Appeal in matters of public law

submitted on 21 January 2019 to the Federal Supreme Court [of Switzerland]

against Judgment A-2992/2017 of 27 November 2018 of the Federal Administrative Court [of Switzerland]

in the case

Verein KlimaSeniorinnen Schweiz et al.

v.

Federal Department of the Environment, Transport, Energy and Communications (DETEC)

Unofficial translation prepared on behalf of *KlimaSeniorinnen*

Explanatory notes

Case history

The association (*Verein*) *KlimaSeniorinnen Schweiz* as well as four individual women filed a request on 25 November 2016 for issuance of a ruling on real acts in terms of Art. 25*a* (1) (a) APA for discontinuation of omissions in climate protection.[1] The request was addressed to four administrative authorities which had been identified as having failed to fulfill their obligations: the Federal Council, as the highest executive body; DETEC, as the department

[1] See <http://klimaseniorinnen.ch/wpcontent/uploads/2017/05/request_KlimaSeniorinnen.pdf> for an unofficial English translation of the request.

responsible for the protection and preservation of natural resources and protection against natural hazards; and finally two of DETEC's subordinate administrative units, the Federal Office for the Environment (FOEN) and the Swiss Federal Office of Energy (SFOE). DETEC responded to the request on behalf of the other three respondents. In its 25 April 2017 ruling,[2] DETEC denied standing, alleging the applicants' rights had not been affected as required by Art. 25*a* APA, and did not enter into the case.

In May 2017 the senior women appealed to the Federal Administrative Court. The judgment issued by the Federal Administrative Court on 27 November 2018[3] was in response to that appeal. In it, the Federal Administrative Court did not find fault with DETEC's not entering into the case.

The appellants then submitted an appeal in matters of public law to the Federal Supreme Court on 21 January 2019.

English terminology

The following terminology is used in the present translation:

In the first instance, *KlimaSeniorinnen Schweiz* and the four individual women were the **applicants**; they filed a **request** in which they made demands. DETEC, one of the four **respondents**, issued a **ruling**.

In the second instance, *KlimaSeniorinnen Schweiz* and the four individual women were the **appellants**; they filed an **appeal** with the Federal Administrative Court (the **first appeal proceedings**), which issued a **judgment**. From the perspective of the second instance, DETEC served as the respondent in the first appeal proceedings and as the authority of first instance (it is not called the "lower court" or "court of first instance" since DETEC is not a court).

In the third instance, *KlimaSeniorinnen Schweiz* and the four individual women are the **appellants**; they filed an **appeal in matters of public law** with the Federal Supreme Court (the **second appeal proceedings**), asking for a **decision overturning the judgment of the Federal Administrative Court**. From the perspective of the third instance, the Federal Administrative

[2] See <http://klimaseniorinnen.ch/wpcontent/uploads/2017/11/Verfuegung_UVEK_Abschnitt_C_English.pdf> for an unofficial translation of DETEC's reasons.
[3] See https://klimaseniorinnen.ch/wp-content/uploads/2019/02/Judgment-FAC-2018-11-28-KlimaSeniorinnen-English.pdf for an unofficial translation of the judgment.

Court served as the **court of previous instance**. The **respondent in the second appeal proceedings** is DETEC.

For reasons of readability, we refer simply to DETEC and not to "the respondent in the first appeal proceedings" and "the respondent in the second appeal proceedings."

The term **Convention law** refers to the European Convention on Human Rights.

In the German version of APA, Art. 48, which concerns standing, reads "*Zur Beschwerde ist berechtigt: ... wer durch die angefochtene Verfügung* ***besonders berührt*** *ist ...*" The official French version uses the terms "*spécialement atteint*," the official Italian version "*particolarmente toccato*." Whereas "*besonders berührt*" is translated as "specifically affected" in the Swiss government's unofficial translation into English,[4] the translators of the present appeal decided to use "**particularly affected**."

[4] https://www.admin.ch/opc/en/classified-compilation/19680294/index.html

Abbreviations

English		**German**	
APA	Administrative Procedure Act	VwVG	Verwaltungsverfahrensgesetz (SR 172.021)
Art.	Article	Art.	Artikel
BBl	Federal Gazette	BBl	Bundesblatt
BGE	(Published) decisions of the Federal Supreme Court of Switzerland	BGE	(Publizierte) Bundesgerichts-entscheidungen
BGer	Federal Supreme Court, (unpublished) judgments of the Federal Supreme Court	BGer	Bundesgericht, (nicht publizierte) Bundesgerichts-entscheidungen
CO_2 Act	Federal Act on the Reduction of CO_2 Emissions	CO_2-Gesetz	Bundesgesetz über die Reduktion der CO_2-Emissionen (SR 641.71)
CO_2 Ordinance	Ordinance on the Reduction of CO_2 Emissions	CO_2-Verordnung	Verordnung über die Reduktion der CO_2-Emissionen (SR 641.711)
Const.	Federal Constitution of the Swiss Confederation	BV	Bundesverfassung der Schweizerischen Eidgenossenschaft (SR 101)
DETEC	Federal Department of the Environment, Transport, Energy and Communications	UVEK	Departement für Umwelt, Verkehr, Energie und Kommunikation
DFAC	(Published) decision(s) of the Federal Administrative Court	BVGE	(Publizierte) Bundesverwaltungsgerichts-entscheid(e)
E.	Considerations	E.	Erwägungen
ECHR	European Convention on Human Rights	EMRK	Europäische Menschenrechts-konvention
ECtHR	European Court of Human Rights	EGMR	Europäischer Gerichtshof für Menschenrechte
EPA	Federal Act on the Protection of the Environment, Environmental Protection Act	USG	Umweltschutzgesetz

FAC	Federal Administrative Court (unpublished judgments of the Federal Administrative Court)	BVGer	Bundesverwaltungsgericht, (nicht publizierte) Bundesverwaltungsgerichts-entscheide
FEDRO	Federal Roads Office	ASTRA	Bundesamt für Strassen
FOEN	Federal Office for the Environment	BAFU	Bundesamt für Umwelt
FOJ	Federal Office of Justice	BJ	Bundesamt für Justiz
FOPH	Federal Office of Public Health	BAG	Bundesamt für Gesundheit
FSCA	Federal Supreme Court Act	BGG	Bundesgerichtsgesetz (SR 173.110)
FSO	Federal Statistical Office	BFS	Bundesamt für Statistik
GAOA	Government and Administration Organisation Act	RVOG	Regierungs- und Verwaltungs-organisationsgesetz
NEDC	New European Driving Cycle	NEFZ	Neuer Europäischer Fahrzyklus
OE	Offer of evidence	BO	Beweisofferte
OECD	Organisation for Economic Co-operation and Development	OECD	Organisation für wirtschaftliche Zusammenarbeit und Entwicklung
ParlA	Federal Act on the Federal Assembly (Parliament Act)	ParlG	Parlamentsgesetz
SAEFL	Swiss Agency for the Environment, Forests and Landscape	BUWAL	Bundesamt für Umwelt, Wald und Landschaft
SFOE	Swiss Federal Office of Energy	BFE	Bundesamt für Energie
SR	Classified compilation of federal legislation	SR	Systematische Sammlung des Bundesrechts
WLTP	Worldwide Harmonized Light-Duty Vehicles Test Procedure		

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1000 Lausanne 14

Zurich, 21 January 2019

Appeal in matters of public law, Verein KlimaSeniorinnen et°al. v. Federal Department of the Environment, Transport, Energy and Communications DETEC

Mr. President,
Federal judges,
Ladies and gentlemen,

In the case

Verein KlimaSeniorinnen Schweiz, P.O. Box 9320, 8036 Zurich,

Appellant 1

A. Z.,

Appellant 2

B. Y.,

Appellant 3

C. X.,

Appellant 4

D. W.,

Appellant 5

(taken together "the appellants")

represented by

Dr. Ursula Brunner, attorney-at-law, and/or Martin Looser, attorney-at-law,
ettlersuter attorneys-at-law, Klausstrasse 43, Postfach 3062, 8034 Zurich,
(address for service)

and/or

Cordelia Bähr, lic. iur. LL.M. Public Law (LSE), attorney-at-law,
bähr ettwein attorneys-at-law, Ekkehardstrasse 6, Postfach 46, 8042 Zurich,

v.

Federal Department of the Environment, Transport, Energy and Communications DETEC, Kochergasse 6, 3003 Bern,

Respondent

and

Federal Administrative Court, Division I, P.O. Box, 9023 St. Gallen,

Court of previous instance

Re:

Request to stop omissions in climate protection pursuant to Art. 25*a* APA and Art. 6 (1) and (13) ECHR

Acting under a mandate from and on behalf of the appellants, we hereby file an

appeal in matters of public law

against the judgment of the Federal Administrative Court of 27 November 2018 ("judgment under appeal") and submit the following

legal requests:

1. The judgment under appeal shall be overturned and the matter is to be referred back to DETEC for a material assessment.
2. In the alternative to no. 1, the judgment under appeal shall be overturned and the case referred back to the court of previous instance for a new assessment.
3. All procedural costs shall be imposed on DETEC; the costs of representation are to be reimbursed to the appellants.

In addition, we submit the following

procedural motions:

1. The files from the previous proceedings shall be obtained and referred to.
2. In light of the urgency of the case at hand, it shall be decided promptly.

Grounds:

1. Formal matters

1.1 General prerequisites

1. The undersigned are the authorized representatives.

OE:
- Power of attorney appellant 1 of 17 October 2016 — *Files from the previous proceedings*
- Power of attorney appellant 2 of 19 November 2016 — *Files from the previous proceedings*

- Power of attorney appellant 3 of 27 October 2016 — *Files from the previous proceedings*
- Power of attorney appellant 4 of 22 October 2016 — *Files from the previous proceedings*
- Power of attorney appellant 5 of 27 October 2016 — *Files from the previous proceedings*

2. The judgment under appeal is dated 27 November 2018 and was delivered to the undersigned by mail on 6 December 2018 and by email in advance on 5 December. The 30-day **period for lodging an appeal** is observed by today's postmark on the present appeal, taking into account its extension due to court recess (Art. 100 (1) in conjunction with Art. 46 (1) c FSCA).

OE: Judgment of the Federal Administrative Court of 27 November 2018 (A-2992/2017) — *Exhibit 1*

3. The judgment under appeal is a decision in matters of public law and thus a **permissible object of appeal** by means of an appeal in matters of public law to the Federal Supreme Court (Art. 83 a and Art. 86 (1) a FSCA). No exceptions in terms of Art. 83 FSCA apply.

4. The appellants criticize violations of Confederation law on the basis of Art. 9, 10, 29 and 29*a* Const. and violations of international law on the basis of Art. 2, 6, 8, 13 and 34 ECHR. Moreover, the appellants criticize that the determination of the legally relevant facts of the case is in multiple respects obviously incorrect and based on violations of the law or on the refusal of the right to be heard in terms of Art. 97 (1) FSCA. Thus they base their demands on **permissible grounds for appeal** (Art. 95 a and b FSCA).

5. The **request to stop omissions in climate protection** pursuant to Art. 25*a* APA and Art. 6 (1) and 13 ECHR of 25 November 2016 (in the following: the request) directed to the Federal Council (respondent 1), the Federal Department of the Environment, Transport, Energy and Communications (DETEC; respondent 2), the Federal Office for the Environment (FOEN; respondent 3) and the Swiss Federal Office of Energy (SFOE; respondent 4; in the following jointly: the respondents), which preceded the judgment under appeal, stated the matter in dispute comprehensively, based on numerous and comprehensive documentary evidence. In the following, passages of this request and the corresponding exhibits will variously be referred to in condensed form.

OE:	Request of the appellants to stop omissions in climate protection of 25 November 2016	*Files from the previous proceedings*

1.2 Legitimation of the appellants

6. The appellants are addressees of the judgment under appeal (Art. 89 (1) a FSCA). As such, they are particularly affected as a matter of course (loc. cit. b) and, since DETEC did not enter into their request to stop omissions in climate protection pursuant to Art. 25*a* APA and Art. 6 (1) and (13) ECHR, they have an interest worthy of protection (loc. cit. c) in the assessment of the initially submitted legal requests (revocation of the judgment under appeal and referral back to DETEC so that that respondent will enter into the demands stated in the request and perform a material assessment). The appellants' interest worthy of protection is current and practical, since, in the absence of the present unlawful situation being remedied, Switzerland continues to emit excessive greenhouse gas emissions that contribute to increasingly impacting the appellants in their lives and their health. Thus, the prerequisites of Art. 89 (1) FSCA have clearly been fulfilled and the appellants have the right to appeal.[1]

OE:	Ruling of the Federal Department of the Environment, Transport, Energy and Communications DETEC of 25 April 2017.	*Files from the previous proceedings*

7. With reference to appellant 1, it must be added to the deliberations in margin number 6 that it is appealing in terms of the rules of the appeal brought by an association in its own name but in the interests of its members (*egoistische Verbandsbeschwerde*). The purpose of the association (*Verein*) is to advocate for the interests and the well-being of older women, who are exposed to an increased risk of morbidity and mortality because of global warming (Art. 2 statutes, exhibit 16 of the request). The association can also take legal measures to protect their interests (Art. 3 statutes.)

The number of members of appellant°1 has grown from 772 to 1202 (as of 16 January 2019) since the submission of the appeal to the Federal Administrative Court. The average age of the members of the association is currently 73 years. This age is currently also the median of the association's members; thus, 50 % of the members are 73 years of age or older. 430 members are 75 years old or older.

[1] For similar constellations BGE 129 II 297 E. 2.3 and BGE 124 II 124 E. 1b.

OE: List of members of the Verein KlimaSeniorinnen Schweiz (Name, residential address, age; as of 16 January 2019) *Subsequent submission on demand*

The interests of its members are *directly* impacted by the ruling under appeal issued by DETEC and by the judgment under appeal. As older women, the members of the *Verein* belong to the particularly vulnerable group that is impacted *to a greater extent than the general public* by the consequences of global warming in their health and potentially in their being alive. For this reason, the members of appellant 1, at least a large number of members (430 women are 75 years old or older),[2] would also be legitimized themselves as individuals to assert their interests by means of an appeal (in place of many BGE 134 I 269, unpublished E. 2.2.2).[3] Thus, all the prerequisites for an appeal brought by an association in its own name but in the interests of its members (*egoistische Verbandsbeschwerde*) are fulfilled in the present case, and appellant 1 is entitled to appeal.

It should be noted that up to today, 900 women and men who do not fulfill the criteria for membership in the *Verein* and are therefore not members have expressed their solidarity with the appellants and their goals in writing (as of 16 January 2019).

1.3 Comments on the procedural motions, in particular regarding urgency

8. In the judgment under appeal, the court of previous instance upheld a decision by DETEC not to enter into the demands of the request for the issuance of an appealable ruling which had been submitted to it (and the Federal Council and various offices of DETEC). It did so, as did DETEC, mainly on the grounds that the appellants had put forward motions that amounted to an *actio popularis* (more on this in detail below, section 2.5). In the following, the appellants show that this conclusion is incorrect and that, as a result, it violates their rights.

Since DETEC *did not enter into* the request and the court of previous instance dismissed the appeal against this decision, the demands made by the appellants have not yet been dealt with and assessed materially at all. The questions

[2] It is argued that, with reference to Art. 11*a* APA, it suffices if 20 members are affected, HÄNER, ISABELLE, Die Beteiligten im Verwaltungsverfahren und Verwaltungsprozess, Zurich 2000, p. 368.
[3] For the relevant case law of the ECtHR regarding Art. 6 ECHR also *L'Erablière A.S.B.L. v. Belgium*, application no. 49230/07.

concerning the right to have the request addressed materially by DETEC (or by the offices associated with that respondent) are predominantly of a legal nature. All the aspects of the facts of the case which must be available to the court *in order to assess whether there is an obligation to enter into the matter* are available; in this respect, the court addressed is to correct or supplement the facts of the case according to the criticisms raised in the present appeal (Art. 97 (1) FSCA) or ex officio (Art. 105 (2) FSCA).

Therefore, if the appeal is approved, it does not appear necessary to refer the case back to the court of previous instance for it to complete the facts of the case. Because of this situation at the outset, the appellants request, in legal request 1, revocation of the decision and direct referral back to DETEC (Art. 107 (2) FSCA) for a material assessment. Only in the alternative (legal request 2) do the appellants request a referral back to the court of previous instance for a new assessment of the question whether to enter into the matter.

Referral back to DETEC (and not the court of previous instance) is also necessary for reasons of time (forthwith margin numbers 9 et seq.).

9. In legal request 1 in conjunction with procedural motion 2, the appellants respectfully ask the court to decide the present matter in dispute promptly. For one thing, as long as the current unlawful situation is not remedied, Switzerland is continuing to emit excessive amounts of greenhouse gas emissions. They contribute to increasingly threatening the lives and the health of the appellants. For another, the legal requests threaten to become obsolete due to the passage of time.

10. Demands 1, 2 and 4 stated in the request refer to the period through 2020. Today, in early 2019, only little time remains for climate protection actions in accordance with the law by the end of 2020. More than two years have already passed since the request was submitted in 2016: after five months, DETEC decided, in a very brief ruling and without mentioning the material provisions that were the subject of the appeal, that the appellants were not particularly affected; the court of previous instance came to the same decision after a year and a half, mostly without subsuming the legally relevant facts of the case under the provisions invoked. This was the case, the DETEC stated, because climate protection also benefited the general public (ruling of 25 April 2017) or because everyone was affected in some way by global warming, for which reason the appellants were not particularly affected (grounds stated by the court of previous instance, judgment under appeal E. 7.4.3).

11. Demand 3 stated in the request is just as urgent for the period through 2030. The Federal Assembly is currently debating the revision of CO_2 legislation for the period 2020 to 2030. According to demand 3 stated in the request, the respondents are to correct their current proposals to the parliament, which violate fundamental and human rights.

1.4 Insufficient determination of the facts of the case by the court of previous instance

12. It is the task of the court of previous instance to determine the legally relevant facts of the case with the cooperation of the parties (Art. 12 and Art. 13 APA). If the facts of the case have obviously been determined incorrectly – merely estimated instead of "determined"[4] in terms of the provisions mentioned above – or if the determination of the facts of the case is based on a violation of the law in terms of Art. 95 FSCA, the Federal Supreme Court can make the necessary determinations itself (Art. 105 (2) FSCA) and conduct the measures to obtain evidence necessary to achieve this end (Art. 55 et seq. FSCA). The different cognition of the Federal Supreme Court concerning questions of law and of fact, which is laid down in Art. 105 FSCA, necessitates that these two aspects are differentiated by the court of previous instance (Art. 112 (1) b FSCA).[5]

13. The appellants request the Federal Supreme Court to make the necessary determinations regarding the facts of the case itself since the court of previous instance *presents* the facts of the case insufficiently and only in a rudimentary way. For this reason, it must be assumed that the court of previous instance also *determined* the facts of the case incompletely and incorrectly.

