Columbia Law School | COLUMBIA CLIMATE SCHOOL
SABIN CENTER FOR CLIMATE CHANGE LAW

Judge Síofra O'Leary
President of the European Court of Human Rights
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December 5, 2022

Re: Third-party intervention in the case of *Verein KlimaSeniorinnen and others v Switzerland* (Application no. 53600/20)

Honorable Judge O'Leary,

We hereby submit our attached observations as third-party intervenors in the proceedings *Verein KlimaSeniorinnen and others v Switzerland* (Application no. 53600/20). These written observations were prepared and submitted by the Sabin Center for Climate Change Law, Columbia Law School (Sabin Center), pursuant to leave granted by the Grand Chamber of the European Court of Human Rights (ECtHR) on 24 October 2022 in accordance with rule 44 §5 of the Rules of the Court.

The Sabin Center for Climate Change Law, located at Columbia Law School, is an internationally recognized academic center dedicated to tracking, describing, analyzing, and developing climate change law and litigation. The core mission of the Sabin Center is to develop and promulgate legal techniques to address climate change and to train the next generation of lawyers who will be leaders in the field.

Given the delay sometimes experienced in receiving posts, it would be beneficial if correspondence could be via e-mail: mburger@law.columbia.edu and mb4913@columbia.edu.

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EUROPEAN COURT OF HUMAN RIGHTS

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Verein KlimaSeniorinnen and others v Switzerland
Application no. 53600/20

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Intervenor Brief

filed by the

Sabin Center for Climate Change Law at Columbia Law School

pursuant to leave granted by the Court on 24 October 2022

I. Statement of Interest

1. The Sabin Center presents these written observations as a third-party intervenor in the proceedings *Verein KlimaSeniorinnen and others v Switzerland* (Application no. 53600/20). This case raises issues of the utmost importance on how regional courts respond to climate change claims in Europe and worldwide. These are issues that the drafters of the European Convention on Human Rights (ECHR) likely did not foresee, and the European Court of Human Rights (ECtHR or Court) has not yet developed its approach to them. In our intervention, we will aim to assist the Court in this exercise based on our thorough knowledge of global climate change litigation, the intersection of international human rights law and climate change law, and issues pertaining to the separation of powers in climate change cases.

II. Victim status in climate cases: a direct relationship with a state's human rights obligations to mitigate climate change

2. The ECtHR asks whether the applicants (an association and individual applicants) can be regarded as existing and/or potential victims under the ECHR, as interpreted by the Court, on account of an alleged omission of the Swiss authorities to afford applicants effective protection against the effects of climate change. Both the parties and other third-party intervenors have widely discussed the issue of victim status under the ECHR. See, e.g., Applicants' Observations on the facts, admissibility and the merits (2 December 2022), Section 2.3; Intervenor Brief Submitted by the United Nations High Commissioner for Human Rights (21 September 2021), Section III; Written Submissions on Behalf of the International Commission of Jurists (21 September 2021), Section 1. This intervention focuses on existing case law from international and national fora to demonstrate that the Court's question may properly be understood as a question of merit, and that where such a question exists courts tend to give applicants the opportunity to prove that an alleged omission by a State in mitigating climate change caused them particularized individual harms.

3. Article 34 of the ECHR[1] allows the Court to hear individual applications "from any person, non-governmental organization or group of individuals claiming to be the victim of" a violation of the Convention's enumerated rights by a Contracting State.[2] A "victim" has suffered or is likely to suffer some level of particularized individual harm from a challenged action, and is directly affected by the impugned measure.[3] While applicants can claim victim status based on future harms, the harms cannot be "hypothetical" and must have some likelihood of occurrence.[4] A victim's claimed harm must also pass some materiality threshold.[5] But a petitioner is not required

