point 5.1.2.

¹⁷³ Cf. *Poschl*, Gleichheit vor der Gesetz (2008) 175.

to distribute the total population according to the respective performance characteristics.¹⁷⁴
Through

§ Section 3(2) of the KSG 2011, however, imposes a disproportionately heavier burden on younger generations than on older generations. This effect is acute and can be observed in different forms already for the applicants.¹⁷⁵ No public interest or legitimate justification for this unequal treatment of de facto equal groups of the population is apparent, which is why the applicants are not justified by the fact that they are not treated in the same way.

§ Section 3 (2) KSG 2011 in its current form directly violates their right to equality before the law within the meaning of Article 7 B-VG and Article 2 StGG.

Against this background, it is to be noted that the applicants, without being direct addressees of the contested norm, are **directly affected in their legal sphere** according to the **content and purpose of** the contested Sec. 3 (2) KSG 2011 in its current version. The nature and extent of this interference is clearly determined by the wording of the KSG 2011.

5.3 Concerning the current concern of the applicants in relation to the main application

In the case in question, the infringement of the fundamental right is directly and acutely effected by the law itself, without the need for the issuance of a decision or a court judgment.

§ Section 3 (2) KSG 2011 is in force at the time of the application and - as explained above - interferes not only potentially but also acutely and directly with the legal rights of the applicants.¹⁷⁶ § Section 3 (2) of the KSG 2011 in its current version has the following effect in particular,

<let the state of its gem Art 1 BVG child rights iVm §§ 1 and 3 BVG sustainability not
The provision does not or cannot fulfill the negotiation obligations, since it only establishes indeterminate negotiation obligations for the development of measures, which reduces their effectiveness in terms of real GHG reductions.¹⁷⁷ Furthermore, the

§ Section 3 (2) of the Austrian Climate Change Act 2011 exclusively refers to past commitment periods with regard to the obligation to negotiate, which has led to the result that no coordinated measures for TI-IG reduction have been set on the basis of the Austrian Climate Change Act 2011 since 2021. This, in turn, violates the obligation of the state under Article 1 of the Federal Constitutional Law on Children's Rights to continuously take effective measures to protect the best interests of the child in relation to the climate crisis, its consequences and the fight against it, until a threat to the best interests of the child has been identified.

¹⁷⁴ See already above under point 5.1.2; see also *Poschl*, Gleichheit vor dem Gesetz (2008) 175.

¹⁷⁵ Cf claw already closer under PwK-i 5.1.1.

¹⁷⁶ Cf. VfSlg 9185/1981, 14.797/1997; 14.831/1997.

¹⁷⁷ See already in detail under Punh.-t 5.1.1.

can be excluded or it has been reduced to the minimum possible.¹⁷⁸ Due to the state's omission, it thus violates its genuine duty to protect the applicants, whereby the applicants' right to the protection of the best interests of the child is **currently violated**. This also applies in a comparable manner to the violation of the subjective rights to the best interests of the child to which the applicants are entitled under Article 24 (1) GRC in conjunction with Article 37 GRC.¹⁷⁹

Likewise, the applicants are currently affected in their right to equality before the law pursuant to Article 7 of **the Federal** Constitution and Article 2 of the Constitutional Law by Section 3 (2) of the Climate Change Act 2011 as belonging to the delimitable **group of younger generations**. The contested provision already has the current effect that the **burdens** related to the climate crisis, its consequences and its fight have to be borne almost entirely by younger generations, which already has an impact on their well-being and development opportunities at the time of application. In addition, the future burden will be placed on them, which will affect their future planning and development.

-The new law already currently restricts and restricts the right to a fair distribution of the burden. This is contrary to the principle of fair burden sharing, the general principle of objectivity and the general principle of equality.¹⁸⁰ The applicant:ilms are thus also idZ currently restricted by § Section 3 (2) KSG 2011 in its legal sphere.

The applicants are therefore currently affected in their legal sphere by Section 3 (2) KSG 2011, whereby the encroachment on their constitutionally guaranteed rights is perpetuated by the continued existence of the provision in the body of law.

5.4 Regarding the reasonableness of the main request

In the present case, there is no possibility for the applicants to raise their concerns regarding the unconstitutionality of Section 3 (2) of the Consumer Protection Act 2011 in its current version with the Constitutional Court in the context of a different appeal procedure - and thus in a different "reasonable" way.¹⁸¹ § Section 3 (2) of the KSG 2011 is, according to its formulation, addressed to the Federal Ministers and, beyond that, does not contain any rights of application or appeal for the applicants. The rest of the KSG 2011 also does not provide for a procedure that would allow public participation in the adoption of coordinated measures.

¹⁷⁸ See in detail already under point 5.1.1.

¹⁷⁹ See <lazu in detail already under point 5.1.1.

¹⁸⁰ Cf. Art 7 B-VG and Art 2 StGG; see also *Poschl*, Gleichheit vor dem Gesetz (2008) 175.