14. Moreover, the judgment under appeal does not differentiate between questions of fact and questions of law. In the statements of the court of previous instance on the facts of the case (specifically in E. 7.4.2 and E. 8.3, more on this forthwith), (at times) incorrect or incomplete determinations of the facts of the case are intermingled with their subsumption, and this is done in a manner that violates the law.

15. For example, E. 7.4.2 of the judgment under appeal is limited to a "brief synopsis of possible impacts of climate change." The court of previous instance does not at all review the decisive question, which the appellants described in

[4] SEILER, HANSJÖRG, Bundesgerichtsgesetz BGG, Stämpflis Handkommentar, 1st ed. Bern 2007, Art. 97 N 17.
[5] BGE 123 II 49 E. 6b.

detail (request, sections 4.4 and 5.4.1.1; appeal, sections 2.1.2 and 2.3.3.2), *whether and how the appellants, as older women, are affected by climate change-induced heat waves in their health and their lives, also in comparison with the general public*. The court of previous instance did not consider this essential question of fact without a comprehensible reason. Thus, the presentation of the facts of the case by the court of previous instance is incomplete and *obviously incorrect* in terms of Art. 97 FSCA.[6]

Moreover, this incomplete presentation of the facts of the case is considered a *violation of the law* in terms of Art. 95 FSCA:[7] The court of previous instance acted *in an arbitrary manner* (Art. 9 Const.) because it disregarded the evidence presented by the appellants.[8]

In addition, it thereby violates the appellants' *right to be heard* (Art. 29 (2) Const. and Art. 6 (1) ECHR), as explained in detail in section 2.4.3.

16. In E. 8.3 of the judgment under appeal, the court of previous instance comes to the assessment, without investigations and on the basis of arbitrarily selected examples, that the actions requested by the appellants would not contribute to Switzerland emitting a smaller amount of greenhouse gases. This presentation is incomplete and *obviously incorrect, and thus arbitrary* (Art. 9 Const.).[9] After all, the appellants assert various failings in application of the law whose rectification results or would result directly in reducing greenhouse gas emissions. It is mentioned here merely as examples that the preliminary legislative proceedings and the respondents' public relations are capable of having significant impacts on the amount of greenhouse gas emission reductions. In particular the preliminary legislative proceedings have significant creative power,[10] whereby their central goal in the present context would have to be oriented toward reducing greenhouse gas emissions to the extent necessary; however, the draft presented to the parliament of a completely revised CO_2 Act *post-2020* falls short by far (margin numbers 33 et seq.). See margin numbers 122 et seq. for more detail.

17. Besides, the court of previous instance does not go into decisive, legally relevant elements of the facts of the case at all in the judgment under appeal. For example, the question which reductions Switzerland would have to achieve in

[6] BGE 137 I 58 E. 4.1.2.
[7] SEILER (fn. 4, Art. 97 N 24; BGE 137 I 58 E. 4.1.2.
[8] BGE 136 III 552 E. 4.2.
[9] BGE 137 I 58 E. 4.1.2.
[10] KÜNZLI, JÖRG, Art. 181 BV, in WALDMANN, BERNHARD ET AL. (eds.), Bundesverfassung, Basler Kommentar 2015, Art. 181 N 14.

which time period to make its contribution to the "2°C target" or the "well below 2°C target" (more on this below, section°2.3.1), which concerns the facts of the case, was not mentioned in the judgment under appeal. Yet this is specifically a question concerning the facts of the case that would have been imperative to determine with respect to the assessment of the violations of fundamental rights that were contested (Art. 10 Const., Art. 2 and 8 ECHR). In addition, the judgment of the court of previous instance lacks determinations of facts of the case around the questions – also relevant in terms of fundamental rights – concerning the (insufficient) effectiveness of the measures taken to date and the measures still planned as well as the (insufficient) application of climate legislation (margin number 39).

In addition, this also obviously insufficient or incorrect determination of the facts of the case constitutes a violation of the appellants' right to be heard (Art. 29 (2) Const. and Art. 6 (1) ECHR); see on this in more depth section 2.4.3.

18. Remedying the insufficient determination of the facts of the case is decisive for the outcome of the proceedings (Art. 97 (1) FSCA).

The court of previous instance dismissed the appellants' appeal *specifically* on the grounds that the appellants were not particularly affected (E. 7.4.3) and that the actions requested would not result in a reduction of greenhouse gas emissions in Switzerland (E. 8.4).

19. For the assessment of the question of entering into the facts of the case in terms of Art. 25*a* APA – and thus also for the outcome of the present proceedings – it would have been decisive to review whether a reflex triggered by a real act is relevant in terms of fundamental rights (see also judgment under appeal E. 6.3.3). To conduct this assessment, the court of previous instance would have had to explain which reductions Switzerland would have to achieve in order to make its contribution to the "2°C target" or the "well below 2°C target," and it would have had to review the effectiveness and the application of the climate measures (see on this margin number 77).

20. Against this background, the appellants correct and round out the partly incorrect and incomplete determinations of the court of previous instance of the facts of the case in section 2.3 for the attention of the court addressed.

2. Material considerations

2.1 History of the proceedings

21. The appellants submitted their request to respondents 1 – 4 on 25 November 2016.

OE: • Request of the appellants to stop omissions in climate protection of 25 November 2016 — *Files from the previous proceedings*

22. In the request, the appellants demanded that the Confederation stop the omissions in the reduction of greenhouse gas emissions that are in violation of the Constitution and the ECHR. Put in positive terms, the appellants demand that the respondents undertake all actions possible in their area of responsibility with respect to the protection of the appellants' lives and health that are necessary and to which Switzerland is committed in terms of the Constitution and international law (Art. 10 Const. in conjunction with Art. 73 and 74 (2) Const. as well as Art. 2 and 8 ECHR) to limit global warming to well below 2°C.

23. In particular, the appellants demand the following of the respondents in their request of 25 November 2016 (see demands on pages 3–6 of the request):

> "1. The respondents shall take all necessary actions within their competence to reduce greenhouse gas emissions by 2020 to such an extent that Switzerland's contribution aligns with the "well below 2°C target" for the maximum increase in global average temperature, or at the very least, does not exceed the 2°C target, thereby putting an end to the unlawful omissions undermining these targets. In particular:
>
> a. Respondent 1 shall review the duties of the Confederation in terms of Art. 74 (1) Const. and the fulfillment of these duties in the climate sector with the current climate goal and in compliance with:
>
> – Art. 74 (2) and Art. 73 Const. and the constitutional duty to protect in terms of Art. 10 (1) Const; and
>
> – Art. 2 and 8 ECHR;
>
> and shall develop, without delay, a new plan to be implemented immediately and through 2020 that will permit Switzerland to achieve the "well below 2°C" target or, at the very least, the 2°C target, which requires a reduction of domestic greenhouse gas emissions by at least 25 % below 1990 levels by 2020;
>
> b. Respondent 1 shall communicate to the Federal Assembly (Parliament) and the general public that – in order to comply with Switzerland's obligation to protect and the principles of precaution and sustainability – a reduction of greenhouse gas emissions is necessary by 2020 in order to meet the "well below 2°C" target or, at the very least, the 2°C target, which requires a domestic greenhouse gas reduction of at least 25 % below 1990 levels by 2020;

c. With a decision at the level of the Federal Council, department or federal office, respondents 1, 2 or 3 shall initiate, without delay, preliminary legislative proceedings for an emission reduction target as laid out in legal request 1(a); and
d. Respondent 1 shall inform Parliament in its dispatch as stated in legal request 1(c) that the proposed emissions reduction target is in compliance with the Constitution and the ECHR.

2. Respondents shall take all necessary reduction measures within their competence to meet the greenhouse gas reduction target defined in legal request 1, i.e. reducing greenhouse gas emissions by at least 25 % below 1990 levels by 2020, thereby putting an end to their unlawful omissions. In particular:
   a. Respondent 1 shall consider measures to achieve the target as defined in legal request 1(a);
   b. Respondent 1 shall communicate the appropriate measures to reach the target as stated in legal request 1(b);
   c. Respondents 1, 2 or 3 shall, with regard to legal request 1(c) above, include measures to achieve the target in the preliminary legislative proceedings.

3. Respondents shall carry out all acts, within their competence, required to lower emissions by 2030 to such an extent that Switzerland's contribution aligns with the "well below 2°C" target or, at the very least, does not exceed the 2°C target, thus ending the unlawful omissions inconsistent with these targets. In particular:
   a. Respondents 1, 2 or 3 shall, in the course of the preliminary legislative proceedings, carry out all actions that allow Switzerland to make its contribution to meeting the "well below 2°C" target or, at the very least, not exceed the 2°C target, which means a domestic reduction of greenhouse gas emissions of at least 50 % below 1990 levels by 2030;
   b. Respondents 1, 2 or 3 shall include in the preliminary legislative proceedings all necessary reduction measures required to meet the greenhouse gas reduction target as defined in legal request 3(a).

4. Respondents shall implement all mitigation measures within their competence that are required to achieve the current greenhouse gas reduction target of 20 %, thus ending the unlawful omissions. In particular:
   a. Respondent 3 shall obtain without delay the reports of the cantons detailing the technical measures adopted to reduce the CO_2 emissions from buildings;
   b. Respondent 3 shall verify that the cantonal reports include data about CO_2 reduction measures that have already been taken or are planned and their effectiveness; demonstrate the progress made to reduce CO_2 emissions from buildings in their territory; and require improvements if necessary;
   c. Respondent 3 shall verify that cantons are issuing state-of-the art building standards for new and existing buildings;
   d. Respondents 1, 2 and 3 shall take the necessary actions if cantons fail verification as stated in legal request 4(c); if

necessary they shall take action to prepare new state-of the-art federal building standards for new and existing buildings;

e. Respondent 2, having determined that the interim building sector target for 2015 was not achieved, shall examine the need for improvements by cantons and propose additional effective reduction measures to respondent 1;

f. Respondents 1, 2 and 3 shall take steps aimed at rapidly increasing the CO_2 levy on thermal fuels;

g. Respondent 4 shall require the importers of passenger cars to submit data showing actual CO_2 emissions of passenger cars;

h. Respondent 2, given that the interim transport sector target 2015 will likely be missed, shall immediately draft additional and effective reduction measures and propose them to respondent 1; in particular, respondent 1 shall take actions to promote electromobility or else demonstrate that the sector interim target in Art. 3 (2) CO_2 Ordinance can be achieved without such promotion; and respondents 1, 2 and 3 shall take actions to raise the compensation rate for the CO_2 emissions from motor fuels;

i. Respondent 1 shall make a comprehensive assessment of the effectiveness of measures enacted under the CO_2 Act and consider whether additional measures are necessary, report the findings of the assessment to Parliament, and immediately initiate steps to implement the necessary measures for the period ending in 2020.

5. Alternatively, with regard to legal requests 1, 2, 3 and 4, a declaratory ruling shall be issued that states the respective omissions are unlawful."

24. In a ruling dated 25 April 2017, DETEC decided not to enter into the request. DETEC issued this ruling on behalf of all the respondents without stating this explicitly, but in conformity with the appellants and in terms of Art. 47 (6) GAOA. DETEC stated, mostly without stating specific grounds, that the appellants were not affected in their rights and obligation in terms of Art. 25*a* APA. It also rejected claims to effective legal protection derived from the ECHR.

25. On 26 May 2017, the appellants submitted an appeal to the court of previous instance against the ruling of 25 April 2017. In a ruling dated 11 July 2017, the court of previous instance declared the matter ripe for decision and dismissed the appeal in the judgment under appeal dated 27 November 2018.

26. The appellants explicitly uphold the statements made in their request as well as in their appeal to the Federal Administrative Court. The aims and measures of Swiss climate protection law as well as its implementation are insufficient. This is the case to an extent that severely impacts the health of appellants 2 – 5 as well as at least a large number of members of appellant 1 and at least puts their being alive at risk. The adverse effects they are exposed to are clearly distinct

from those of the broader population. The respondents to the request – and in particular DETEC – violated the fundamental and human rights enshrined in the Constitution and the ECHR as well as the basic principles of environmental law enshrined in the Constitution by failing to undertake actions in accordance with basic rights and the ECHR in the *preliminary* legislative proceedings and to correctly apply and actually implement applicable law.

In the following, it will also be shown anew that the appellants are *not* (primarily) demanding that DETEC or the other respondents issue general-abstract regulations.

2.2 The object of the present appeal

27. Corresponding to the judgment under appeal, the present appeal is limited to the procedural aspects of fulfillment of the prerequisites for entering into the case in terms of Art. 25*a* APA and the procedural rights of Art. 6 (1) and (13) ECHR in conjunction with Art. 10 Const. as well as Art. 2 and Art. 8 ECHR and the refusal of the right to be heard in terms of Art. 29 (2) Const.

28. In the judgment under appeal, the court of previous instance violates all of these provisions:

Violation of Art. 25*a* APA: Without determining the facts of the case, without hearing the appellants' pleadings, without reviewing the potential infringements in positions concerning their fundamental rights and contrary to case law, the court of previous instance adjudicated altogether incorrectly that the appellants were affected comparably to the general public ("animals and plants," "population groups," "forestry, agriculture," "winter tourism") and that therefore, Art. 25*a* APA was not applicable as they were not particularly affected.

Violation of Art. 6 ECHR: The court of previous instance reviewed the wrong question. Instead of reviewing the connection between the appellants' legal requests and greenhouse gas emissions (wrong question), the court of previous instance was obligated, in terms of Art. 6 ECHR, to review the connection between the greenhouse gas emissions and the state's obligation to protect in terms of Art. 10 Const. (right question). And the court of previous instance answered the wrong question incorrectly. Contrary to the assessment of the court of previous instance, the appellants' legal requests do bring about reductions of greenhouse gas emissions. For example, if, as requested, the Federal Council decided that fictitious measurements of the CO_2 emissions from

passenger cars did not suffice, but only realistic measurements, then greenhouse gas emissions would be reduced automatically.

Violation of Art. 13 ECHR: Contrary to the court of previous instance, Art. 13 ECHR is applicable specifically also in cases in which the applicability of Art. 6 ECHR is rejected. The court of previous instance was thus obligated to review Art. 13 ECHR in material terms and in doing so would have had to determine that the appellants are adversely impacted more than merely "in a reasonable way" in their right to life in terms of Art. 2 (1) ECHR as well as in their right to respect for their private and family life in terms of Art. 8 (1) ECHR.

29. The court of previous instance structures its considerations as follows: the review of the violation of the right to be heard (consideration 3), the review of the right to issuance of a material ruling in terms of Art. 25*a* APA (considerations 5–7) and the review of the right to effective legal protection under Convention law (consideration 8).

In the following, the appellants follow this structure set out by the judgment: section 2.4 on the right to be heard, section 2.5 on Art. 25*a* APA and section 2.6 on Art. 6 and 13 ECHR. First, they present in section 2.3 the legally relevant facts of the case in condensed form to the court addressed in terms of margin number 20.

2.3 The legally relevant facts of the case

2.3.1 Climate protection: Switzerland's necessary reductions

30. The court of previous instance is silent regarding Switzerland's necessary contribution to emission reductions toward reaching the target agreed in Art. 2 (1) a of the Paris Agreement of 12 December 2015[11] , namely

> *"Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels".*

Yet Switzerland's necessary reductions with respect to reaching this "well below 2°C target" are legally relevant for assessing whether the appellants are affected in their rights and obligations and for assessing their interest worthy of

[11] SR 0.814.012; signed by the Federal Council on 22 April 2016, approved by the Federal Assembly on 16 June 2017, ratified on 6 October 2017. There should be no question that the Paris Agreement is to be applied in the present case, among numerous references BGE 139 II 470 E. 4.2 and BGE 135 II 384 E. 2.3.

protection in terms of Art. 25*a* APA. For this assessment includes reviewing whether the reflex triggered by the real act is relevant in terms of fundamental rights. The fundamental and human rights, in turn, cannot be assessed separately from the climate goal (judgment under appeal E. 6.3.3, margin number 17 above and sections 2.5.2.1–2.5.2.3 below).

The appellants showed in detail in sections 4.2.2 and 4.2.3 as well as sections 4.3.3 and 4.3.5 of the request and in section 2.1.1 of the appeal which reductions Switzerland must achieve with respect to attaining the "well below 2°C target." Here, the appellants present these facts of the case in condensed form to the court addressed.

31. The *Intergovernmental Panel on Climate Change* (IPCC[12]) published calculations in both its Fourth and Fifth Assessment Reports that show which paths to reducing greenhouse gases industrialized countries such as Switzerland must take in order to make their contributions to stabilizing the temperature at 2°C. These apply all the more to stabilization at *well below* 2°C.

32. For example, in its Fourth Assessment Report from 2007,[13] the IPCC states that industrialized countries such as Switzerland must reduce their greenhouse gas emissions *by* ***25 % to 40 %*** **by 2020** compared to 1990 levels in order to meet a "*2°C target*" with a probability of more than 66 %.[14] Switzerland has recognized these calculations (request margin number 59).[15]

Nonetheless, according to Art. 3 (1) CO_2 Act, Switzerland seeks to reduce its greenhouse gases by only 20 % by 2020, compared to 1990, i.e., by at least 5 % too little.

[12] The IPCC was established in the United Nations framework in order to make an objective scientific basis regarding global warming as well as its political and economic impacts available. At the same time, the IPCC is an intergovernmental panel with 195 member states and a scientific body. It compiles the findings of thousands of studies and assesses them from a critical scientific perspective in its regularly published Assessment Reports which must be approved by all the IPCC member states, for which reason they are considered particularly important (www.ipcc.ch/organization/organization.shtml).

[13] GUPTA, S. D.A. TIRPAK, N. BURGER, J. GUPTA, N. HÖHNE, A.I. BONCHEVA, M KANOAN, C. KOLSTAD, A. KRUGER, A. MICHAELOWA, S. MURASE, J. PERSHING, T. SAIJO, A. SARI, Policies, Instruments and Co-operative Arrangements. In Climate Change 2007: Mitigation, Cambridge and New York, p. 776 Box 13.7 *(request, exhibit 33)*.

[14] Art. 3.1 United Nations Framework Convention on Climate Change (UNFCCC) and Art. 4.4 Paris Agreement. Developed countries state that they take the lead in the struggle against climate change.

[15] CONFERENCE OF THE PARTIES TO THE UNFCCC, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session 2010, Decision 1/CMP.6; also BBl 2009 7433, 7446 as well as BBl 2011 2075, 2130.