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, 8, June 1, 2010, C.E.T.S. No. 194, https://perma.cc/B2V2-2WHK.
[2] *Ibid*, art. 34.
[3] *Tănase v. Moldova*, No. 7/08 ¶104, ECtHR (Apr. 27, 2010), https://hudoc.echr.coe.int/eng/#{"itemid":["001-98428"]}.
[4] *Willis v. United Kingdom*, No. 36042/97 ¶49, ECtHR (June 11, 2002), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-60499%22]}; *see also Burden v. United Kingdom*, No. 13378/05 ¶¶ 33–34, ECtHR (Apr. 29, 2008), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86146%22]} (citing Willis for the proposition that future harm must be non-hypothetical and causally linked to an alleged violation of the Convention).
[5] *Cordella and Others v. Italy*, Nos. 54414/13 and 54624/15, ECtHR (Jan. 24, 2019), https://hudoc.exec.coe.int/FRE#{%22EXECIdentifier%22:[%22004-52515%22]}.

to suffer unique harm to claim victim status and may claim victim status through their membership in an at-risk group – such as, for example, elderly women.[6]

4. There are other limitations on victim status. The ECtHR has emphasized that the Convention does not provide individuals the right to bring actions in the form of an "*actio popularis* . . . or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention."[7] And a party's "victim status" requires an ongoing material controversy or dispute between the party and the Contracting State. An applicant can be "deprived . . . of victim status because he or she has been provided sufficient redress" by a Contracting State.[8]

5. Victim status in climate change cases at the ECtHR represents a novel issue of admissibility. The Court's analysis may be usefully informed by other judicial, quasi-judicial, and administrative or intergovernmental bodies' treatment of similar issues, such as standing in climate change cases. The thrust of the case law, to date, would tend toward either granting victim status or else providing petitioners with a more fulsome opportunity to prove their victim status than a dismissal at a preliminary stage would provide.

6. Importantly, aspects of the Court's assessment of victim status may overlap in at least two significant ways with the merits of the case.

7. First, proper assessment may well require a direct engagement with the substantive obligations of states as they pertain to climate mitigation, as well as the potential human rights violations related to these obligations, or lack thereof. While the victim status analysis, like the analysis of standing in other contexts, ordinarily operates distinctly from the merits of the claim, "it often turns on the nature and source of the claim asserted."[9] The United Nations Human Rights Committee (HRC) recently recognized this very point in and affirming the admissibility of the climate-related human rights claims in *Daniel Billy and others v Australia*, noting that "whether the authors' Covenant rights were breached cannot be dissociated from the merits of the case."[10]

8. Second, the analysis may involve a range of scientific assumptions, or even speculation, related to questions of the nature and extent of injury, sources of harm and causation, and redressability through the courts, giving rise to the need for the kinds of fact-intensive inquiries, presentations from competing experts, and weighing of evidence that only comes through a more thorough judicial treatment.[11]

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[6] *Sedjić and Finci v. Bosnia and Herzgovinia*, Nos. 27996/06 & 34836/06 ¶¶ 33–34, ECtHR (Dec. 22, 2009), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-96491%22]}; *Burden v. United Kingdom*, No. 13378/05 ¶ 34, ECtHR (Apr. 29, 2008), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86146%22]}.

[7] *Burden v. United Kingdom*, No. 13378/05 ¶¶ 33–34, ECtHR (Apr. 29, 2008), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86146%22]}.

[8] *Webster v. United Kingdom*, No. 32479/16 ¶ 29, ECtHR (Mar. 24, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202587%22]}

[9] *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[10] UNHRC, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (*Daniel Billy and others v Australia* (hereinafter *Torres Strait Islanders)),* CCPR/C/135/D/3624/2019 ¶7.3. (Sep. 22, 2022).

[11] Michael Burger, Radley Horton and Jessica Wentz, *The Law and Science of Climate Change Attribution*, 45(1) COLUM. J. ENVTL. L. 57, 147-167 (2020).