¹⁸¹ Cf. VfSlg 9394/1982.

effective climate protection measures.¹⁸² The obtaining of a decision with formative effect is therefore ruled out from the outset. Nor is it possible to obtain a declaratory decision on the basis of the KSG 2011. In addition, it is not possible to conduct civil or criminal proceedings before the courts, as

§ Section 3 (2) of the KSG 2011 and the KSG 2011 1111 in general do not grant the applicants any claims or possibilities of action in this respect.¹⁸³ Against this background, it is clear that the applicants have no other way than the individual application at issue to raise their concerns with the Constitutional Court.

5.5 To immediate, legal and current Concern of the applicants11 in connection with the contingent application

In the following, it will be explained that the contingent application now filed is also admissible due to the legal, direct and current concern of the applicants by the clearly contested provisions of the KSG 2011 and that no other way is available to bring the constitutional concerns to the attention of the Constitutional Court. Since the contingent application largely coincides with the main application and only in addition to the main application parts of Section 3 (1) of the KSG 2011 are also challenged, or parts of the main application are challenged, the contingent application is not admissible.

§ The following comments relate exclusively to the admissibility of the additional content of the application. With regard to the parts of the KSG 2011 that are contested in the main application, however, reference is made to the explanations under item 5.1 of the material objections. The same explanations apply to the contingent application.

5.5.1 Legal Affectedness of the Applicants with Regard to the Contingent Motion

§ *Section 3 (1) first and second sentences of the KSG 2011: The maximum quantities of greenhouse gas emissions applicable to the Republic of Austria in accordance with its obligations under national or European Union law shall be determined in accordance with the Annexes. The ceilings may also be set on a sectoral basis.*" Ongmnd of the use of the wording

The GHG ceilings specified in the Annexes are binding according to the law.¹⁸⁴ Notwithstanding this, however, the existing Union GHG-

¹⁸² Cf. sections 1 to 10 KSG 201L

¹⁸³ Cf. §§ 1 to J0KSG 2011.

¹⁸⁴ Cf. § 3 para. 1 KSG 2011.

reduction obligations directly at the national level on the basis of the burden-sharing Regulation (EU) 2018/842, which builds on the national obligations and in particular the Paris Climate Agreement. For example, Austria is required to reduce all GHG emissions that are not subject to the EU Emissions Trading Scheme (EU ETS) by at least -36% by 2030,¹⁸⁵, with this target to be raised to -48%.¹⁸⁶

Despite the direct applicability of the GHG reduction obligations under EU law at the national level, § 3 para 1 KSG 2011 is, however, based on the determination of maximum GHG quantities in its installations. As a result, even the blanket obligation to negotiate pursuant to § 3 para 2 KSG 2011 in its current version only exists in relation to the specified reduction targets of the plants.¹⁸⁷ The exclusively declarative formulation (arg

In the absence of a target provision, no direct legal obligation to actually set and update GHG ceilings in accordance with the requirements of EU law can be inferred from the first sentence of Section 3(1) of the Climate Change Act 2011.¹⁸⁸ Therefore, if no or no current GHG ceilings are set in the Annexes to the Climate Change Act 2011 pursuant to Section 3 (1) of the Climate Change Act 2011, no climate change negotiations within the meaning of Section 3 (2) of the Climate Change Act 2011 are to be conducted and no measures are to be set. The declarative veto on the determination of GHG ceilings in the annexes to the KSG 2011 in § 3 para 1 first sentence KSG 2011 thus leads to the fact that even the negotiation obligation of § 3 para 2 KSG 2011, which is in itself adequately designed, is no longer exercised since the end of the year 2020. As a result, the current wording of Section 3 (I), first and second sentence, KSG 2011 makes it impossible to negotiate fiber climate protection measures in accordance with the provisions of the KSG 2011.

Since § 6 first sentence of the KSG 2011 directly refers to the determination of THG maximum quantities decreed in § 3 para. 1 KSG 2011, this word sequence is inseparably connected with § Section 3 (1) KSG 2011 and is therefore also unconstitutional. The progress reports according to

§ Section 6 of the KSG 2011, which are necessary to ensure continuous and effective implementation of the duty to protect pursuant to Art 1 of the BVG Childr1 Rights and Art 24 of the GRC, may be

¹⁸⁵ Cf. Art 4 in connection with Annex I Burden Sharing Regulation (EU) 2018/842.

¹⁸⁶ See Annex to the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/842 establishing binding annual national greenhouse gas emission reduction targets for the period 2021 to 2030 as a contribution to climate action to meet the commitments under the Paris Agreement, COM(2021) 555 final.

¹⁸⁷ Cf. § 3 para. 1 and 2 KSG 2011.

¹⁸⁸ § Section 3 (1) first sentence of the KSG 2011 merely describes that GHG ceilings are set in the anJages.