33. In the Fifth Assessment Report, the IPCC presented seven variants for burden-sharing between all countries regarding greenhouse gas reductions.[16] Accordingly, OECD-1990 countries such as Switzerland must achieve reductions of **at least 40 % to far more than 100 %** compared to 2010 levels[17] domestically to achieve the "2°C target" by 2030 with a probability of 66 %, depending on the burden-sharing arrangement. *The IPCC indicates a reduction of **50 % by 2030** for the average of all variants of burden-sharing.*[18]

Notwithstanding, in particular respondents 2 and 3 propose to parliament to reduce emissions *in Switzerland* by only 30 % by 2030, compared to 1990.[19] Even compared with the average of the burden-sharing variants, this is at least 20 % too little.

34. The targets of "*well below 2°C*" and "*pursuing efforts to limit the temperature increase to 1.5°C*" (see margin number 30 above), which were newly determined in the Paris Agreement in December 2015 and which are more ambitious because they aim at lower temperatures, require stabilizing the concentration *at a lower level and accordingly more ambitious reduction paths* (request, section 4.2.2.1). On 8 October 2018, the IPCC published a report on the impacts of 1.5°C global warming compared with pre-industrial times. ***Global* CO_2 neutrality must be achieved by 2050** if this target is to be achieved.[20]

[16] SUBSIDIARY BODY FOR SCIENTIFIC AND TECHNOLOGICAL ADVICE, forty-second session, Bonn 1-11 June 2015, Report on the structured expert dialogue on the 2013-2015 review, FCCC/SB/2015/INF.1, P. 136 *(request, exhibit 69)*; CLARKE L., K. JIANG, K. AKIMOTO, M. BABIKER, G. BLANFORD, K. FISHER-VANDEN, J.-C. HOURCADE, V. KREY, E. KRIEGLER, A. LÖSCHEL, D. MCCOLLUM D., S. PALTSEV, S. ROSE, P.R. SHUKLA, M. TAVONI, B.C.C. VAN DER ZWAAN AND D.P. VAN VUUREN, 2014: Assessing Transformation Pathways, in Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, Figure 6.7, p. 458 (*request, exhibit 20*).

[17] The difference between the reference years 1990 and 2010 is negligible for Switzerland since the emission levels were very similar in 1990 and 2010, FEDERAL STATISTICAL OFFICE, Treibhausgasemissionen in der Schweiz. Entwicklung in CO_2-Äquivalente und Emissionen nach Sektoren, 2 May 2018, https://www.bfs.admin.ch/bfs/de/home/statistiken/raum-umwelt/ressourcen/umweltindikatorensystem/emissionen-und-abfaelle/treibhausgasemissionen.assetdetail.5186967.html *(request, exhibit 6)*.

[18] CLARKE ET AL. (Fn. 16), p. 460 (*request, exhibit 20*).

[19] Status as of the prior proceedings: Preliminary draft CO_2 Act, as of 1 September 2016, www.bafu.admin.ch/klima/12006/14323/16721/16722/index.html?lang=de, also Art. 3 Draft CO_2 Act of 1 December 2017, BBl 2018 385: 60 % Inlandreduktion von insgesamt 50 % Emissionsreduktionen gegenüber 1990.

[20] IPCC, Special Report, Global Warming of 1.5°C, Summary for Policy Makers, C.1, https://www.ipcc.ch/sr15/chapter/summary-for-policy-makers/ *(appeal, exhibit 7)*.

35. It follows that Switzerland must, as an *absolute minimum*, reduce its domestic emissions by 25 % by 2020 and by 50 % by 2030, compared with 1990 levels, to make its contribution to the "well below 2°C target."

36. Purchasing 20 % of the emission reductions abroad, as proposed by the respondents, changes nothing in this respect. The IPCC's reduction paths, which show which reductions result in which amount of warming, refer to the reductions achieved by a country *domestically*. Against this background, purchasing emission reductions abroad as planned by DETEC in order to achieve the target serves the sole purpose of postponing to a later date the reduction efforts that Switzerland *itself* must make, as already described in the request (section 4.2.3). Such a strategy would require reducing domestic emissions to zero by 2050 within an extremely short or very short time and would thus constitute *a practically unbearable burden on the economy*. The strategy of postponement is *thus de facto impossible to realize*. It *thus runs the great risk that Switzerland will not be able to make its contribution to the "well below 2°C target."* Moreover, purchasing emission reductions abroad has been very unclear in terms of international law since the Katowice climate conference in December 2018[21] (request, section 4.2.2.3).

37. The appellants' demands of the respondents to work toward a domestic reduction target of at least 25 % by 2020 and at least 50 % by 2030, compared with 1990, in the context of their obligation to protect, are therefore to be understood as *absolute minimum demands*.

38. A specialized agency, DETEC has rightly never disputed these facts of the case, either.

2.3.2 Climate protection: Insufficiency of the measures and of the application of the law

39. The court of previous instance does not ascertain the facts of the case around the (insufficient) effectiveness of the measures and the (deficient) application of climate legislation. The appellants described these facts of the case, which are relevant in terms of fundamental rights (margin numbers 77, 82 and 88) in detail in the request, sections 4.3.2 and 8.5.

[21] SRF, UNO-Klimakonferenz, «Für die Schweiz ist der Beschluss ein Problem», 16 December 2018, https://www.srf.ch/kultur/wissen/uno-klimakonferenz-fuer-die-schweiz-ist-der-beschluss-ein-problem *(appeal, exhibit 10)*.

Here, they emphasize in condensed form selected points relating to the insufficiency of the climate protection measures and the application of CO_2 legislation and otherwise refer to the extensive description mentioned.

40. Even in the 2016 report "Climate policy of Switzerland: Explanatory Report on the draft for consultation" it was abundantly clear that the 20 % target by 2020 would be missed. According to this report, in the absence of further measures, emissions will be reduced by only 12.3 %.[22] Besides, DETEC also explicitly acknowledges in the ruling of 25 April 2017 (bottom of p. 6) that the reductions are smaller than had been hoped. It clearly follows from this that the existing climate protection measures must immediately be rounded out and that the application of CO_2 legislation must be improved.

41. *An example*: in the building sector, which accounts for approximately one-third of Swiss greenhouse gas emissions,[23] there is a backlog of refurbishment work; the building stock is still *largely heated with fossil fuels* (request, margin number 72).[24] Art. 9 (1) CO_2 Act requires the cantons to issue regulations in the building sector based on the "current state of the art" with respect to reaching the climate target. Yet effective *cantonal building regulations* – which according to respondent 3 are an important pillar of climate policy[25] – have not materialized to this day, despite the fact that Art. 9 (1) CO_2 Act entered into force as early as *2013*. Here, the respondents insufficiently exercised their duty of supervision over the cantons and insufficiently applied Art. 9 (1) CO_2 Act.

This means that respondent 3 would have had to obtain annual reports from the cantons about their technical measures to reduce the CO_2 emissions from buildings (Art. 9 (2) CO_2 Act), which – also a flaw in application of the law – it has not done to this day (see in detail request, margin number 327).

42. Respondent 4 also fails to apply the law properly in the transport sector, for example by not requiring measurements of the CO_2 emissions from passenger cars corresponding to their actual emissions.[26] Instead, it relies for the time

[22] DETEC, Klimapolitik der Schweiz, Erläuternder Bericht zur Vernehmlassungsvorlage [Climate policy of Switzerland: Explanatory Report on the draft for consultation], 31 August 2016, p. 29 *(request, exhibit 64)*.
[23] FOEN, Gebäude, 29 June 2016, www.bafu.admin.ch/klima/13877/14510/14513/index.html?lang=de *(request, exhibit 5)*.
[24] FOEN, Treibhausgasemissionen leicht höher als im Vorjahr, 13 April 2018, https://www.bafu.admin.ch/bafu/de/home/themen/klima/mitteilungen.msg-id-70417.html *(appeal, exhibit 4)*.
[25] FOEN (fn 23).
[26] DUPUIS, JOHANN, PETER KNOEPFEL, RÉMI SCHWEIZER, MARIO MARCHESINI, MARIE DU PONTAVICE, LIONEL WALTER, La politique Suisse de reduction des émissions de gaz à effet de serre: une analyse de las mise an oeuvre/Die Politik der Schweiz zur Reduktion der Treibhausgasemissionen: eine Vollzugsanalyse/Rapport à l'intention de

being on figures calculated by manufacturers under idealized conditions in terms of the "New European Driving Cycle (NEDC),"[27] whereby *the average deviation from real emissions is 38 %*.[28] It does so even though a new, better test procedure ("Worldwide Harmonized Light-Duty Vehicles Test Procedure," WLTP) is available.[29]

Art. 10 (1) CO_2 Act (of course) does not provide for CO_2 emissions being measured under fictitious conditions deviating from reality. In E. 8.3, the court of previous instance overlooks that precisely conversely, a measurement method deviating from reality has no legal basis in Art. 10 CO_2 Act.

2.3.3 Heat waves cause deaths and illnesses associated with heat, especially among older women

43. The court of previous instance rightly explains that marked changes of temperature and precipitation during the summer are expected as consequences of global warming and that warm periods and heat waves will be more frequent, more intense and of longer duration. The court of previous instance then determines that "people, animals and plants" are not all impacted equally and that the adverse effects vary "in terms of economic and health impacts" among "different population groups." Finally, the court of previous instance makes statements about how the population groups "population in cities and agglomerations" and "infants and small children" are affected. It speaks about people who could fall victim to adverse health impacts because of high ozone levels and the geographic range of carriers of disease such as ticks and mosquitoes. In addition, the change of temperature also impacts various sectors of the economy such as agriculture and tourism (judgment under appeal E. 7.4.2).

44. Although these determinations by the court of previous instance do not give grounds for corrections, they are incomplete. For the court of previous instance is silent, among other things,

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l'Office federal de l'environnement (OFEV), Lausanne IDHEAP, Université de Lausanne, 2016, p. 9 *(Request, exhibit 27)*.

[27] SFOE AND FEDRO, Einführung WLTP in der Schweiz, FAQ, June 2018, p. 3, http://www.bfe.admin.ch/php/modules/publikationen/stream.php?extlang=de&name=de_340379128.pdf *(appeal, exhibit 5)*.

[28] HÄNE STEFAN, Bund soll CO_2-Werte besser berechnen, Tages-Anzeiger vom 20. Juni 2015 *(Request, exhibit 34)*; also DUPUIS ET AL. (FN. 26), p. 9 (*request, exhibit 27*).

[29] SFOE AND FEDRO (fn. 27) (*request, exhibit 5).*

– on the additional *deaths* caused by the climate change-induced heat waves and
– on the *adverse health impacts*

in the population group of *75- to 84-year-old women*.

For this reason, this matter must be entered into here in terms of margin number 20. The relevant most recent insights for assessing how the appellants are affected – and thus admissible new evidence – must also be presented.

45. As the appellants already evidenced in detail in the request and the appeal to the court of previous instance, the population group of 75- to 84-year-old women, to which most of the appellants belong, is particularly affected in terms of their health and their lives.

These are "legislative facts" which must be determined and assessed when applying the law.[30] In the following and for this reason, the appellants emphasize in condensed form that and how in detail climate change-induced heat waves result not only in adverse health impacts, but also in deaths, and that deaths and adverse health impacts occur significantly more frequently in the population group of older women than in the general population.

The findings presented in the following become more specific step by step.

46. The hot summer of 2003 resulted in almost 1,000 additional deaths in Switzerland;[31] roughly 800 additional heat-related deaths in Switzerland were reported for the hot summer of 2015.[32]

More than half of hot days are caused by global warming.[33] The probability that a particular heat wave can be attributed to global warming is more than 75 %.[34] *According to the IPCC, it is "likely"* (i.e., likelihood of 66 %-100 %) *that the deaths during heat waves can be attributed to human-induced global warming.*[35]

[30] ALTWICKER, TILMANN, Statistikbasierte Argumentation im Verwaltungsgericht, ZBl 119/2018, 619 et seq., p. 622.
[31] FOPH AND FOEN, Schutz bei Hitzewelle, Vorsorge treffen – Todesfälle verhindern, Bern, 2007, p. 1 ("Goldene Regeln für Hitzetage") *(request, exhibit 12)*.
[32] FOEN, Hitze und Trockenheit im Sommer 2015, 2016, https://www.bafu.admin.ch/bafu/de/home/themen/klima/publikationen-studien/publikationen/Hitze-und-Trockenheit-im-Sommer-2015.html.
[33] FISCHER, ERICH, Hitzetage zu mehr als der Hälfte wegen des Klimawandels, 2015, www.ethz.ch/de/news-und-veranstaltungen/eth-news/news/2015/04/hitzetage-zu-mehr-als-der-haelfte-wegen-des-klimawandels.html *(request, exhibit 30)*.
[34] FISCHER, ERICH AND RETO KNUTTI, Anthropogenic contribution to global occurrence of heavy-precipitation and high-temperature extremes, Nature Climate Change, 27 April 2015, pp. 1, 3 and 5 *(request, exhibit 31)*.
[35] SMITH, KIRK R., ALISTAIR WOODWARD, DIARMID CAMPBELL-LENDRUM, DAVE D. CHADEE, YASUSHI HONDA, OIYONG LIU, JANE M. OLWOCH, BORIS REVICH, RAINER SAUERBORN, 2014: Human health: impacts, adaptation, and co-benefits, in: Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects. Contribution

47. A recent study demonstrates clearly that limiting global warming to less than 2°C can prevent a strong increase of temperature-related mortality specifically in Switzerland (Central Europe) and in comparison with other regions:[36]

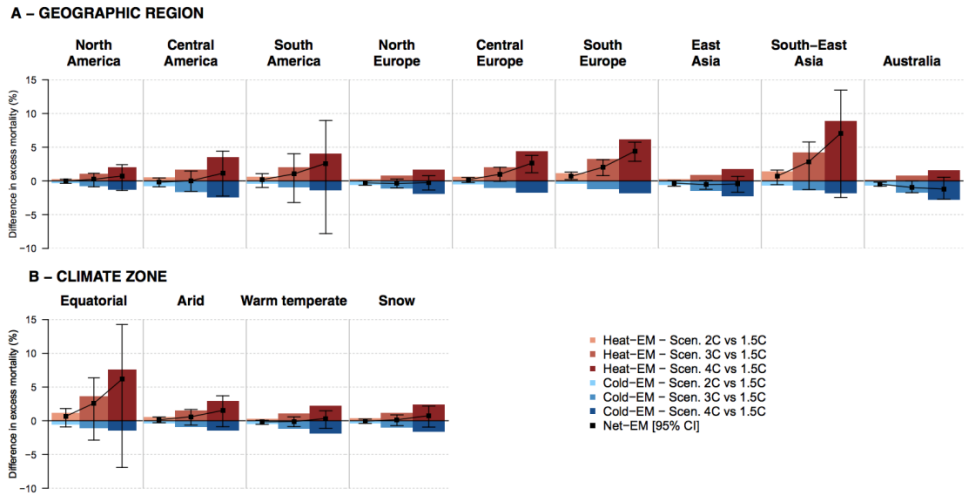

Fig. 2 Trends in changes in excess mortality projected for warming in 2, 3 and 4 °C, relative to 1.5 °C, by geographic region and climate zone. Red and blue bars represent changes in heat (above minimum mortality temperature) and cold (below minimum mortality temperature) excess mortality, respectively, while black squares correspond to net excess mortality (heat+cold) and its 95% confidence interval.

Source: VICEDO-CABRERA (fn. 36), figure 2.

48. The *heat-related deaths* are not distributed randomly across the population, but occur *much more frequently in older persons*.[37] According to the IPCC, 80 % of the additional deaths occur in persons older than 75 (assessment using studies on the heat wave in 2003).[38] And according to the FOPH and the FOEN, older persons are the population group affected most strongly by heat-related deaths; most heat-related deaths occur due to cerebral vessel, cardiovascular and respiratory tract diseases.[39] The hot summer of 2015 had brought about an *increase of the mortality risk the largest of which* was by 9.7 % among 75- to 84-year-olds.[40]

of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press, Cambridge, United Kingdom and New York, USA, 709-754, p. 720 *(request, exhibit 65)*.

[36] VICEDO-CABRERA, ANA MARIA ET AL., Temperature-related mortality impacts under and beyond Paris Agreement climate change scenarios, Climatic Change, 13 September 2018, p. 396, https://link.springer.com/content/pdf/10.1007%2Fs10584-018-2274-3.pdf *(appeal, exhibit 11)*.

[37] FOPH AND FOEN (fn. 31) *(Request, exhibit 12)*.

[38] Smith et al. (fn. 35), p. 721 *(Request, exhibit 65)*.

[39] FOPH AND FOEN (fn. 31), p. 3 *(Request, exhibit 12)*.

[40] FOEN (fn°32), p. 84.

These findings, which were already presented in the request and the appeal, are also confirmed by current studies from 2018.[41] The most recent *2018 Lancet Countdown Report* states in particular that specifically in Europe, people over 65 are particularly affected by heat waves in their health and their lives.[42]

49. Older persons not only have a particular mortality risk during heat waves, they are also particularly *affected in terms of their health*, namely by dehydration, hyperthermia, fatigue, loss of consciousness, heat cramps and heat stroke.[43] Members of appellant 1 and in particular all the appellants 2 – 4 have already suffered and continue to suffer from heat-related afflictions (request, margin number 18 and exhibits 12–14). In more detail:

– Applicant 2 is resident in Zurich and is now 87 years old. She wears a pacemaker and suffered a loss of consciousness resulting from a heat wave in the summer of 2015.
– Applicant 3 is resident in Geneva and is now 81 years old. She suffers greatly during the hot summers; during these times, she must stay in her residence, cut off from the outside world, with the air conditioning on. She has a cardiovascular illness, and heat waves not only strongly impair her well-being, but also her physical performance.
– Applicant 4 is resident in Vico Morcote and is now 77 years old. She receives medical treatment because of chronic asthma and chronic obstructive pulmonary disease (COPD). Both afflictions grow more acute during heat waves.
– Applicant 5 is resident in Carouge and is now 76 years old. She suffers from asthma.

OE:
- Medical certificate of Applicant 2 dated 15 November 2016 — *Files from the previous proceedings*
- Medical certificate of Applicant 3 dated 19 October 2016 — *Files from the previous proceedings*
- Medical certificate of Applicant 4 dated 7 October 2016 — *Files from the previous proceedings*

[41] IPCC, Special Report, Global Warming of 1.5 C, chapter 3.4.7.1, https://www.ipcc.ch/site/assets/uploads/sites/2/2018/12/SR15_Chapter3_Low_Res.pdf *(appeal, exhibit 8)*; WATTS, NICK ET AL., The 2018 report of the *Lancet* Countdown on health and climate change: Shaping the health of nations for centuries to come, The Lancet, Vol. 392, December 2018, p. 2485, https://www.thelancet.com/climate-and-health *(appeal, exhibit 12)*.
[42] WATTS (fn. 41), p. 2484 (*appeal, exhibit 12).*
[43] FOPH AND FOEN (fn. 31) (*appeal, exhibit 12)*; WATTS (fn. 41), p. 2485 (*appeal, exhibit 12*).