9. Two decisions from HRC are instructive, here. In *Daniel Billy*, HRC made a positive declaration on admissibility on a petition asking whether a State may have committed a violation of the International Covenant on Civil and Political Rights (read in light of the obligations under the Paris Agreement and the United Nations Framework Convention on Climate Change (UNFCCC)), where the harm allegedly resulted from the State's failure to implement adaptation and/or mitigation measures to combat adverse climate change impacts within its territory.[12] With respect to mitigation measures, HRC concluded that the alleged actions and omissions fall under Australia's jurisdiction,[13] and that HRC's jurisprudence on victim status required (i) the person to be actually affected, (ii) the person demonstrate that their rights had been impaired by the acts or omissions of the State or that impairment was imminent, and (iii) in absence of a concrete application of the law or practice to the detriment of the person, its risk of being affected had to be more than a theoretical possibility.[14] Based on these requirements, which mirror the standards present in the matter at hand, the Committee assessed that the authors showed real personal predicaments owed to climate change that could possibly have compromised their ability to maintain their culture, subsistence and livelihoods, and that the risk of rights impairment was more than a theoretical possibility,[15] and ordered appropriate relief.[16]

10. In *United Nations Human Rights Committee Views Adopted on Teitiota Communication*,[17] HRC found that the concreteness of a claim of actual or imminent harm necessary to establish victim status is "a matter of degree,"[18] and that in that instance "the author sufficiently demonstrated, for the purpose of admissibility, that due to the impact of climate change and associated sea level rise on the habitability of the Republic of Kiribati and on the security situation in the islands," that he faced a real risk of impairment to his right to life.[19] In an analysis of merits, HRC considered that a situation of such intensity that creates a real risk of irreparable harm where the individual is exposed to violence on return or in a particularly vulnerable situation was not present.[20]

11. The appropriateness of the Court's finding admissibility here is further supported by several national courts' treatment of some of the complex matters involved in locating injury, causation, and redressability in other climate cases. Consider, for example, the issue of the relative or incremental impact of a nation's greenhouse gas (GHG) emission contributions and reductions. In *Urgenda v. the Netherlands*, the Dutch Supreme Court dismissed the government's argument that courts cannot impose orders to reduce GHG emissions on individual actors because other actors will continue to release emissions, and held that the Netherlands has a responsibility under the UNFCCC and ECHR to reduce its GHG emissions, which is not voided by other countries' failure, actual or prospective, to fulfill their own responsibilities.[21] Likewise, the court rejected the

[12] *Daniel Billy and others v Australia*, ¶7.6.
[13] *Ibid*, ¶7.8.
[14] *Ibid*, ¶ 7.9.
[15] *Ibid*, ¶7.10.
[16] *Ibid*, ¶11.
[17] United Nations, Human Rights Committee (2020). *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016.* CCPR/C/127/D/2728/2016 (hereinafter *Teitiota*).
[18] *Ibid*, ¶8.4.
[19] *Ibid*, ¶8.6.
[20] *Ibid*, ¶9.7.
[21] *Ibid*, ¶5.7.7.

government's defense that its share of GHG emissions is very low and that a reduction in its territorial emissions would make little difference on the global scale.[22]

12. The United States Supreme Court reached a similar conclusion in *Massachusetts v. EPA*.[23] In that case, the U.S. Supreme Court acknowledged that the federal government's regulation of GHG emissions from motor vehicles could not by itself reverse climate change but also that this did not mean that the court lacked jurisdiction to decide "whether EPA has a duty to take steps to slow or reduce it."[24] The court explained that while a favorable decision would not totally remedy the harms from sea level rise on petitioners' property, those harms would be reduced, and that that reduction was sufficient to meet the requirements for the court's finding jurisdiction.

13. The United States Court of Appeals for the D.C. Circuit—often referred to as the second most important court in the U.S. for matters of administrative law—reached a similar conclusion just two years ago, in *Natural Resources Defense Council v. Wheeler*.[25] There, the court held that while the question of how much an agency action might contribute to increased GHG emissions was ultimately a merits question, the petitioners had adequately alleged facts sufficient to show injury, causation and redressability, and therefore confer standing, where they alleged a rule change would increase emissions of hydrofluorocarbons (HFCs) that would, even in some small degree, contribute to climate change, sea level rise, and lost property as a result.[26]

14. The United States Court of Appeals for the Ninth Circuit decision in *Juliana v. United States* offers further insight. There, youth plaintiffs claimed that the federal government's affirmative actions in establishing pollution standards and granting approvals to fossil fuel development on public lands violated substantive due process rights—including the rights to life, liberty, and property—and the public trust doctrine, under which certain natural resources must be protected for the citizens and future generations. All three judges agreed that the individual plaintiffs had sufficiently alleged concrete, particularized harm sufficient to meet the requirements for individualized injury, and that there was at least an issue of material fact warranting development of further evidence concerning the causal connection between the government's actions and inactions and the plaintiffs' harms.[27] However, a two-judge majority dismissed the case on redressability grounds, finding that courts are not empowered to grant the specific relief sought by the plaintiffs – namely, a court injunction ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[28]

15. In contrast, the European Court of Justice (ECJ) recently faced a related issue in *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*,[29] where the applicants asked the Court to annul a legislative package regarding GHG emissions as insufficiently ambitious.[30] The case was dismissed based on the failure to establish *individual concern*. The ECJ

[22] *Ibid*,
[23] 549 U.S. 497 (2007).
[24] *Ibid*, at 525.
[25] 955 F.3d 68 (D.C. Cir. 2020).
[26] *Ibid*, at 77.
[27] *Ibid*, at 18.
[28] *Ibid*, at 11.
[29] Case T-330/18 Carvalho and Others v Parliament and Council ECLI:EU:T:2019:324 and C-565/19 P – Carvalho and Others v Parliament and Council ECLI:EU:C:2021:252. *Carvalho and Others v Parliament and Council (General Court)* cit.
[30] *Ibid*, ¶18.

concluded that the plaintiffs could not establish individual concern because climate change affects every individual in one manner or another, explaining that case law requires that plaintiffs are affected by the contested "act in a manner that is peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually."[31] On appeal, the ECJ confirmed the General Court's ruling.[32]

16. The *Carvalho* case, however, is distinguishable from the human rights-based claims under the ECHR at issue here. Individual concern limits standing under EU law - following the precedent in *Plaumann v. Commission*[33] - to protect the EU legislature when adopting generally applicable norms from legal challenges of non-privileged applicants, *i.e*., private persons.[34] That is, it is a distinct form of the "particularized individual harm" requirements more familiar to victim status determinations and other standing analyses. Since climate change is a global problem that affects everyone, the ECJ's narrow interpretation of standing makes it impossible to meet its standards, as no one can be uniquely affected by climate change for its purposes.[35] If the ECJ's interpretation of individualized concern were extended to victim status in the human rights context, and to standing analysis in other judicial contexts, then no individuals anywhere would have access to the courts to challenge government or corporate actions and omissions related to climate change unless specifically provided with the right to do so by statute. Such a result would run counter to basic notions of fairness, access to justice, and the rule of law.[36]

III. Principles of separation of powers and the role of the judiciary in climate change litigation

17. The science is clear: Climate change has widespread and dramatic negative impacts on the lives and livelihoods of individuals and communities worldwide, and it is absolutely necessary that the international community, and individual nations, drastically and in short order reduce GHG emissions. Yet, in Europe as elsewhere, there is a gap between what a global carbon budget demands, the timeframes and extent of countries' climate commitments, and countries' implementation of the commitments they do have.[37] This case - along with *Carême v. France* and *Agostinho et al. v. Portugal* - presents the ECtHR with its first opportunity to address the separation