- Medical certificate of Applicant 5 dated 4 October 2016 — *Files from the previous proceedings*
- Proof of residence of Applicants 2 – 5 — *If disputed*

50. According to a study from France, women are even more strongly affected than men among the group of older persons.[44] In the hot summer of 2003, *65 % of the heat-related deaths affected women*.[45] Women suffer from the heat more than men for physiological reasons; they withstand up to 6°C less heat and perspire less.[46] This finding is confirmed by the World Health Organization (WHO).[47] Recent studies from 2017 and 2018 also come to the same result with respect to older women being particularly affected.[48]

It is hardly surprising that women also feel more strongly adversely affected in their *well-being* during heat waves.[49]

51. A broad-based international study[50] shows that older women between 75 and 84 years of age *with respiratory diseases* – in other words, appellants 4 and 5

[44] ROBINE, JEAN-MARIE, SUI LAN CHEUNG, SOPHIE LE ROY, HERMAN VAN OYEN, FRANÇOIS R. HERRMANN, Report on excess mortality in Europe during summer 2003, February 2007 (*Request, exhibit 59*); DOMBOIS, OLIVER THOMMEN, CHARLOTTE BRAUN-FAHRLÄNDER, Gesundheitliche Auswirkungen der Klimaänderung mit Relevanz für die Schweiz, Literaturstudie im Auftrag der Bundesämter für Umwel, Walt und Landschaft (BUWAL) und für Gesundheit (BAG), November 2004, p. 33 *(Request, exhibit 26)*.

[45] ROBINE, JEAN-MARIE, SIU LAN CHEUNG, SOPHIE LE ROY, HERMAN VAN OYEN, CLARE GRIFFITHS, JEAN-PIERRE MICHEL AND FRANÇOIS R. HERRMAN, Death toll exceeded 70,000 in Europe during the summer of 2003, C. R. Biologies 331 (2008) 171–178, p. 174, www.sciencedirect.com/science/article/ pii/S1631069107003770 *(request, exhibit 58)*.

[46] JEITZINER DENISE, Also doch: Frauen sind schmerzempfindlicher als Männer, Tages-Anzeiger, 4 May 2010, http://www.tagesanzeiger.ch/leben/gesellschaft/Frauen-snd-wehleider-als-Maenner/story/15122163 (*request, exhibit 42)*; SCHAFFNER, NILS, AMREI WITTWER, ELVAN KUT, GERD FOLKERS, DAVID H. BENNINGER AND VICTOR CANDIA, Heat pain threshold and tolerance show no left–right perceptual differences at complementary sites of the human forearm, Neuroscience Letters 440 (2008) 309–313, p. 312 and figure 2 *(request, exhibit 62)*; SHAPIRO, YAIR, KENT B. PANDOLF, BARBARA A. AVELLINI, NANCY A. PIMENTAL AND RALPH F. GOLDMANN, Physiological responses of men and women to humid and dry heat, Journal of Applied Physiology, 1 July 1980 Vol. 49 no. 1, 1–8, p. 1 *(request, exhibit 64)*; MORIMOTO, T., Z. SLABOCHOVA, R. K. NAMAN AND F. SARGENT 2ND, Sex differences in physiological reactions to thermal stress, Journal of Applied Physiology, 1 March 1967 Vol. 22 no. 3, 526-532, p. 526 (*request, exhibit 51*).

[47] WHO, Gender, Climate Change and Health, Geneva 2010, www.who.int/globalchange/Gender ClimateChangeHealthfinal.pdf, p. 9 *(request, exhibit 76).*

[48] IPCC (fn. 41), chapter 3.4.7.1 (*appeal, exhibit 8*); ZHANG, YUNQUAN, RENJIE FENG, RAN WU, PEIRONG ZHONG, XIAODONG TAN, KAI WU AND LU MA, Global climate change: impact of heat waves under different definitions on daily mortality in Wuhan, China, *Global Health Research and Policy*, 2017 2:10, 5 April 2017, https://ghrp.biomedcentral.com/articles/10.1186/s41256-017-0030-2 (*appeal, exhibit 13*).

[49] Aerzteblatt, Hitzewelle macht Frauen stärker zu schaffen als Männern, 31 July 2018, https://www.aerzteblatt.de/nachrichten/96809/Hitzewelle-macht-Frauen-staerker-zu-schaffen-als-Maennern *(appeal, exhibit 3)*.

[50] D'IPPOLITI, DANIELA, PAOLA MICHELOZZI, CLAUDIA MARINO, FRANCESCA DE'DONATO, BETTINA MENNE, KLEA KATSOUYANNI, URSULA KIRCHMAYER, ANTONIS ANALITIS, MERCEDES MEDINA-RAMÓN, ANNA PALDY, RICHARD ATKINSON, SARI KOVATS, LUIGI BISANTI, ALEXANDRA SCHNEIDER, AGNÈS LEFRANC, CARMEN IÑIGUEZ, CARLO A. PERUCCI, The impact of heat waves on

(request, margin number 101 and request, exhibits 14 and 15) – are affected *even more strongly*, i.e., in no less than three ways. That people with respiratory diseases are particularly affected was recently confirmed in the *2018 Lancet Countdown Report*.[51]

52. Conclusion: Particularly women 75 years of age or older, and thus appellants 2–5 and a large number of the members of appellant 1, have *a significantly increased mortality risk in hot summers and are affected to a significantly greater degree in their health than the general public*. They are thus a "most vulnerable group" which is particularly affected by the consequences of global warming.

Concerning the mortality risk, this is also particularly true of appellants 4 and 5, who also suffer from respiratory diseases, as well as for appellants 2 and 3, who live in cities and are thus also additionally affected, according to the court of previous instance (E. 7.4.2). With respect to health, all of the appellants 2–5 display heat-related afflictions even today (see above margin number 49).

DETEC has rightly never disputed these facts of the case, either.

2.4 Violation of the right to be heard (Art. 29 (2) Const., Art. 6 ECHR)

2.4.1 Legal discussion of the right to be heard

53. The right to be heard, which is enshrined in Art. 29 (2) Const., demands that the government agency *actually hears, reviews and takes into consideration in its decision-making* the parties' pleadings. In the sense of self-monitoring, this is supposed to prevent the government agency from being guided by considerations having nothing to do with the issue, as explained in the judgment under appeal (E. 3.2, first paragraph).

As a matter of principle, the grounds stated in a ruling consist of the presentation of the legally relevant facts of the case, followed by their subsumption under the relevant legal norms (judgment under appeal E. 3.2, second paragraph).

mortality in 9 European cities: results from the EuroHEAT project, Environmental health: a global access science source 2010 37, p. 1 *(request, exhibit 24)*.

[51] WATTS (fn. 41), p. 2485 (*appeal, exhibit 12).*

54. The right to be heard also arises from Art. 6 ECHR, in the sense of a right "to have one's case properly examined."[52] In light of this, a government agency must examine the substance of the parties' main pleadings *effectively*; in particular, it cannot limit itself to taking up and dealing with (merely) those pleadings that it believes appear significant. It is also insufficient to simply paraphrase a party's pleadings and then to refrain from actually dealing with them.

55. Both DETEC (see below section 2.4.2) and the court of previous instance (see below section 2.4.3) violated the appellants' right to be heard in several respects. These violations of the right to be heard are the *root cause* for not entering into the appellants' request and for leaving their demands unadjudicated as a result.

2.4.2 Violation by DETEC of the right to be heard (E. 3)

56. The court of previous instance rightly determines that the statements in the ruling by DETEC are "brief and general" and that a "subsumption of the legally relevant facts of the case under Art. 25*a* APA and, in particular, under the prerequisites that rights and obligations be affected and that an interest worthy of protection exists, is largely lacking" (judgment under appeal E. 3.3, second paragraph).

57. However, contrary to the court of previous instance, this violation of the right to be heard cannot be remedied by leaving the efforts to shed light on the matter to the attorneys. As the court of previous instance previously and correctly determined in its general statements (see above margin number 53), the purpose of the right to be heard is not only that the appellants are in a position to appeal the ruling properly in terms of its substance. Rather, its purpose is to ensure that the parties' pleadings are actually heard and taken into consideration and that, in the sense of self-monitoring, the government agencies do not permit themselves to be guided by considerations having nothing to do with the issue. Contrary to the court of previous instance, DETEC already violated the appellants' right to be heard by mostly failing to establish the legally relevant facts of the case presented in detail by the appellants (request, section 4) and to

[52] On this in particular HARRIS, O'BOYLE AND WARBRICK, Law of the European Convention on Human Rights, 3rd ed., Oxford 2014, p. 429. Case law: *Dulaurans v. France,* application no. 34553/97 paragraph 33; *Pronina v. Ukraine*, application no. 63566/00 paragraph 25; *Kuznetsov and Others v. Russia*, application no. 184/02 paragraph 84; and *Hiro Balani v. Spain*, application no. 18064/91 – 303-B, paragraph 28.

subsume them under the relevant provisions, which were also described in detail by the appellants (request, sections 5–7).

2.4.3 Violation by the court of previous instance of the right to be heard (E. 5–8)

58. The court of previous instance makes extensive general-abstract statements about Art. 25*a* APA and Art. 6 and 13 ECHR. In contrast, the "facts of the case" (judgment under appeal A.–F.) are limited to reproducing the parties' pleadings – however, in an incomplete fashion with respect to important points (see above section°1.4). The appellants show in the following that the determination of the legally relevant facts of the case, the discussion of Art. 10 Const. and Art. 2 and 8 ECHR and the subsumption under the relevant legal norms are largely lacking. A discussion of the appellants' detailed pleadings in this regard – which are key to assessing the legal requests posed – is lacking.

59. For example, the court of previous instance states regarding Art. 25*a* APA that "[i]f potential infringements of fundamental rights are involved, it is essentially a matter of the scope of the fundamental right whether the effect of the infringement is sufficient to assume that rights or obligations have been affected" (judgment under appeal E. 6.3.3). *But in the following, the court of previous instance fails entirely (i.e., regarding the facts of the case, the legal situation, subsumption) to review the violation of the appellants' fundamental and human rights, which was presented in detail by the appellants* (request, sections 5.4, 5.5 and 5.6 and appeal, section 2.2.2), and thereby fails to review important prerequisites of the interest worthy of protection as well as their being affected in their rights or obligations. The court of previous instance thus violates the appellants' right to be heard.

60. E. 7.4.2 of the judgment under appeal is limited to a "brief synopsis of possible impacts of climate change." The court of previous instance does not review the decisive question, which the appellants described in detail (request, sections 4.4 and 5.4.1.1; appeal, sections 2.1.2 and 2.3.3.2), whether and how the appellants, as older women, are affected in their health and their lives by climate change-induced heat waves – particularly in comparison with the general public.

The court of previous instance also failed to review in material terms the heat-related diseases under which appellants 2 – 5 suffer and which were evidenced

by physicians (request, margin numbers 18 and 101 as well as appeal, margin number 74).

61. In E. 8.3, the court of previous instance does not go into the appellants' statements on the link between the outcome of the proceedings and their rights recognized under domestic law (request, section 6.1.2.3 and appeal, section 2.4.4.3). Nor does it review the domestic law presented (the state's obligation to protect in terms of Art. 10 Const.), which is relevant for assessing Art. 6 ECHR and was explained by the appellants; more on this below, margin numbers 128 et seq.

62. In E. 8.4, the court of previous instance refrains from reviewing the rights under the ECHR (Art. 2 and 8 ECHR, request, sections 5.5 and 5.6 as well as appeal, section 2.2.2.2), which the appellants invoked and which they presented in detail, even though it would have been obliged to review them in conjunction with Art. 13 ECHR.

63. Finally, the court of previous instance does not go into the appellants' pleadings on Switzerland's necessary domestic reductions as well as the (insufficient) effectiveness of the measures and the (insufficient) application of climate legislation (request, sections 4.3.2 and 8.5 and appeal, section 2.1.1; see on this the statements above in margin number 17), even though these statements are relevant for assessing Art. 25*a* APA in conjunction with Art. 10 Const. and Art. 2 and 8 ECHR (see below margin number 71), Art. 6 ECHR in conjunction with Art. 10 Const. (see below margin number 128 et seq.) and Art. 13 ECHR in conjunction with Art. 2 and 8 ECHR (see below margin number 155).

64. Thus, the court of previous instance violated the appellants' right to be heard in several respects.

2.5 Violation of the right to issuance of a ruling in terms of Art. 25*a* APA (E. 5–7)

2.5.1 Preliminary remarks

65. Whoever has an interest worthy of protection can, on the basis of Art. 25*a* (1) APA, demand of the government agency responsible for the actions based on federal public law and affecting rights or obligations that it refrains from, discontinues or revokes unlawful actions (a and b) or confirms their illegality (c).

66. To the court of previous instance, it is not in question that the appellants directed their request to the government agency responsible for the matter and that the actions demanded are based on federal public law (E. 5). The same is true of the existence of a real act and the subsidiarity of the appellants' request (E. 6.2).

67. The court of previous instance leaves it largely open whether the two further prerequisites for entering into the case in terms of Art. 25*a* APA are fulfilled, namely the question whether the appellants are affected in their rights or obligations and whether they have an interest worthy of protection (E. 6.3).

68. The court of previous instance limits itself to reviewing the additional prerequisite developed in case law with reference to Art. 25*a* APA, namely whether *the appellants are affected in a way that differs from the general public and is thus particular*.

It answers in the negative (judgment under appeal E. 7) without dealing with the legally relevant facts of the case (on the violation of the right to be heard, see margin number 60 above).

69. Against this background, the appellants show in the following that

- they are affected in their rights and obligations and that they have an interest worthy of protection because at least the reflex triggered by the respondents' omissions is relevant in terms of fundamental rights (see section 2.5.2);
- contrary to the court of previous instance, their being affected is clearly differentiated from that of the general public and is thus particular (see section 2.5.3), for which reason this is not an *actio popularis*.

2.5.2 Interest worthy of protection as well as being affected in rights or obligations

70. For the appellants as well as the court of previous instance, is it decisive for both the "interest worthy of protection" and "being affected in their rights or obligations" as prerequisites for entering into the case in terms of Art. 25*a* APA, whether an applicant can argue "in a reasonable way" that a "reflex" triggered by a real act is "relevant to fundamental rights" (E. 6.3).

Contrary to the court of previous instance, *the distinction from [an inadmissible] actio popularis cannot be reviewed in isolation from this question*. The result of

the review whether the people seeking legal protection were affected or violated in their fundamental rights by a particular action or omission must imperatively be included in the review of the distinction from *actio popularis*. For example, in BGE 144 II 233, the Federal Supreme Court recently *first* reviewed the question of relevance to fundamental rights (E. 8.1–8.3) and only in a *second step* the distinction to *actio popularis* (E. 8.4). It did so because it was "extremely doubtful *after what was stated above* [review of fundamental rights] that "children and youths (...) were to be protected in terms of *Art. 11 Const.*," for which reason "what *finally* matters because of the broad impacts of the information campaign is whether [the appellants were] particularly affected, in distinction to *actio popularis*" (emphasis added).

The ECHR, too, requires that appellants can feel that they themselves are direct or indirect victims of a violation of the Convention if the case is not to be regarded as *actio popularis*.[53]

71. For the appellants, the "reflex" triggered by the real acts under dispute is clearly relevant to their fundamental rights. In their request to the respondents, the appellants explained in detail why they have been violated and continue to be violated in their fundamental and human rights, namely Art. 10 Const. (request, section 5.4) as well as Art. 2 and 8 ECHR (request, sections 5.5 and 5.6), by the respondents' numerous omissions. They also demonstrated this again in their appeal to the court of previous instance (in sections 2.2.2 and 2.3.2.2). The appellants continue to uphold these statements in their entirety as an integral component of the present appeal.

In the following, the most important aspects will be presented in condensed form.

2.5.2.1 Violation of the appellants' right to life (Art. 10 Const.)

72. The right to life protects the condition of being alive.[54] In addition to the deprivation of life, threats to life can also be considered impairments of the right.[55] In particular, the right to life comprises Switzerland's *obligations to*

[53] KLEY-STRULLER, ANDREAS, Europäische Kommission für Menschenrechte, decision on admissibility of 4 December 1995, *Noël Narvii Tauira and 18 others v. France* (appeal no. 282044/95), AJP 1997, pp. 318, 319.
[54] TSCHENTSCHER, AXEL, Art. 10 BV, in: WALDMANN, BERNHARD ET AL. (eds.), Bundesverfassung, Basler Kommentar 2015, Art. 10, N 9.
[55] TSCHENTSCHER (fn. 54), Art. 10, N 10. Also according to Scheffer, Markus, Beeinträchtigung von Grundrechten, in: MERTEN, DETLEF, HANS-JÜRGEN PAPIER (EDS.), Handbuch der Grundrechte in Deutschland und Europa, Vol. VII-2,

protect, including cases in which life is threatened by natural disasters such as climate change.[56] Today, adequate environmental legislation (and thus also adequate CO_2 legislation) is part of the indispensable measures that must be taken by the state to protect the lives of its citizens;[57] the scope of Art. 74 Const. is recognized to include well-being as well.[58] The obligation to protect applies either in situations of concrete impairment of fundamental rights (i.e., at least risk to life) or if such impairment might occur with a certain probability.[59]

73. Climate change causes risks to life through natural disasters such as heat waves (margin number 46); even the court of previous instance recognizes that heat waves are now more frequent and more intensive (margin number 43). The risk of climate change-induced increased mortality particularly affects the appellants (margin number 46 et seq.). Viewed in this light, global warming results in a *new vulnerable population group* ("most vulnerable group"): older women. The state has a special obligation to protect this population group.

74. In the decision regarding the *Mühleberg nuclear power plant*, the Federal Supreme Court considered the "low probability of occurrence of damage" as sufficient to give rise to the legislator's obligation to protect neighbors of nuclear power plants.[60] The obligation to protect must apply in the present case *a fortiori*: regarding heat waves, climate change has undisputedly already begun, and the probability of heat-induced deaths – particularly in the especially vulnerable population group to which the appellants belong – has been scientifically proven, based on statistics (margin number 46 et seq.). It is irrelevant that the facts of the cases differ with respect to spatial proximity: for the risk induced by heat waves, epidemiological (i.e., statistical) data and scientific conclusions based on them must be taken into account, instead of spatial proximity, in order to do justice to the special features of the intrinsically diffuse and complex phenomenon of global warming (margin number 45).

Heidelberg 2007, p. 159, it is not necessary to wait for the impairment to begin: the danger of a violation suffices.