[31] *Ibid*, ¶49.
[32] *Carvalho and Others v Parliament and Council (Court of Justice)* cit. *See also EU Biomass Plaintiffs v. European Union, CITE* (finding petitioners lack individual concern sufficient to establish standing to challenge EU's 2018 revised Renewable Energy Directive).
[33] Case 25-6, Plaumann & Co. v Commission of the European Economic Community, Judgment of the Court of 15 July 1963.
[34] Art. 263(4) Treaty of the Functioning Union (TFEU).
[35] Caroline Brown, The Plaumann Problem: How the People's Climate Case Widened the Gap to Judicial Review of the EU's Inadequate Climate Policy, 50(2) Denver J. of Int'l L. and Pol. 197 (2022).
[36] The issue of standing has appeared in a number of climate change cases in other jurisdictions, including Ireland (*Friends of the Irish Environment v. Ireland*); Italy (*A Sud et al. v. Italy*); Japan (*Citizens' Committee on the Kobe Coal-Fired Power Plant v. Japan*); South Korea (*Do-Hyun Kim et al. v. South Korea*), Mexico (*Julia Habana et. al., v. Mexico; Jóvenes v. Gobierno de México*), and Canada (*Mathur, et al. v. Her Majesty the Queen in Right of Ontario*) (the cases and related decisions are available on the Sabin Center's Global Climate Change Litigation Database, at http://climatecasechart.com/non-us-climate-change-litigation/). Those cases are less germane, here, as they involve in some instances issues of organizational standing (*Friends of the Irish Environment*), and in other instances reflect decisions from lower courts that are on appeal or else have not yet reached even an initial decision (remaining cases).
[37] United Nations Environment Programme (2021). *Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered*. Nairobi. https://www.unep.org/resources/emissions-gap-report-2021.

of powers principles that might guide human rights courts in assessing climate-related human rights claims. Accordingly, the ECtHR has asked whether, given its "margin of appreciation" in environmental matters, the Swiss government had fulfilled its obligations under the Convention.

18. While not specifically related to climate issues, in previous environmental cases the ECtHR has used the term "margin of appreciation" to refer to the political "wiggle room" granted to Contracting States in securing the rights set forth in the Convention. These rights are not absolute in their application. Contracting States "exceed their margin of appreciation by failing to strike a fair balance between the rights of those affected by the regulations and the interests of the community as a whole."[38] The ECtHR has consistently found that Contracting States have a "wide" margin of appreciation when balancing environmental concerns against other economic, cultural, and social interests, and Contracting States "must in principle be left a choice between the different ways and means of meeting" a substantive human rights obligation.[39]

19. The applicants have addressed this issue in their submission. See, e.g., Applicants' Observations, Section 2.5.3. This section seeks to further assist the Court by providing a comparative context, and illustrations of how courts in other settings have addressed related questions. Broadly construed, courts have addressed in three different ways this core separation of powers issue as it pertains to a state's discretion in fulfilling the obligation to mitigate GHG emissions. First, courts have found that nations are given limited deference and that courts must provide judicial review where government action or inaction threatens human rights. Second, courts have found that courts are authorized to provide judicial review of the legality of government action or inaction, but that states hold a great deal of discretion in establishing ultimate climate targets. And third, courts have found that they cannot dictate particular standards or remedies on the issues of the appropriateness of a state's mitigation action (or lack thereof), even where the court may grant certain forms of declaratory relief. Each of these three approaches is discussed below.

Approach 1: States have a limited margin of appreciation and courts must provide judicial review of threats to human rights

20. Some courts have found that the judiciary not only *can* weigh in on a state's commitments to GHG emissions reductions but has a *duty* to review how a state chooses to fulfill its obligation to mitigate. This interpretation relies on the impacts of the climate crisis on human rights. Examples of this approach can be found in the Netherlands and Brazil. Courts in Colombia, Nepal, and Pakistan have also found that their governments are insufficiently mitigating GHG emissions, granting relief that include specific remedies on how to do so.

21. In *Urgenda v. the Netherlands*, the Dutch Supreme Court concluded that the Dutch government had breached the "duty of care" owed to its citizens by backsliding on the previous administration's GHG emission reduction targets, and ordered the government to reduce GHG emissions to 25 percent below 1990 levels by 2020, consistent with what the court determined to be the country's fair contribution toward the global goal of limiting global temperature increases to 2°C above pre-industrial

[38] *Maempel v. Malta*, No. 24202/10 ¶ 84 (Nov. 22, 2011), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-107514&filename=001-107514.pdf&TID=thkbhnilzk.
[39] *Id.,* ¶ 66; Fadeyeva v. Russia, No. 55723/00 ¶ 134 (June 9, 2005), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2255723/00%22],%22itemid%22:[%22001-69315%22]} .

conditions and with the protection of the rights to life and the family under the ECHR.[40] The Court acknowledged that the executive and legislative branches are responsible for decision-making on the reduction of GHG emissions and have "a great deal of freedom" to make the necessary political decisions on climate mitigation; however, the Court must assess whether the executive and legislative branches have exercised that freedom "within the limits of the law,"[41] consistent with the protection of human rights enshrined in the ECHR.[42]

22. The Dutch Supreme Court specifically assessed the issue of separation of powers, noting that, while judges "should not engage in the political decision-making that is involved in the drafting of legislation," this "does not mean that the judge should not at all come into the field of political decision-making."[43] Under the Dutch Constitution, judges can invalidate legislation that violates binding treaties. Case law also states that a court can issue a declaration of justice, holding that a public entity has acted unlawfully by not adopting legislation with specific content.[44] Furthermore, courts may order the public body to take measures to achieve a certain goal, as long as that order does not amount to an order to create legislation with a particular content.[45]

23. Several other courts have also found state action inadequate to protect residents' rights from climate change impacts and that additional action was needed from the legislature or executive branches, and ordered specific remedies on how to fulfill the government's obligations. For example, in *Future Generations v. Colombia*, the Colombian Supreme Court ordered the government to formulate plans to counteract deforestation in the Amazon rainforest and an intergenerational pact, as well as generally increase actions to mitigate climate change.[46] In *Shrestha v. Office of the Prime Minister et al.*, the Nepalese Supreme Court found the lack of implementation of a wide range of plans and policies related to climate mitigation and adaptation, and the overall lack of an overarching climate law to violate constitutional rights, and ordered the government to formulate such a law.[47] In both cases, the pervasive effects of climate change on a wide range of human rights justified the judicial mandate.

24. Courts have also exercised the power of judicial review to ensure the execution of a legislative mandate by the executive branch in order to protect fundamental rights. In *PSB et al., v. Brazil (on Climate Fund)* the Brazilian Supreme Court held that the Brazilian government's failure to allocate funds to climate mitigation projects consistent with national legislation potentially threatened fundamental rights and violated the government's duty to mitigate its contributions to climate change, and directed the government to remediate its failure.[48]

25. In the examples shown in the first approach, the courts have justified a more direct interference in how the executive and legislative bodies mitigate GHG emissions based on the direct threats posed by climate change to human rights. As such, courts in the Netherlands,

[40] HR 20 december 2019, 2020 m.nt (De Staat Der Nederlanden/Stichting Urgenda) (Neth.), ¶ 8.3.4 [hereinafter *Urgenda* Decision] https://perma.cc/2XZL-SCLY.
[41] *Ibid*.
[42] *Ibid*, ¶8.3.3.
[43] *Ibid*, ¶8.2.3.
[44] *Ibid*.
[45] *Ibid*, ¶8.2.7.
[46] Future Generations v Ministry of the Environment and Others 'Demanda Generaciones Futuras v Minambiente' [2018] 11001 22 03 000 2018 00319 00 (Colombia Supreme Court).
[47] Shrestha v Office of the Prime Minister et al., Decision no 10210, NKP, Part 61, Vol 3 (Supreme Court).
[48] PSB et al. v. Brazil (on Climate Fund), ADPF Nº 708, Supremo Tribunal Federal, 01.07.2022.