[56] TSCHENTSCHER (fn. 54), Art. 10 N 18.

[57] MÜLLER, JÖRG PAUL AND MARKUS SCHEFER, Grundrechte in der Schweiz, Im Rahmen der Bundesverfassung, der EMRK und der UNO-Pakete, Bern 2008, p. 54.

[58] TSCHANNEN, PIERRE, Kommentar zum Umweltschutzgesetz, 2nd ed. 2004, Art. 1, N 19.

[59] WALDMANN, BERNHARD, Art. 35 BV, in: WALDMANN, BERNHARD et al. (eds.), Bundesverfassung, Basler Kommentar 2015, Art. 35, N 43.

[60] BGE 140 II 315 E. 4.8.

75. The larger the group of people negatively affected is, the stronger their protection through fundamental rights.[61] The fact that besides the appellants, the general population would also benefit if the Confederation assumed its obligation to protect (as is the case with regard to neighbors of nuclear power plants) does not alter the obligation to protect in any way.

76. If the area of climate change is not to be a legal vacuum in terms of fundamental rights that is mostly beyond the reach of judicial review,[62] but rather a space in which state obligations to protect apply as they do in all other spaces, then these obligations apply *at least* with respect to older women and thus to the appellants as members of a most vulnerable group. Appellants 4 and 5 are additionally particularly affected because they suffer from respiratory diseases and are thus exposed to an even higher risk of mortality (margin number 51).

77. The state must take the *legal and factual measures required to protect fundamental rights*.[63]

With respect to the *climate target* and with a view to the constitutional obligations to protect, the respondents, represented by DETEC, must *at least* work toward Switzerland making its contribution to the "well below 2°C target" agreed in the Paris Agreement (margin number 30). As shown above in section 2.3.1, greenhouse gas emissions are to be reduced by at least 25 % by 2020 and at least 50 % by 2030, each compared with 1990 levels, to achieve this end. To this end, all the necessary measures must be taken and implemented effectively.

The scope of the obligation to protect is measured against the precautionary principle enshrined in Art. 74 (2) Const. According to the precautionary principle, the state must protect "the population" – i.e., each member of the population – in its natural environment *preventively*. With reference to the gradations of the precautionary principle developed in the case of the Mühleberg nuclear power plant,[64] the risks that *non-compliance with the "well below 2°C target"* entails are "*absolutely impermissible*" in terms of the precautionary principle (see on this in detail request, sections 5.4.1.3 and 5.3). This must apply in the present case as well with regard to the obligation to protect: the scope of the state's obligation to protect most vulnerable population groups from *risks to life* due to

[61] SCHEFER, MARKUS, Die Beeinträchtigung von Grundrechten, Zur Dogmatik von Art. 36 BV, Bern 2006, p. 50.
[62] BGE 140 II 315 E. 4.7.
[63] WALDMANN (fn. 59), Art. 35, N 49.
[64] BGE 139 II 185 E. 11.3.

natural disasters (Art. 10 Const.) cannot be smaller than the obligation of the state to take preventive action.

It follows from this that the state must ensure, regarding the *measures to reduce greenhouse gas emissions* in the context of its obligation to protect, *that taken together, they suffice to achieve the target and that they are applied correctly.*

78. No reasons whatsoever exist to justify Switzerland not fulfilling its state obligation to protect. The Confederation is very well informed about the climate risks and must therefore take measures to protect the affected population. In particular, Switzerland cannot use the "small country" argument as justification. After all, the reductions calculated by the IPCC necessary to achieve the target can only result in achieving the "well below 2°C target" if *all* the parties to the Agreement addressed fulfill them. If all governments were to act like the Swiss government, global warming would significantly exceed 2°C.[65]

For the *question of entering into the matter of the case* and thus the question of *potential infringement* in a fundamental right, this question can remain unanswered, however. Only when examining whether the contested omissions in climate protection are unlawful in terms of Art. 25*a* APA must it be reviewed whether the fundamental and human rights have been – unjustifiably – *violated*.

2.5.2.2 Violation of the appellants' right to life (Art. 2 ECHR)

79. According to the case law of the European Court of Human Rights (ECtHR), the right to life in terms of Art. 2 ECHR requires the signatories to positively protect life.[66] Art. 2 ECHR comes into play if certain activities are so harmful to the environment that they endanger being alive. The case law regarding Art. 2 ECHR does not require death to occur.[67]

80. In order to fulfill its obligation to protect, the state is required to avert any threat to the right to life from environmental disasters *preventively*. To this end, it

[65] CLIMATE ACTION TRACKER, Switzerland, http://climateactiontracker.org/countries/switzerland *(request, exhibit 22)*.
[66] Manual on human rights and the environment, Council of Europe Publishing, Strasbourg 2012, p. 18; *L.C.B. v. the United Kingdom*, application no. 23413/94, paragraph 36*; Paul and Audrey Edwards v. the United Kingdom*, application no. 46477/99, paragraph 54; *Öneryildiz v. Turkey* [GC], application no. 48939/99, paragraph 71; *Budayeva and Others v. Russia*, application no. 15339/02, paragraph 128.
[67] Manual on human rights and the environment (fn. 66), p. 35.

must establish the necessary regulatory regime[68] and "administration."[69] These must take into account the special circumstances of a particular situation and the level of risk.[70]

81. When determining the scope of the obligation to protect, the ECtHR regularly relies on international environmental rules[71] and principles[72] (such as the "no-harm-rule"[73]) and the precautionary principle.[74] Especially the Paris Agreement, the works of the IPCC and the precautionary principle (margin number 77) should be decisive for the ECtHR in the present case.[75]

82. The scope of the obligation to protect in terms of Art. 2 ECHR is thus at least as large as that in terms of Art. 10 (1) Const. (margin number 77).

83. The infringement of Art. 2 ECHR is simultaneously a violation of Convention law, since the infringement cannot be justified (Art. 2 (2) ECHR).

84. Besides, it is widely recognized today – for example by the *Office of the United Nations High Commissioner for Human Rights* (OHCHR) – that climate change represents a *human rights crisis* and that international human rights law obligates all states to take the necessary steps with respect to law, policy, institutions and public expenditures to protect people from harm.[76]

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[68] On regulatory inaction also FLUECKIGER, ALEXANDRE, Droits de l'homme et environnement, in HERTIG, RANDALL MAYA AND MICHEL HOTTELIER, Introduction aux droits de l'homme. Genève, 2014, pp. 606–620, p. 610; PÉTERMANN, NATHANAËL, Les obligations positives de l'Etat dans la jurisprudence de la Cour européenne des droits de l'homme Théorie générale, incidences législatives et mise en œuvre en droit suisse, pp. 117 et seq.

[69] *Öneryildiz v. Turkey* [GC], application no. 48939/99, paragraph 89; *Budayeva and Others v. Russia*, application no. 15339/02, paragraph 129.

[70] *Öneryildiz v. Turkey* [GC], application no. 48939/99, paragraph 90; *Budayeva and Others v. Russia*, application no. 15339/02, paragraph 132.

[71] *Borysiewicz v. Poland*, application no. 71146/01, paragraph 53.

[72] Manual on human rights and the environment (fn. 66), p. 31.

[73] Manual on human rights and the environment (fn. 66), p. 149.

[74] *Tătar v. Romania*, application no. 67021/01, paragraph 120; *Borysiewicz v. Poland*, application no. 71146/01, paragraph 53; also *Urgenda Foundation vs. The State of the Netherlands*, ECLI:NL:GHDHA:2018:2610, 9 October 2018, paragraph 43, https://www.urgenda.nl/wp-content/uploads/ECLI_NL_GHDHA_2018_2610.pdf.

[75] Also BÄHR, CORDELIA, URSULA BRUNNER, KRISTIN CASPER AND SANDRA LUSTIG, KlimaSeniorinnen: Lessons from the Swiss senior women's case for future climate litigation, Journal of Human Rights and the Environment, Vol. 9 No. 2, September 2018, pp. 194–221, https://www.elgaronline.com/view/journals/jhre/9-2/jhre.2018.02.04.xml#ref_bib-092, pp. 209, 207 and footnote 92 with reference to RODA VERHEYEN, Climate change damage and international law: prevention duties and state responsibility (Leyden 2005), p. 191.

[76] ZR AL HUSSEIN, 'Burning Down the House', December 2015, http://www.ohchr.org/EN/NewsEvents/Pages/BurningDowntheHouse.aspx; OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), Understanding Human Rights and Climate Change, http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf; Oslo Principles on Global Obligations to Reduce Climate Change, 1 March 2015, https://law.yale.edu/system/files/area/center/schell/oslo_principles.pdf; for context BÄHR ET AL. (fn. 75), p. 218.

Only recently, the *UN Special Rapporteur on Human Rights and the Environment* again issued a statement – in light of current events with respect to Ireland – on the question of the obligation to protect people from damages due to climate change, which must apply analogously to Switzerland:

> *"There is **no doubt** that **climate change is already violating the right to life and other human rights today**. In the future, **these violations will expand** in terms of geographic scope, severity, and the number of people affected **unless effective measures are implemented in the short term to reduce greenhouse gas emissions** and protect natural carbon sinks. The Government of Ireland has **clear, positive, and enforceable obligations to protect against the infringement of human rights by climate change**. It must reduce emissions as rapidly as possible, applying the maximum available resources. This conclusion follows from the nature of Ireland's obligations under international human rights law and international environmental law."*[77]

In the same vein, at the most recent climate conference in Katowice, *UN Independent Human Rights Experts* called on the signatories to exercise their obligations to protect:

> *"(…) as human rights experts we urge States to rapidly deploy effective actions capable of achieving the 1.5°C target in the Paris Agreement. (…) as recognized in the Paris Agreement, **States must ensure that all actions taken to address climate change are in full accordance with their human rights obligations**."*[78]

2.5.2.3 Violation of the appellants' right to respect for private and family life (Art. 8 ECHR)

85. The ECHR also derives a positive obligation of the state to protect fundamental rights under threat from the right to respect for private and family life (Art. 8 ECHR).[79] Such an obligation to protect exists regarding cases of

[77] BOYD, DAVID R., UN Special Rapporteur on Human Rights and Environment, Statement on the human rights obligations related to climate change, with a particular focus on the right to life, 25 October 2018, margin number 58, https://www.ohchr.org/Documents/Issues/Environment/FriendsIrishEnvironment25Oct2018.pdf.
[78] Joint statement of the United Nations Special Procedures Mandate Holders on the occasion of the 24th Conference of the Parties to the UNFCCC, 6 December 2018, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23982&LangID=E
[79] *López Ostra v. Spain,* application no. 16798/90, paragraph 51.

environmental degradation with negative effects in health, physical integrity or private and family life.[80]

86. The risks to the appellants' health, physical integrity and well-being due to global warming are comparable to those in the cases affirmed by the ECtHR under Art. 8 ECHR[81] or involve a greater intensity of infringement. In this vein, excessive greenhouse gas emissions are similar to harmful air pollution[82] and are to be considered as dangerous activities by a state and/or private entities in the context of Art. 8 ECHR.

87. The appellants have shown that their health is impaired by global warming, which is continually increasing in the absence of further measures, and by the resulting strongly increasing number of hot days, to such a degree that an increasingly frequent infringement of this right under Convention law must be assumed. Following *Atanasov v. Bulgaria,*[83] an increased mortality rate is considered evidence of adverse health impacts; but in contrast to the appellants in *Atanasov v. Bulgaria,*[84] the appellants have provided clear evidence of the increase in the mortality rate; section°2.3.3 above.

88. The scope of the obligation to protect in terms of Art. 8 ECHR must also correspond to that in terms of Art. 10 (1) Const. (see above margin number 77).

89. The infringement of Art 8 ECHR is not justified; on this see request, section 5.6.4 and appeal, margin number 37. Besides, concerning the question of entering into the matter of the case and thus the question of potential infringement in a

[80] ECtHR, Factsheet - Environment and the European Convention on Human Rights, June 2016, www.echr.coe.int/Documents/FS_Environment_ENG.pdf; *Fadeyeva v. Russia*, application no. 55723/00, paragraph 68; *Kyrtatos v. Greece*, application no. 41666/98, paragraph 52; *Dubetska and Others v. Ukraine*, application no. 30499/03, paragraph 105.

[81] *Deés v. Hungary,* application no. 2345/06 (violation of Art. 6 (1) and Art. 8 ECHR)*, Grimkovskaya v. Ukraine*, application no. 38182/03 (violation of Art. 8 ECHR); *Bor v. Hungary,* application no. 50474/08 (violation of Art. 6 (1) and Art. 8 ECHR); *Fadeyeva v. Russia,* application no. 55723/00 (violation of Art. 8 ECHR)*; Moreno Gómez v. Spain,* application no. 4143/02 (violation of Art. 8 ECHR); *Guerra and Others,* application no. 14967/89 (violation of Art. 8 ECHR); *Dzemyuk v. Ukraine*, application no. 42488/02 (violation of Art. 8 ECHR)¸ *Brincat and Others v. Malta,* application no. 60908/11 (violation of Art. 2 and 8 ECHR); *McGinley v. the United Kingdom,* application no. 21825/93 (obligation to protect in terms of Art. 8 ECHR confirmed, but no violation in this concrete case because appellants had not exhausted domestic remedies); *López Ostra v. Spain,* application no. 16798/90 (violation of Art. 8 ECHR); *Guerra and others v. Italy,* application no. 14967/89 (violation of Art. 8 ECHR)*; Giacomelli v. Italy,* application no. 59909/00 (violation of Art. 8 ECHR)*; Brânduse v. Romania,* application no. 6586/03 (violation of Art. 8 ECHR)*; Di Sarno and Others v. Italy,* application no. 30765/08 (violation of Art. 8 ECHR)*.*

[82] *Fadeyeva v. Russia,* application no. 55723/00 (violation of Art. 8 ECHR)*.*

[83] In *Ivan Atanasov v. Bulgaria*, application no. 12853/03, paragraph 76.

[84] In *Ivan Atanasov v. Bulgaria*, application no. 12853/03, paragraph 76, the ECtHR criticized that "there are no materials in the case file to show that the pollution in and around the pond has caused an increase in the morbidity rate of Elshitsa's residents ...".

fundamental right, this question can remain unanswered (margin number 78 above).

2.5.3 The appellants' being particularly affected

2.5.3.1 The legal statements of the court of previous instance (E. 7.2 and 7.3)

90. In E. 7.2, the court of previous instance rightly points out that actual actions by the state (which, in terms of Art. 25*a* APA, can also consist of omissions), too, can infringe on legal positions worthy of protection. For this reason, Art. 25*a* APA creates appropriate legal protection against real acts.

91. Contrary to the subsumption by the court of previous instance (on this see the following section 2.5.3.2), *its general legal statements support that the appellants are particularly affected*, as they had already explained in detail in the request (section 7.5) and in the appeal (sections 2.3.3.1 and 2.3.3.2): The small population group of the appellants – consisting mainly of women at least 75 years of age – *is exposed to a significantly higher degree than the general population to the risk of dying or their physical integrity being infringed upon during a climate change-induced heat wave and is thus particularly affected* (section 2.3.3 above). This is also true not least of appellants 2 – 5, who display concrete heat-induced ailments (appellants 2 and 3) or who have an even higher mortality risk because of respiratory diseases (appellants 4 and 5) (request, margin number 101).

These significantly increased risks of mortality and morbidity are decisive for the question of being particularly affected.

92. Contrary to the assessment of the court of previous instance, the present matter in dispute is not an *actio popularis*. As will be shown in the following, the general legal statements made by the court of previous instance itself also come to this result (E. 7.2 and 7.3 of the judgment under appeal). Besides, it should be undisputed that the appellants' climate change-induced mortality and heat-induced diseases are not "cases of minor importance." Although the court of previous instance quotes a statement in BGE 140 II 315, E. 4.4 in this regard in E 7.2, it does not go into this in more detail in the present context.

93. According to the court of previous instance, making the distinction from *actio popularis* requires the following, which must be "carefully examined": it "must be

determined separately for each area of the law"; "a practical and reasonable distinction is required which takes into account the need for legal relief and the further options for legal protection" (E. 7.2).

In its own subsumption (E 7.4.3), however, the court of previous instance specifically does not take into account these criteria developed by case law. Yet these requirements underline the fact that the appellants are particularly affected and the circumstance that the present case is not *actio popularis*:

- *"Careful examination":* In its subsumption in E 7.4.3, the court of previous instance specifically does not provide a "careful examination." In particular, sufficient examination of the question *whether and how, also in comparison with the general public*, the group of 75- to 84-year-old women, to whom the appellants 2 to 5 and a large number of the members of appellant 1 belong (margin number 60) *are affected in their health and in their lives by climate change-induced heat waves* (margin number 15). The court of previous instance quotes BGE 144 II 233 E. 8.4 (margin number 94); however, contrary to that decision, it does *not* review *how strongly* the impacts of the heat waves on the appellants are to be weighted – compared with the general public; instead, it argues that everyone is impacted somehow and in different ways, for which reason the appellants cannot be particularly affected.
- *"Separate assessment for each area of the law":* In its subsumption in E. 7.4.3, the court of previous instance reduces "climate" as an area of law as well as the inherently diffuse and complex phenomenon of global warming to absurdity by determining that because of the special features of global warming – everyone is affected somehow – *no legal protection at all* is to be ensured in the area of real acts. Conducting an *assessment specifically tailored to the climate* requires *basing the argument on epidemiological (i.e., statistical) data and scientific conclusions drawn from them as to being particularly affected* instead of on spatial proximity, as in the decisions quoted by the court of previous instance in E. 7.3; see on this section 2.3.3 above.
- *The "practical and reasonable distinction which takes into account the need for legal relief and the further options for legal protection":* It is undisputed that preventive options for legal protection other than on the basis of Art. 25*a* APA do not exist (margin number 66 above). The consequences of global warming are immense, as the court of previous instance too described in part (E. 7.4.2). This is true not least if the

climate change-induced *deaths* (section 2.3.3 above), which the court of previous instance did not mention (see also margin numbers 15 and 60), are taken into account. Today, it is difficult to imagine an area of the environment in which there were a greater need for legal protection. Accordingly, the preamble of the Paris Climate Agreement reads:

> *"Acknowledging that **climate change is a common concern of humankind**, Parties should, when taking action to address climate change, respect, promote and consider their **respective obligations on human rights, the right to health**, (...) **and people in vulnerable situations** (...) intergenerational equity".*

The people in vulnerable situations – they include *at least*, as shown above in section 2.3.3, women of at least 75 years of age and thus the appellants 2 – 5 and a large number of [the members of] appellant 1 – have a strong need for legal protection regarding sufficient protection from the consequences of global warming that threaten their lives and their health. Thus, they have a right to have the demands formulated in the request assessed and approved.

94. All of the decisions quoted by the court of previous instance in E. 7.3 also support that the appellants are particularly affected. There is no indication to what extent the court of previous instance bases its generally worded subsumption (E. 7.4.3) on these decisions at all.

In more detail:

– On BGE 140 II 315, E. 4.7 *(Mühleberg nuclear power plant)*: When reviewing whether they were particularly affected, the Federal Supreme Court considered "risk exposure" to a special source of danger to be a prerequisite for *locus standi*.[85] The appellants made numerous statements regarding this decision (request, section 7.5 and appeal, section 2.3.3). As explained just above (margin number 93), in the area of climate, it is *never* a case of *spatial* proximity to the matter in dispute. Instead, an assessment tailored specifically to the climate requires that risk exposure with respect to the consequences of global warming (the "special source of danger") is to be *assessed on the basis of statistical – in the present context epidemiological – data and*

[85] BGE 140 II 315 E. 4.6 *(Mühleberg nuclear power plant);* this in place of the test of whether "a person is affected more than others and has a special, noteworthy and close relationship to the matter in dispute" used by the Federal Administrative Court concerning clean air policy in relation to Art. 6 in conjunction with Art. 48 APA, – DFAC 2723/2007 of 30 January 2008, E. 6.

scientific conclusions drawn from them. These data and studies permit one to determine and delineate a particularly affected group of people (E. 4.7). The fact that the general public would *also* be protected from negative consequences of global warming changes nothing about the risk exposure. A major accident in a nuclear power plant would also have impacts not only on its direct surroundings, but rather on all of Switzerland and, what is more, also on all of Europe. The purpose of Art. 25*a* APA is *to help enforce material law, thus avoiding gaps in legal protection*. It must be prevented that appeals in the area of prevention are practically ruled out and that *they are largely exempted from judicial review* (E. 4.7)

- According to BGE 120 Ib 379, E. 4, "there is *doubtless an increased danger* for the neighboring residents who would be affected *most* directly by the impacts of a major accident" (emphasis added). If one wishes to take account of this decision, which was not pursuant to Art. 25*a* APA, at all, then the decision can only result in the following conclusion: the senior women over 75 years of age, and thus the appellants 2 – 5 and a large number of [members of] appellant 1, are affected most directly by the impacts of climate change-induced heat waves, as shown (section 2.3.3); thus there clearly exists an increased danger for them and thus also an interest worthy of protection.
- It must be noted regarding BGE 121 II 176, E. 3 that the criterion of "spatial proximity" cannot be applied in the area of climate; the reasons for this were given just above in margin number 93. Therefore, it is not possible to take guidance from the decision for the questions to be assessed in the present case.
- Concerning BGE 144 II 233 (margin number 70 above): In contrast to the court of previous instance, the Federal Supreme Court reviewed in a first step (E. 8.2 and 8.3) whether the *reflex triggered by a real act is relevant to fundamental rights*. In the present case, as shown above, this must be answered in the positive regarding the appellants (sections 2.5.2.1 – 2.5.2.3). According to BGE 144 II 233 E. 8.4, if many persons were affected by an impact, *the weighting of the impact on the individual* was decisive. The statistically proven *consequences for mortality and morbidity* (section 2.3.3) show that the consequences of not taking the necessary measures to achieve the "well below 2°C target" or "pursuing efforts to limit the temperature increase to 1.5°C" *are severe* for the appellants. Omissions in climate protection result in

ever more frequent and ever stronger heat waves (margin number 43). The lives and health of the members of appellant 1 as well as appellants 2 – 5 are at risk during these heat waves. This is particularly true of appellants 4 and 5, who suffer from respiratory diseases. The health risks have already manifested in the past for appellants 2 – 4 (section 2.3.3).

95. In its description of the case law, the court of previous instance entirely omits important precedents to which the appellants referred:

- In cases of appeals regarding aircraft noise, it is also generally recognized that *a very large group of people can have locus standi without the claim being qualified as an actio popularis* (FAC A-101/2011 of 7 September 2011, E. 4.3 and E. 4.4; request, margin number 276; appeal, margin number 68). Accordingly, the circumstance that 5.4 % of the total population (as of 1 January 2016)[86] are women over 75 changes nothing about their being particularly affected in comparison with the general population.
- In cases of appeals against the construction of mobile phone towers, the Federal Supreme Court also affirmed *locus standi* even with a radiation intensity measuring well below the given thresholds and did not qualify appeals against mobile phone towers as inadmissible *actio popularis*, but rather ruled that the appellants were affected (BGer judgment 1A.220/2002 of 10 February 2003, E. 2.4.3; BGE 128 II 168 E. 2.3; request, margin number 277; appeal, margin number 69).

96. For all these reasons mentioned above, the appellants are particularly affected in terms of the case law.[87] The court of previous instance violates Art. 25*a* APA by denying the appellants the status of being particularly affected, as will be shown in detail in the following.

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[86] Figure calculated on the basis of the dataset *Provisorische Bilanz der ständigen Wohnbevölkerung 2016 nach Jahr, Staatsangehörigkeit, Geschlecht, Kanton, Alter und Demographische Komponente* of the Federal Statistical Office (https://www.pxweb.bfs.admin.ch/Selection.aspx?px_language=de&px_db=px-x-0102020000_202&px_tableid=px-x-0102020000_202/px-x-0102020000_202.px&px_type=PX).

[87] Here we quote from an older cantonal decision in which it was affirmed that an asthmatic who had asked for an appealable ruling on various legal requests in the area of air pollution prevention was particularly affected because the high level of air pollution worsened his health condition (decision *Regierungsstatthalteramt* [Office of the chief of administration and police] Bern of 13 March 2008, E. 4.6, p. 6): "Because of his asthma, the appellant displays particular sensitivity because of which air pollution causes far more serious adverse health impacts for him than for the average citizen [...]. Thus, in contrast to the view of the respondent, he also displays the necessary particular close connection, which must be taken into account. *Even if a reduction of air pollution benefited all persons in the area of the city XXX in the end, there does exist a direct and special proximity of the appellant to the emissions because of his situation." (Appeal, exhibit 9)*

2.5.3.2 Subsumption by the court of previous instance is arbitrary and in violation of the law (E. 7.4.3)

97. The court of previous instance *cannot derive* from the legal deliberations summarized above in section 2.5.3.1 that women 75 years of age and older are "not particularly affected" by the impacts of global warming. *It does not even attempt to do so.*

98. Instead, it concludes simply and *directly*, *without subsumption under the legal foundations presented*, from a "brief synopsis of possible impacts of climate change," that the appellants are "not particularly affected" (E. 7.4.3, sentence 1). Besides the fact that this conclusion, which is decisive for the outcome of the case, is incorrect (sections 2.3.3 and 2.5.3.1), the court of previous instance does not base its deliberations on the legal foundations it presented itself in E. 7.2 and 7.3, but bases its conclusion on facts of the case that were determined in an incomplete manner and in violation of the right to be heard (margin numbers 15 and 60): The "brief synopsis of possible impacts of climate change" includes *neither* explanations on whether older women are affected *nor* on climate change-induced deaths (on this also margin numbers 15, 43, 44 and 60).

99. Although the court of previous instance explicitly acknowledges in sentence 2 of E. 7.4.3 that "different groups are affected in different ways," it draws astonishing conclusions: being affected ranges "from economic interests to adverse health effects affecting the general public." Contrary to the statements of the court of previous instance, however, it cannot be concluded from the circumstance that global warming *also* causes impacts on the economy and "health effects affecting the general public" that the appellants are not *particularly* affected. Different groups are also affected in different ways by a major accident in a nuclear power plant – yet case law has not denied that neighboring residents are particularly affected. On the contrary:[88] the greater the spatial proximity of a residence to an atomic power plant, the more strongly affected the residents are, as a matter of principle.

Regarding global warming, as it is not a matter of spatial proximity, the assessment *is to be based on statistical data and scientific studies as to being particularly affected by the consequences of global warming* (margin

[88] BGE 140 II 315 E. 4.7.

number 45). Concerning the impacts of heat waves on health and life, it is possible to *determine and delineate a particularly affected population group on the basis of the findings of epidemiological studies*, as shown above in section 2.3.3 (also margin number 94); women at least 75 years old, and thus the appellants 2 – 5 and a large number [of the members of] appellant 1 belong to this population group.

100. The court of previous instance repeats in the subsumption that the "proximity of the appellants to the matter in dispute" is lacking. This statement is incorrect.

The appellants are subject to a higher risk than the general public *concerning the probability of the realization of the danger* as well as the *severity of the adverse effects* and thus have a *particular proximity* to the matter in dispute (see especially BGE 123 II 376 E. 4bb; BGE 121 II 176, E. 3a). Although it is unclear whether this case law, which was developed under Art. 48 APA, actually also directly applies to Art. 25*a* APA, since being affected in fundamental rights is decisive in Art. 25*a* APA, it should be emphasized that the probability of women 75 or older being affected by climate change-induced deaths and adverse health impacts is significantly higher than the probability "with respect to" the general public. This is clearly supported by scientific evidence and clearly foreseeable (section 2.3.3).

Moreover, *impairment through deaths has greater weight* than the impairment of "economic interests and health of the general public," which the court of previous instance described only in vague terms.

101. The statements of the court of previous instance on the lack of proximity to the matter at hand can probably be attributed not least to its lacking review of fundamental rights (margin number 59 above). It is not apparent to what degree a state obligation to protect economic interests exists, for which reason there is no particular proximity to the Confederation's climate protection activities. Particular proximity concerning the "health of the general public" – which is described in decidedly general terms – cannot be discerned, and a state obligation to protect cannot be derived.

102. Besides, the fact that the state may have obligations to protect multiple most vulnerable groups of the population and can thus violate these obligations to protect in multiple ways does *not* mean, conversely, *that it has no obligation to protect at all*.

103. As stated in BGE 140 II 315, E. 4.7, Art. 25*a* APA is to help enforce material law, thus avoiding gaps in legal protection. *The application of Art. 25a APA is to prevent the area of climate being largely beyond the reach of judicial review.*

104. Finally, it must be stated the 2007 decision (DFAC 2007/1) from the court of previous instance itself, which it invoked as grounds for its subsumption, permits no other conclusion than that the court of previous instance wrongly dismissed the appeal.

The appellants in the case of DFAC 2007/1 based their legitimation partly on the fact that they were members of the initiative committee "Ja zum Trolleybus" or that they dedicated themselves to this cause as members of cantonal parliaments by interpellation. In part, they argued that they were direct neighbors of the new diesel bus line against which the appeal was directed. At the time, the court of previous instance determined: "Although being affected in terms of larger amounts of pollutants and noise for the last-mentioned persons or the affected quarters in general is *variously implied, it is not made concrete for the appellants in their capacity as neighboring residents*" (DFAC 2007/1, E. 3.8, emphasis added). Thus, the present case is not comparable to it: *the appellants made their being affected as a population group most vulnerable to the consequences of climate change-induced heat waves concrete in detail* (request, section 7.5 and appeal, sections 2.3.3.1 and 2.3.3.2). In addition, DFAC 2007/1 was solely about Art. 48 APA; no violations of fundamental rights were asserted.

It is explained in DFAC 2007/1, with reference to the judgments BGer 1A.148/2005 E. 3.5 and 3.6 of 20 December 2005 and BGer 1A.123/2003 E. 3.5.3 of 7 June 2004 that the additional amount of traffic, and thus the increase in noise and pollutants, *was not at least 10 %*, for which reason the appellants could not be particularly affected in comparison to the general public (E. 3.9). Conversely, that means: if certain population groups affected by noise, pollutants, or also the consequences of climate change are impacted more than 10 % more severely than the general population, then they are particularly affected. In the present case, this is clearly true of the appellants. The summer of 2015 (June through August) shall serve as an example. During this time, the mortality risk of 75- to 84-year-olds increased by 9.7 %, that of the general public, in contrast, by only 5.4 %.[89] Accordingly, with the considerable difference

[89] FOEN (fn 32), p. 84.

of 4.3 % percentage points compared with the mortality risk of the general public, *the mortality risk of 75- to 84-year-olds* was *increased by roughly 80 %*!

105. Conclusion regarding the question of being particularly affected: by incorrectly negating that the appellants are particularly affected, the judgment under appeal violates Art. 25*a* APA.

2.5.4 Interpretation of Art. 25*a* APA in terms of the Aarhus Convention and the ECHR

106. The appellants' request for issuance of a ruling in terms of Art. 25*a* APA is justified all the more as it is in agreement with Switzerland's obligations arising from the Aarhus Convention of 25 June 1998.

107. The third pillar of the Aarhus Convention concerns access to courts in environmental matters (Art. 9 Aarhus Convention). It provides legal protection against decisions, actions and omissions regardless of the form of official action (Art. 9 (3) Aarhus Convention), and thus also against real acts.[90]

Taking the "meaning and the spirit" of Aarhus Convention into account speaks for generous provision of legal protection.[91]

108. The interpretation of Art. 25*a* APA conforming to international law comes to the same conclusion, i.e., especially the interpretation in the light of Art. 6 and 13 ECHR (on the applicability of Art. 6 ECHR section 2.6.2, of Art. 13 ECHR section 2.6.3). Not least, the circumstance must be taken into consideration that it was specifically the purpose of Art. 25*a* APA to fill a serious gap in the system of legal protection.[92]

2.5.5 Overall conclusion of section 2.5

109. If the court of previous instance had reviewed the question whether the appellants are affected in their rights or obligations and whether they have an interest worthy of protection as provided for in Art. 25*a* APA, it would have had

[90] BGE 141 II 233 E. 4.3.4.
[91] THURNHERR, DANIELA, Die Aarhus-Konvention in der Rechtsprechung des Bundesgerichts und des Bundesverwaltungsgerichts, Eine Spurensuche, Umweltrecht in der Praxis 2017, pp. 510 et seq., 523.
[92] HÄNER, ISABELLE, Art. 25*a*, in WALDMANN, BERNHARD UND PHILIPPE WEISSENBERGER (EDS.), Praxiskommentar Verwaltungsverfahrensgesetz (VwVG), Zurich 2016, N 3 and footnote 9 with reference to, *inter alia*, BGE 121 I 87 E. 1b and BGE 128 II 156 E. 4b.

to come to the conclusion, on the basis of an assessment of the right to life (Art. 10 Const. and Art. 2 ECHR) and to health (Art. 8 ECHR), that the appellants fulfill these prerequisites for entering into the case.

110. The court of previous instance instead denied that the appellants are affected in a way that differs from the general population; this is an additional prerequisite developed in case law with reference to Art. 25*a* APA. The court of previous instance concluded this directly from an overview of the potential impacts of global warming on animals, plants, the economy and other persons without dealing with the legally relevant facts of the case at all (margin number 15) and in violation of the right of the appellants to be heard (margin number 60).

This conclusion by the court of previous instance is incorrect: on the contrary, the appellants are clearly and in terms of case law affected in a way that differs from the general population, for which reason this is not *actio popularis*. Not least, this conclusion would have suggested itself to the court of previous instance if it had reviewed the question whether the appellants are affected in their rights or obligations and whether they have an interest worthy of protection – and had thus reviewed the violation of the appellants' fundamental and human rights.

2.6 Violation of the right to effective legal protection under Convention law (E. 8)

2.6.1 Preliminary remarks

111. According to Art. 6 (1) ECHR, every person has a right to a court hearing on disputes with respect to their rights and obligations under civil law. According to Art. 13 ECHR, there exists a right to effective remedy before a national authority if a fundamental right in terms of the ECHR has been violated.

A right to *domestic* judicial protection can arise *directly from international law*, from Art. 13 or Art. 6 (1) ECHR.[93]

112. The court of previous instance does not call into question that the appellants are basing their case on "rights under civil law" in terms of Art. 6 (1) ECHR. Nor

[93] SEFEROVIC, GORAN, Art. 189 BV in WALDMANN, BERNHARD ET AL. (eds.), Bundesverfassung, Basler Kommentar 2015, N 62 with reference to BGE 129 II 193 concerning a refusal of entry imposed by the Federal Council (Art. 13 ECHR) and the guiding decision BGE 125 II 417 concerning confiscation of propaganda (Art. 6 ECHR).

does it doubt that a right derived from domestic law exists and that this matter does not concern *actes de gouvernment*.

The appellants had made extensive statements on the "rights under civil law," both in the request and in the appeal to the court of previous instance, and had explained that

- the right to the protection of physical integrity is a right under civil law, following the consistent case law of the ECtHR (request, section 6.1.2.1 and appeal, section 2.4.4.1)
- concerning the dispute about the right to life in terms of Art. 10 (1) Const. and about the legality of application of CO_2 legislation, a right to be derived from domestic law exists (request, section 6.1.2.2 and appeal, section 2.4.4.2)
- this is not a case of *actes de gouvernement* because the state has no discretionary power concerning the question *whether* it seeks to achieve the "well below 2°C target" to fulfill its obligations arising from treaties as well as obligations on the basis of fundamental and Convention rights, even though it is recognized to have considerable latitude in terms of *how* to do so,[94] for which reason the appellants refer to possible remedies only as examples (demands stated in the request as well as request, section 6.1.2.4 and appeal, section 2.4.4.4).

113. Instead, the court of previous instance denies that the case concerns a "dispute of genuine and serious nature," i.e., a dispute whose *outcome is directly decisive* for the appellants (E. 8.4).

In their request, section 6.1.2.3 and their appeal, section 2.4.4.3, the appellants stated detailed grounds why the present case is a "dispute of genuine and serious nature"; they stand by these statements and refer to them. The appellants state grounds why the court of previous instance violated Art. 6 ECHR by denying the genuine and serious nature of the present dispute again in condensed form in the following in section 2.6.2 below.

114. The court of previous instance did not review the contested violation of Art. 13 ECHR at all, stating as grounds that this review was not necessary since Art. 6 ECHR was not applicable (E. 8.4). The appellants show in the following in

[94] On this also *Urgenda Foundation vs. The State of the Netherlands*, ECLI:NL:GHDHA:2018:2610, 9 October 2018, paragraph 67, https://www.urgenda.nl/wp-content/uploads/ECLI_NL_GHDHA_2018_2610.pdf.

section 2.6.3 that this opinion of the court of previous instance is not tenable, either.

2.6.2 Violation of Art. 6 (1) ECHR

2.6.2.1 No review of the question whether a sufficiently close connection exists between a right recognized under domestic law and the outcome of the proceedings (E. 8.3)

a. **Grounds stated by the court of previous instance**

115. In E. 8.3, the court of previous instance argued first and foremost that the actions demanded by the appellants would not directly contribute to greenhouse gas emissions being reduced. This subsumption has no basis in the wording of or the case law concerning Art. 6 ECHR (see the following sections 2.6.2.2 to 2.6.2.4 on the incorrect presentation of the legal bases as well). It is thus arbitrary.

116. The court of previous instance reviewed the "sufficiently close connection" required for the application of Art. 6 ECHR in particular *between the wrong parameters*. In particular, it did not examine the connection between a right recognized under domestic law and the outcome of the proceedings, which is required in terms of case law concerning Art. 6 ECHR[95] (also section 2.6.2.2).

Instead, the court of previous instance made statements on the connection between

- the *actions of the state in terms of the appellants' demands in the request* and
- the *reduction of greenhouse gas emissions* following from them.

However, *both* of these points belong to the parameter "outcome of the proceedings" (section 2.6.2.2 below), which for its part would have had to be contrasted with the domestic law invoked.

Yet the court of previous instance did not review this connection of the "outcome of the proceedings" and the "right recognized under domestic law," which was to be examined in terms of Art. 6 ECHR, at all. Even for this reason, the subsumption performed by the court of previous instance in E. 8.3 and 8.4 is

[95] Among numerous references *Mennitto v. Italy* [GC], application no. 33804/96, paragraph 23; *Zahnder v. Sweden*, application no. 14282/88, paragraph 22; *Gülmez v. Turkey*, application no. 16330/02, paragraph 28; *Fredin v. Sweden*, application no. 12033/86, paragraph 63.

materially incorrect. It is also completely beside the point, is thus arbitrary in terms of Art. 9 Const. and violates Art. 6 ECHR.

117. The appellants already demonstrated and stated grounds for the sufficiently close connection between the *outcome of the proceedings* and the *domestic law* invoked by the appellants in the request, section 6.1.2.3, and in the appeal, section 2.4.4.3. In the following, the appellants provide more detail on this topic with reference to the deliberations of the court of previous instance. First, they explain the "outcome of the proceedings" that would be expected if the appellants' legal requests were approved. They contrast this outcome of the proceedings with their rights recognized under domestic law and demonstrate that the outcome of the proceedings is directly decisive for the rights in question.

b. **Outcome of the proceedings**

118. With their request, the appellants seek to achieve a discontinuation of failures in climate protection on the part of the respondents, thus reducing excessive greenhouse gas emissions and the heat waves linked to them (sections 2.3.1 and 2.3.2).

In other words, the *outcome of the proceedings* they seek through the approval of the demands stated in the request is the *reduction of greenhouse gases and heat waves*.

119. Instead, the court of previous instance demands, within the parameter "outcome of the proceedings," a direct connection between the appellants' *demands stated in the request* and *the reduction of greenhouse gas emissions*.

This does not correspond to the case law of the ECtHR, but is circular reasoning.

120. Moreover, the assumptions made by the court of previous instance are incorrect.

Contrary to the statements of the court of previous instance, the implementation of the actions requested by the appellants and/or the discontinuation of the relevant omissions (in the following simply "actions") by the respondents would actually result in smaller amounts of greenhouse gases being emitted in Switzerland. *This is specifically the purpose of the demands which the appellants stated in their request*.

Accordingly, the DETEC as the specialized agency did not argue that the actions requested would not result in a reduction of greenhouse gases.

121. The grounds stated by the court of previous instance that neither preliminary legislative proceedings nor the requested provision of information to the public nor the other actions demanded by the appellants would be able to contribute to reducing greenhouse gas emissions in Switzerland must first be countered by stating that these actions were mentioned in the request as *examples* of potential actions and were also designated as such, with respect to substantiating the main demands concerning reducing CO_2 emissions to an amount that is not unconstitutional.

Instead of repeating the statements in the request, section 8 in detail in the following, it will be shown using the examples mentioned by the court of previous instance that its assumptions are incorrect.

122. *Reduction measures to achieve the current target of reducing greenhouse gases by 20 %:* Contrary to the incorrect and above all also selective description by the court of previous instance, the appellants assert various failures of application of the law whose discontinuation would have direct effects on reducing greenhouse gas emissions (section 2.3.2). If the failures of application of the law mentioned were corrected following the approval of the request, this would in the end result in reducing CO_2 emissions in Switzerland.

For example:

- If the responsible federal agencies were to obtain the reports of the cantons detailing the technical measures they adopted to reduce CO_2 emissions from buildings (demand 4a stated in the request), if this agency were to prepare a content-related assessment of the reports (demand 4b stated in the request) and if it were to review in particular whether the cantons were actually issuing state-of-the-art building standards for new and existing buildings (demand 4c stated in the request), then the responsible agency would have to determine that very many cantons are fulfilling their tasks in terms of Art. 9 CO_2 Act in a significantly insufficient manner. The Confederation would have various ways to respond to this insufficiency and to ensure the necessary reduction of emissions in the building sector with respect to the reduction target enshrined in Art. 3 CO_2 Act (margin number 41).
- If the importers of passenger cars were required to undertake realistic measurements of the CO_2 emissions of passenger cars instead of providing fictitious measurement data (demand 4g stated in the request), this would directly result in a reduction of greenhouse gases.

The court of previous instance overlooks in E. 8.3 that contrary to its statements specifically the measurement method practiced today, which does not provide correct, realistic emission data, has no basis in Art. 10 CO_2 Act (margin number 42).

123. *Preliminary legislative proceedings:* The preliminary legislative proceedings have significant creative power.[96] In this stage of proceedings, the course for future legislation is set in important ways; the structure and substance of the future enactments of law bear the mark of the Federal Council's drafts.[97] This is also true of climate legislation. The respondents themselves argue that they are working toward a reduction of greenhouse gas emissions through their actions in the context of the preliminary proceedings for CO_2 legislation.[98] However, the appellants demand that the respondents intensify their efforts and in particular that they orient them toward the goals of the Constitution (demands 1 and 3 stated in the request).

124. *Provision of information to the public:* Provision of information to the public (demand 1 stated in the request) brings about more knowledge about the changes in the climate and higher acceptance of climate protection measures among the general public, or more pressure from the public for intensified climate protection policy. This opens up further scope for action for the parliament and the individual parliamentarians toward stronger measures to reduce greenhouse gases. Moreover, heightened sensitivity on the part of the public can have the effect of individuals reducing their own greenhouse gas emissions.[99] Accordingly, Art. 41 (2) CO_2 Act states that public agencies are to inform the public about preventive climate protection measures. Besides, what has been stated here is also true of the period through 2030 (demand 3 stated in the request).

125. *Provision of information to the parliament:* Only if the parliament is fully informed about its obligations to protect and about what can and must be done to exercise its obligations to protect (the necessary emission reduction target

[96] KÜNZLI (fn. 10), N 14. Also MÜLLER, GEORG AND FELIX UHLMANN, Elemente einer Rechtssetzungslehre, 3rd ed. Zurich 2013, margin numbers 397 et seq., margin number 472.
[97] KÜNZLI (fn. 10), N 14. Extensively on this MÜLLER AND UHLMANN (FN. 96), margin numbers 397–399.
[98] Botschaft zur Totalrevision des CO_2-Gesetzes nach 2020, BBl 2018 247, p. 248: "(...) in particular, the Federal Council shall elaborate proposals for the further reduction of greenhouse gas emissions. The Federal Council fulfills this task with the present dispatch."
[99] TSCHANNEN, PIERRE, Kommentar USG, Art. 6 N 15, 25, 28 and 34. As of 1 June 2012, Art. 6a EPA was repealed and transposed to Art. 10e EPA because of the changes in connection with the ratification of the Aarhus Convention.

and possible measures) can it take action in terms of these obligations to protect. Specifically the dispatch forms the *basis for the discussion and decision-making* in Parliament.[100] The Federal Council and the agencies subordinate to it have the obligation and the task, with a view to climate policy that conforms to the Constitution, to inform the Parliament in such a way in their official statements – in dispatches on regulations by the parliament, in reports, in responses to parliamentary motions – that it can fulfill its obligations in terms of international law and the Constitution (demand 1 stated in the request). Contrary to the requirements of Art. 141 (2) a and g ParlA, and the even more specific Legislation Manual (*Gesetzgebungsleitfaden*)[101] and Dispatch Manual (*Botschaftsleitfaden*)[102], the documents of the respondents 1, 2 and 3 lack the information necessary for decision-making by parliament on the impacts on fundamental rights,[103] compatibility with superordinate law[104] and the impacts on future generations[105].[106] As the Legislation Manual of the FOJ also states, this information would be eminently important:

> *"(...) [this information] is* ***to prevent the Federal Council from submitting an unconstitutional regulatory draft to the two chambers of Parliament (...)****. For this reason,* ***it is eminently important that the constitutionality of regulatory drafts for enactment by the Federal Assembly is carefully reviewed in advance by the administration.****"*[107] (emphasis added)

Besides, what has been stated here is also true of the period through 2030 (demand 3 stated in the request). However, DETEC does not provide information about the constitutionally insufficient orientation of climate policy, neither in its

[100] BGE 138 I 61 E. 7.3.
[101] FEDERAL OFFICE OF JUSTICE, Gesetzgebungsleitfaden, 3rd ed. 2007, www.bj.admin.ch/dam/data/bj/staat/legistik/hauptinstrumente/gleitf-d.pdf, p. 182.
[102] FEDERAL CHANCELLERY, Botschaftsleitfaden, July 2018, p. 37 https://www.bk.admin.ch/bk/de/home/dokumentation/sprachen/hilfsmittel-textredaktion/leitfaden-fuer-botschaften-des-bundesrates.html.
[103] *In particular also the impacts on fundamental rights* – specifically also to protect persons such as the appellants – are to be explained in the dispatch, BIAGGINI, GIOVANNI, Art. 181 BV, in EHRENZELLER, BERNHARD, BENJAMIN SCHINDLER, RAINER J. SCHWEIZER, KLAUS A. VALLENDER KLAUS A. (eds.), Die schweizerische Bundesverfassung, St. Galler Kommentar, Zurich, St. Gallen 2014, N 10; MÄGLI, PATRICK, Art. 141, in GRAF, MARTIN, CORNELIA THELER AND MORITZ VON WYSS MORITZ (eds.), Kommentar zum Parlamentsgesetz vom 13. Dezember 2002, Basel 2014, N 18.
[104] The Federal Council is obligated to illuminate the compatibility of the regulatory drafts with international law in the dispatch; also MÄGLI (fn. 103), N 18.
[105] MÄGLI (fn. 103), N 24.
[106] On all this also KÜNZLI (fn. 10), N 12.
[107] FEDERAL OFFICE OF JUSTICE (fn.°101), p. 182.

most recent dispatch[108] nor in the earlier report[109] on the draft for consultation on climate law post-2020.

126. *Regulatory law (ordinances):* The court of previous instance then argues that the greenhouse gas emissions depend on the body issuing ordinances. One of the respondents is *also* such a body. The Federal Council can directly take action toward reducing greenhouse gases by means of more consistent rules in the CO_2 Ordinance that are more suitable for application. In particular demands 4e, 4f and 4h of the request are to be seen in this light. It should be noted in this context that the current decision *not to issue* legislative provisions covering certain content is *not legislative* and is thus a real act.[110]

127. *Interim conclusion concerning the "outcome of the proceedings":* If the appellants' request were approved and put into practice by DETEC, this would, contrary to the assumptions of the court of previous instance, actually bring about a reduction of greenhouse gas emissions and thus a reduction of the risk of summer heat waves.

Although *the exact extent* of the reduction of greenhouse gas emissions and of the reduction of heat waves cannot be predicted, this fact cannot be decisive. For *every additional ton of CO_2 contributes to further warming the climate* – as the Dutch court of first instance stated memorably in *Urgenda*: "[…] After all, it has been established that any anthropogenic greenhouse gas emission, no matter how minor, contributes to an increase of CO_2 levels in the atmosphere and therefore to hazardous climate change."[111]

The consequences of the additional greenhouse gas emissions also include the *accentuation of summer heat waves*. The appellants have shown, with scientific evidence, that more than half of hot days are caused by global warming and that the probability that a specific heat wave can be attributed to global warming is more than 75 %. Besides, the determination of the facts of the case by the court of previous instance in E. 7.4.2, which is worded in general terms, is in agreement with this statement of fact (section 2.3.3 above).

[108] Botschaft zur Totalrevision des CO_2-Gesetzes nach 2020, BBl 2018 247.
[109] DETEC, Klimapolitik 2016 (fn. 22).
[110] SEILER, HANSJÖRG, Bundesgerichtsgesetz BGG, Stämpflis Handkommentar, 2nd ed. Bern 2015, Art. 82, N 88.
[111] *Urgenda Foundation vs. The State of the Netherlands*, C/09/456689 / HA ZA 13-1396, 24 June 2015, margin number 4.79 https://www.urgenda.nl/wp-content/uploads/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf.

c. **Domestic law**

128. According to the ECtHR, the outcome of the proceedings in terms of Art. 6 ECHR must display a sufficiently close connection to the invoked *rights recognized under domestic law* (margin number 116 above). *Regardless of the case law of the ECtHR on Art. 6 ECHR, the court of previous instance, however, did not review domestic law at all* – and thus also did not review how the invoked rights recognized under domestic law relates to the outcome of the proceedings. The court of previous instance thus applied Art. 6 ECHR incorrectly. Moreover, Art. 6 ECHR is violated because of the violation of the right to be heard in this regard (section 2.4.3 above).

129. In the present case, the domestic law invoked is the right to life in terms of Art. 10 (1) Const. In section 2.5.2.1 above, it was explained that the right that the lives of appellants 2 – 5 and the members of appellant 1 are to be protected from adverse effects at least to the extent arising from the goals of international climate law and the precautionary principle – in concrete terms, protection at least at the level of achieving the "well below 2°C target" – arises from the right to life.

130. In addition, the present case concerns a dispute about the lawfulness of the application of the law, namely CO_2 legislation, which is relevant in this context (section 2.3.2).

131. Interim conclusion concerning "rights recognized under domestic law": the provisions of the Constitution (Art. 10 Const.) and CO_2 legislation, which the appellants are invoking, are such relevant domestic law.

d. **Reduction of greenhouse gas emissions directly decisive for the protection of life**

132. There is obviously a *more than merely weak connection* between the outcome of the proceedings (i.e., the reduction of greenhouse gas emissions and thus the reduction of the risk of heat waves) and the invoked obligation to protect from adverse effects on life (section 2.5.2.1): *the connection is clear and direct*.

The substance of the obligation to protect in terms of Art. 10 Const. is *to protect life*. The lives of the senior women over 75 years of age and thus the appellants 2 – 5 and a large number [of the members] of appellant 1 are *directly endangered* by the climate change-induced and thus greenhouse gas-induced

heat waves, as shown not least by the numerous deaths which have already occurred during heat waves (section 2.3.3). In order to do justice to the state obligation to protect, with the goal of reducing the risks to life, greenhouse gas emissions must be reduced at least to the extent, compared to current levels, that the global temperature increase can be limited to well below 2°C. *The reduction of greenhouse gas emissions is thus directly decisive for the state obligation to protect.*

133. In margin number 122 et seq. above, it was explained, using examples, how the additionally invoked domestic law, namely the application of CO_2 legislation in conformity with the law, directly affects the reduction of greenhouse gas emissions.

134. Interim conclusion concerning the "direct" connection: a direct connection exists between a right recognized under domestic law and the outcome of the proceedings. Contrary to the court of previous instance, the present case is a genuine and serious dispute in terms of Art. 6 ECHR. In the judgment under appeal, the court of previous instance violated Art. 6 ECHR.

2.6.2.2 Dispute "of a genuine and serious nature" in terms of Art. 6 (1) ECHR (E. 8.2)

135. A dispute is genuine and serious if the outcome of the proceedings is directly decisive for the civil rights in question.

In E. 8.2, the court of previous instance assumes that the dispute must "have a direct and immediate impact on civil rights; effects that are only distant or indirect are not sufficient."

136. However, it remains unclear which understanding of the "direct relevance" of the outcome of the proceedings on civil rights the court of previous instance actually imputes because it does not review the connection between the outcome of the proceedings and the appellants' civil rights under domestic law, as explained above in section 2.6.2.1.

137. According to an autonomous interpretation of the ECHR, "direct decisiveness" requires that there must be at least *more than a merely weak connection or*

distant impact between the civil rights in question and the outcome of the proceedings.[112]

Besides, this also results from BGE 127 I 115, which was quoted by the court of previous instance in E. 5b, with references to the case law of the ECtHR:

> *«L'issue de la procédure doit être directement déterminante pour le droit en question.* ***Un lien ténu ou des répercussions lointaines ne suffisent pas à faire entrer en jeu l'art. 6 par. 1 CEDH*** *(CourEDH, arrêts Le Compte, Van Leuven et De Meyere précité, pp. 21-22, par. 47; Fayed c. Royaume-Uni du 21 septembre 1994, série A, vol. 294-B, pp. 45-46, par. 56; Masson et Van Zon c. Pays-Bas du 28 septembre 1995, série A, vol. 327-A, p. 17, par. 44; cf. aussi JAAC 64/2000 no 136 p. 1326).»*

In other words, if there is *more* than merely a "weak connection or distant impact" between the outcome of the proceedings and the civil rights in question, *the outcome of the proceedings can be "directly decisive" to these civil rights.*

138. *Interim conclusion concerning the genuine dispute of a serious nature:* A connection between the civil right under domestic law and the outcome of the proceedings, which is *more than merely weak* or that amounts *not only to distant impacts* suffices.

For example, according to the ECtHR, there was "doubtless" a serious and genuine dispute in *Taskin v. Turkey*, since under Turkish law, the appellants could argue that they had a right to protection from environmental damages caused by the activities of a particular mine.[113] In the same way, the appellants assert a right to protection of their lives which are endangered by excessive greenhouse gas emissions.

2.6.2.3 Art. 6 ECHR and interests of the general public

139. DETEC and the court of previous instance stated that there was no right to a ruling in terms of Art. 25*a* APA because climate protection *also* benefits the general public (grounds stated by DETEC) or because everyone is somehow affected by global warming, for which reason the appellants were not particularly affected (grounds stated by the court of previous instance). As shown, this argumentation goes amiss (section 2.5 above; appeal, margin numbers 61 and 67).

[112] KLEY, ANDREAS, Gerichtliche Kontrolle von Atombewilligungen, EuGRZ of 14 May 1999, section III.C; also request, margin number 196 and appeal, margin number 101.
[113] *Taşkın and others v. Turkey*, application no. 46117/99, paragraph 132.

140. The same is true with respect to Art. 6 ECHR. According to the case law of the ECtHR, this provision is applicable explicitly also *if an interest of the general public also exists besides the interest of the appellants*.

The Court explains in *Bursa Barosu Başkanlığı*[114]:

> *«Par conséquent, la Cour considère que,* ***nonobstant l'intérêt général défendu en l'espèce par les requérants, leurs recours ne peuvent pas être assimilés à des recours du type*** **actio popularis,** ***compte tenu des circonstances de l'espèce,*** *notamment l'enjeu des recours, la nature des actes attaqués et la qualité pour agir des requérants.»* (emphasis added)

141. Interim conclusion concerning the interests of the general public: Art. 6 ECHR remains applicable, even if the appellants' legal requests benefit not only them exclusively, but also the general public.

2.6.2.4 Interpretation of Art. 6 in the light of Art. 34 ECHR?

142. In E. 8.2, the court of previous instance further states that Art. 6 ECHR must be interpreted in conjunction with Art. 34 ECHR. For multiple reasons, interpreting Art. 6 ECHR in this way is arbitrary in terms of Art. 9 Const. and thus in violation of the law.

143. Art. 34 ECHR is not to be applied by national courts, but only by the ECtHR.

144. KLEY, whom the court of previous instance quotes, specifically does not support the interpretation of the court of previous instance. On the contrary, he considers the application of the provisions in such a mixed way to be a "logical rift" that had occurred in the – strongly criticized[115] – case of *Balmer-Schafroth v. Switzerland.*

According to KLEY, "various things must be connected sufficiently closely" in cases of Art. 6 and Art. 34 ECHR: Art. 34 ECHR concerns the "sufficiently close" connection between *the action or omission on the part of the state* and the *detriment* suffered by the appellant. Art. 6 ECHR, in contrast, concerns the

[114] *Bursa Barosu Başkanlığı and others v. Turkey*, application no. 25680/05, 19 June 2018, paragraph 128.
[115] KLEY (fn. 112), section III.C. The decision *Balmer-Schafroth v. Switzerland* is criticized by MÜLLER/SCHEFER (fn. 57), Art. 10 (1), p. 54, fn. 72; SCHMIDT-RADEFELDT, ROMAN, Ökologische Menschenrechte. Ökologische Menschenrechtsinterpretation der EMRK und ihre Bedeutung für die umweltschützenden Grundrechte des Grundgesetzes, Baden-Baden 2000, pp. 172 et seq.; moreover, some of the ECtHR's judges issued a *dissenting opinion*, departing from the argumentation of the judgment in *Balmer-Schafroth v. Switzerland* (also request, margin number 198).

"sufficiently close connection" between the *domestic law* invoked by the appellant and the *outcome of the proceedings*.[116]

SCHÄFER, who was mentioned by the court of previous instance as a further source, does not deal with the interpretation of Art. 6 ECHR at all in his comments on Art. 34 ECHR.[117] The same is true of the further literature quoted by the court of previous instance in E. 8 and the ECtHR's Guide on Article 6 ECHR.[118]

145. The fact that Art. 6 would have to be reviewed in conjunction with Art. 34 ECHR *cannot* be derived in particular from decision A-2723/2007 of the court of previous instance of 30 January 2008, either. Besides, contrary to the court of previous instance in judgment A-2723/2007, the ECtHR did not doubt the victim status of the appellant in a comparable decision (fine particulate case).[119]

146. The general-abstract statements of the court of previous instance on the interpretation of Art. 6 ECHR in conjunction with Art. 34 ECHR are therefore incorrect. Finally, even the court of previous instance does not apply its interpretation to the concrete case at hand (on the subsumption, which is incorrect for other reasons, section 2.6.2.1 above).

2.6.2.5 Interim conclusion concerning the violation of Art. 6 ECHR

147. The appellants' dispute is genuine and serious because the outcome of the proceedings – *the reduction of greenhouse gases* – is directly decisive for their *right to protection of their lives as well as for the application of CO_2 legislation*. The appellants thus have the right to access to a court in terms of Art. 6 ECHR.

148. In contrast, the court of previous instance reviewed a question for which Art. 6 ECHR does not provide a basis: whether the appellants' *legal requests* were directly relevant for *reducing greenhouse gases*. Even for this reason alone, the court of previous instance came to the wrong conclusion.

In addition, contrary to the statements of the court of previous instance, the appellants' legal requests actually result in a reduction of greenhouse gases,

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[116] KLEY (fn. 112), section III.C.
[117] SCHÄFER, PATRICK, in KARPENSTEIN, ULRICH AND FRANZ MAYER, Konvention zum Schutz der Menschenrechte und Grundfreiheiten, 2nd ed. 2015, Art. 34 margin numbers 61 et seq.
[118] ECHR, Guide on Article 6 of the European Convention on Human Rights (civil limb), updated on 31 August 2018, https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.
[119] BRAIG, KATHARINA, Umweltschutz durch die Europäische Menschenrechtskonvention, Basel 2013, fn 1174.

which can be seen very well specifically using the example of the measurements of CO_2 emissions of passenger cars. If the importers of passenger cars were required to provide realistic measurements of the CO_2 emissions of passenger cars instead of fictitious measurement data, this would directly result in a reduction of greenhouse gases.

149. As shown, it follows from all these statements that the court of previous instance reviewed the wrong question – and answered this wrong question incorrectly. The court of previous instance thus violated Art. 6 ECHR.

2.6.3 Violation of Art. 13 ECHR (E. 8.4)

150. Finally, the court of previous instance commented almost in passing that "[w]ith this outcome [dismissal in terms of Art. 6 ECHR], it is not necessary to examine Art. 13 ECHR, either" (insertion added). This too is incorrect.

151. There are numerous reasons supporting the applicability of Art. 13 ECHR, including in cases in which Art. 6 ECHR *could* be applicable, but whose violation is finally rejected:

As the ECtHR explained in *Kudla v. Poland*, the wording of Art. 13 ECHR includes nothing to the contrary, nor does its drafting history.[120] The system of protection of human rights also supports reducing implied restrictions on Art. 13 ECHR to a minimum.[121] After all, Art. 13 ECHR is to be an *additional* guarantee.[122]

152. Various cases are to be found in the case law of the ECtHR in which the court, after negating a violation of Art. 6 ECHR, directly proceeded to a review of Art. 13 ECHR (of course not without first reviewing the asserted domestic violation of Art. 8 ECHR), for example *Ivan Atanasov v. Bulgaria* in 2010 or *Hardy and Maile v. The United Kingdom* in 2012.[123]

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[120] *Kudla v. Poland* (GK), application no. 30210/96, 26 October 2010, paragraph 151: "The Court finds nothing in the letter of Article 13 to ground a principle whereby there is no scope for its application in relation to any of the aspects of the 'right to a court' embodied in Article 6 § 1. Nor can any suggestion of such a limitation on the operation of Article 13 be found in its drafting history."

[121] *Kudla v. Poland* (GK), application no. 30210/96, 26 October 2010, paragraph 152: "(…) the place of Article 13 in the scheme of human rights protection set up by the Convention would argue in favour of implied restrictions of Article 13 being kept to a minimum."

[122] On this PETERS, ANNE, Einführung in die Europäische Menschenrechtskonvention, Munich 2003, p. 141.

[123] *Ivan Atanasov v. Bulgaria*, application no. 12853/03, paragraph 89 et seq. on Art. 6 ECHR and paragraph 100 et seq. on Art. 13 ECHR; *Hardy and Maile v. The United Kingdom*, application no. 31965/07), paragraph 251 on Art. 6 ECHR, paragraph 254 et seq. on Art. 13 ECHR.

153. Accordingly, Art. 13 ECHR *strengthens* Art. 6 ECHR, following PETERS and PETERS/ALTWICK – and is thus *not absorbed* by Art. 6 ECHR.[124] MIESLER AND VOGLER argue in the same vein: the ECtHR, they argue, does not consider the relationship between Art. 6 and Art. 13 to be exclusive; Art. 13 ECHR, they state, complements the material rights, whereas Art. 6 ECHR is procedural law.[125] According to KLEY, Art. 13 ECHR is to be applied *specifically* if Art. 6 ECHR is assumed not to apply.[126]

154. The sources quoted by the court of previous instance cannot change this result at all:

- according to MEYER-LADEWIG, HARRENDORF AND KÖNIG, Art. 6 ECHR does have precedence over Art. 13 ECHR, with the consequence that a review in terms of Art. 13 ECHR would no longer be necessary if a violation of Art. 6 (1) ECHR was not determined because of a lack of access to a court.[127] However, MEYER-LADEWIG, HARRENDORF AND KÖNIG refer to *Castren-Niniou v. Greece*,[128] whereas in this case, it was *just the reverse*: the ECtHR found a violation of Art. 6 ECHR, for which reason a review of Art. 13 ECHR was unnecessary.
- FROWEIN/PEUKERT base their opinion on two decisions of the ECtHR from 1982 and 1983.[129] However, the ECtHR had given up its earlier case law in this regard and updated it in *Kudla v. Poland* in the year *2000*.[130]

Thus, the literature used by the court of previous instance and the case law discussed there by no means support the conclusions drawn by the court of previous instance in this context.

155. *Interim conclusion:* Art. 13 ECHR is applied *particularly* if the court addressed considers that, contrary to expectation, Art. 6 ECHR was not violated.

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[124] PETERS (fn. 122), p. 141; PETERS, ANNE AND TILMANN ALTWICKER, Europäische Menschenrechtskonvention, 2nd ed. 2012, p. 174.
[125] MIEHSLER, HERBERT AND THEO VOGLER, in PABEL, KATHARINA AND STEFANIE SCHMAHL (EDS.), Internationaler Kommentar zur Europäischen Menschenrechtskonvention, Cologne 2017, Art. 6 N 281, with references to the case law of the ECtHR.
[126] KLEY (fn. 112), section IV.
[127] MEYER-LADEWIG, JENS, STEFAN HARRENDORF AND STEFAN KÖNIG, in MEYER-LADEWIG, JENS, MARTIN NETTESHEIM AND STEFAN VON RAUMER (EDS.), Europäische Menschenrechtskonvention EMRK, Handkommentar, 4th ed. 2017, Art. 6 margin number 253.
[128] *Castren-Niniou v. Greece,* application no. 43837/02, 9 June 2005, paragraph 33.
[129] In which, incidentally, there was also a violation of Art. 6 ECHR and it was therefore unnecessary to review Art. 13 ECHR.
[130] *Kudla v. Poland* (GK), application no. 30210/96, 26 October 2010, PETERS/ALTWICKER (fn. 124), p. 174.

Accordingly, Art. 13 ECHR would have to be subject to a *substantive review*: Under Art. 13 ECHR, *anyone who considers him- or herself in a reasonable way to have been prejudiced* by a measure allegedly in breach of rights and freedoms guaranteed by the Convention has the right to an effective remedy before a national authority.[131] This prerequisite is fulfilled in the present case: The appellants are impaired in more than just "a reasonable way" in their right to life in terms of Art. 2 (1) ECHR (section 2.5.2.2 above) and their right to respect of private and family life under Art. 8 (1) ECHR (section 2.5.2.3 above).

156. As DETEC did not enter into the appellants' request in terms of Art. 25*a* APA and the court of previous instance upheld this decision not to enter into the case, the violations of fundamental and human rights asserted by the appellants have *not been subject to material review* to this day. Yet Art. 13 ECHR is violated if a review before the national instances is not possible or if the scope of the review by the state courts was not sufficient to review whether an ECHR guarantee has been violated.[132]

157. DETEC as well as the court of previous instance thus violated *at least* Art. 13 ECHR if the court addressed should conclude, contrary to expectation, that the present case is not a dispute over civil rights in terms of Art. 6 ECHR.

2.6.4 Excursus: The appellants' victim status

158. As shown, the court of previous instance incorrectly reviewed Art. 6 ECHR in conjunction with Art. 34 ECHR (section 2.6.2.4). The conclusion drawn by the court of previous instance is not consistent with Art. 34 ECHR, either. In the following, the appellants show that they are victims of a violation of the Convention in terms of Art. 34 ECHR in conjunction with Art. 2 and 8 ECHR.

159. Victim status in terms of Art. 34 ECHR does not need to be explained prior to proceedings before the ECtHR. Yet the appellants already showed in their request, section 7.6, that they are victims of the asserted violations of the Convention (on the violations of the Convention sections 2.5.2.2 and 2.5.2.3).

For there is a sufficiently close connection[133] in terms of Art. 34 ECHR between

[131] BGE 129 II 193 E. 3.1.
[132] *Hatton et al. v. United Kingdom* (GK), application no. 36022/97, paragraph 141 et seq.
[133] The criterion of the "close connection" is not applied in a rigid, mechanical and inflexible way by the ECtHR, *Zakharov v. Russia* (GC), application no. 47143/06, paragraph 164.

– DETEC's omissions in climate protection (deviation from the Paris Agreement, sections 2.3.1 and 2.3.2 above), the ECHR and unconstitutional climate legislation (above 2.5.2)[134] and
– the increase in mortality as well as the current and future impairments of the appellants' health, which the appellants demonstrated above in section 2.3.3.

160. Both the strong accentuation of heat waves in the event of deviation from the targets of the Paris Agreement (sections 2.3.1 and 2.3.2 above) and the increase in mortality and the risk of adverse health impacts during heat waves (section 2.3.3 above) were demonstrated in detail by the appellants. These determinations of the facts of the case are based on clear scientific evidence and are thus clearly foreseeable; their effects on the persons affected are serious or even – at least in the case of death – irreparable.[135]

161. *Potential* victims are also victims in terms of Art. 34 ECHR if the future violation of rights as codified in the Convention is demonstrably probable, as in the present case (section 2.3.3 above).[136] The ECtHR determined as early as 1992 that a group of victims being larger (self-evidently) does not exclude the victim status of those affected: in *Open Door and Dublin Well Women v. Ireland*, all women of childbearing age were victims in terms of the Convention. The ECtHR found that a ban on providing information about opportunities for abortion caused an increase in pregnant women's health risks because they may have abortions only at a later stage of pregnancy. The ECtHR did not accept the objection of the Irish government that this was an *actio popularis*.[137]

162. If the applicants were denied victim status in terms of Art. 34 ECHR, hardly anyone would be entitled to this status in connection with the inherently diffuse and complex phenomenon of global warming, which, however, undisputedly has strong impacts on human rights (see Preamble of the Paris Agreement and

[134] On the victims of general-abstract rules *Zakharov v. Russia* (GC), application no. 47143/06, paragraph 171: "Accordingly, the Court accepts that an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures, or legislation permitting secret surveillance measures."
[135] On this *Soering v. The United Kingdom*, application no. 14038/88, paragraph 90; *Di Sarno and Others v. Italy*, application no. 30765/08, where the ECtHR acknowledged the victim status of appellants who merely worked in the town affected by the waste crisis, but did not live there; see also BRAIG (fn. 119), p. 225; KLEY (fn. 112), sections I and III.C.
[136] ECtHR, Practical Guide on Admissibility Criteria, 30 April 2018, pp. 12 et seq., https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf with references to the case law, e.g. *Zakharov v. Russia* (GC), application no. 47143/06, paragraph 173–178, *Klass v. Federal Republic of Germany,* application no. 5029/71, paragraph 36–38.
[137] *Open Door and Dublin Well Women v. Ireland*, application no. 14234/88.

margin number 84 above). As a result, the area of climate would remain a legal vacuum in terms of human rights, which cannot be correct against the background of the ECtHR's case law in comparable cases concerning environmental law, for example, *M. Özel and Others v. Turkey.*[138]

3. Result

163. In conclusion,

- the present appeal is urgent because of the ongoing accentuation of the dangers to life and health and the demands stated in the request which are linked to the years 2020 and 2030 (margin numbers 9 et seq.),
- the court of previous instance presented and determined the legally relevant facts of the case insufficiently (section 1.4),
- the appellants therefore again present the legally relevant facts of the case to the court addressed in condensed form (section 2.3),
- DETEC as well as the court of previous instance have violated the appellants' right to be heard (Art. 29 Const., Art. 6 ECHR) (section 2.4),
- the court of previous instance violated Art. 25*a* APA by failing to review whether the appellants have an interest worthy of protection in the assessment of the request and whether they are affected in their rights and obligations, whereby the appellants can argue at least in a reasonable way that the reflex triggered by the omissions in climate protection is relevant to fundamental rights (section 2.5.2),
- the court of previous instance also violated Art. 25*a* APA because it failed to consider in its assessment that the appellants are exposed to the risk of death or the risk of their physical integrity being violated during climate change-induced heat waves to a significantly greater extent than the general public and are therefore particularly affected in terms of Art. 25*a* APA (section 2.5.3),
- the court of previous instance violated Art. 6 ECHR by failing to review the connection between the outcome of the proceedings and the rights recognized under domestic law, which is decisive under Art. 6 ECHR, and failing to review the domestic law invoked, thereby arriving at an incorrect result (section 2.6.2),

[138] *M. Özel and Others v. Turkey*, application no. 14350/05.

– the court of previous instance violated Art. 13 ECHR by incorrectly declaring this provision not applicable and not reviewing it in material terms in conjunction with Art. 2 and 8 ECHR (section 2.6.3).

Thus, the legal requests made at the outset are justified.

164. In accordance with this result, the appellants are to be granted appropriate compensation both for the proceedings before the Federal Supreme Court and before the Federal Administrative Court (legal request 3).

For all these reasons, we respectfully request the approval of the legal requests made at the outset.

Very truly yours,

RAin Dr. Ursula Brunner RAin Cordelia C. Bähr RA Martin Looser

in sextuplicate

Exhibits according to separate list

List of exhibits

1. Judgment of the Federal Administrative Court of 27 November 2018
2. List of materials offered as proof in the footnotes
3. Aerzteblatt, Hitzewelle macht Frauen stärker zu schaffen als Männern, 31 July 2018
4. FOEN, Treibhausgasemissionen leicht höher als im Vorjahr, 13 April 2018
5. SFOE AND FEDRO, Einführung WLTP in der Schweiz, FAQ, June 2018
6. FEDERAL STATISTICAL OFFICE, Treibhausgasemissionen in der Schweiz. Entwicklung in CO_2-Äquivalente und Emissionen nach Sektoren, 2 May 2018
7. IPCC, Special Report, Global Warming of 1,5 °C, Summary for Policy Makers, C.1
8. IPCC, Special Report, Global Warming of 1.5 °C, Chapter 3.4.7.1
9. REGIERUNGSSTATTHALTERAMT (Office of the chief of administration and police) Bern, decision of 13 March 2008/stb vbv 8.9.9 / 20 – 2007
10. SRF, UNO-Klimakonferenz, "Für die Schweiz ist der Beschluss ein Problem," 16 December 2018
11. VICEDO-CABRERA ANA MARIA ET AL., Temperature-related mortality impacts under and beyond Paris Agreement climate change scenarios, Climatic Change, 13 September 2018
12. WATTS ET AL., The 2018 report of the Lancet Countdown on health and climate change: Shaping the health of nations for centuries to come, The Lancet, Vol. 392, December 2018
13. ZHANG ET AL., Global climate change: impact of heat waves under different definitions on daily mortality in Wuhan, China, Global Health Research and Policy, 2017 2:10, 5 April 2017

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