Colombia, Nepal and Brazil have found that judicial review is triggered by potential human rights violations, and the court has a duty to not only provide judicial review by analyzing the legality of the measure in question, but also the authority to specifically direct the State to certain ways to comply with the duty to protect human rights. States still maintain discretion on how to adopt certain norms or how to implement them.

Approach 2: Judicial review of legality, but States hold a wide margin of discretion

26. Some courts have found that they can assess whether a State's obligation to mitigate GHG emissions is bound by a legal rule set forth in legislation, policy, or a constitutional obligation or duty but that nations have a wide margin of discretion to determine how to comply with that duty. This approach is perhaps best exemplified by courts in Ireland and Germany.

27. In *Friends of the Irish Environment v. Ireland*, the Irish Supreme Court held that Ireland's national mitigation plan was not sufficiently specific because a reasonable reader could not understand how Ireland would achieve its 2050 goal of aggregate CO2 emission reductions of at least 80% compared to 1990 levels. The Court assessed whether the plan complied with the requirements the legislature had set out, an issue which it found to be a matter of law and clearly justiciable.[49] The Court found that the trajectory for GHG emissions reductions proposed by the executive government was deficient and that the national law required the government to specify how to achieve the reduction target set forth.[50] However, the Court found a "blurring" of separation of powers when asked to identify the right to a healthy environment, which is not explicitly included in the Irish Constitution.[51]

28. In *Neubauer v. Germany*, the German Supreme Court analyzed whether the 55% target of emissions reductions by 2030 compared to 1990 levels according to German climate law was adequate to protect human rights of present and future generations. The Supreme Court did not weigh in on the adequacy of a separate, long-term target for GHG emission reductions by 2050. Rather, it held that the annual emission allowances until 2030 violated fundamental rights by irreversibly offloading emission reduction burdens into the future.[52] The Supreme Court described the test as whether the State's mitigation provisions are "manifestly unsuitable" or "completely inadequate" to achieve the required protection goal.[53] The Court clarified that the legislature enjoys a particular prerogative to specify the emission reduction objectives and requirement of climate protection under its margin of discretion,[54] but maintained that it is the proper role of the judiciary to ensure that these norms' outer boundaries are respected.

29. The apex courts in Ireland and Germany therefore found that the judiciary would not in those cases review the long-term targets of emissions reductions defined by the executive and legislative branches. However, these courts found that judicial review is well placed to assess how

[49] Friends of the Irish Environment CLG v The Government of Ireland (Irish Climate Case) [2020] Appeal No. 2015/19 (Supreme Court of Ireland), ¶ 6.27.
[50] *Ibid*, ¶5(25).
[51] *Ibid*, ¶8.9.
[52] Christina Eckes, *Separation of Powers in Climate Cases: Comparing cases in Germany and the Netherlands*, Verfassungsblog (May 10, 2021), https://verfassungsblog.de/separation-of-powers-in-climate-cases/.
[53] Neubauer and Others v Germany [2021] German Federal Constitutional Court 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (official translation), ¶152.
[54] *Ibid*, ¶205.

the long-term goal is implemented, including the sufficiency of measures to achieve it and the budget allocation leading up to the target year. The courts thereby deferred to their national governments on the mitigation goal, while ensuring that human rights are respected according to its implementation.

Approach 3: Courts cannot dictate particular standards or remedies on the issues of the appropriateness of a state's mitigation action (or lack thereof)

30. Finally, some lower, domestic courts have found that they cannot dictate particular standards or remedies on the appropriateness of a state's mitigation action, or lack thereof. Courts in the United States and Canada have used this approach. In *Juliana v United States*, discussed above, a two-judge majority held that the specific relief sought – a national program for climate drawdown – would involve "complex policy decisions" best left to the other branches of government.[55] Similarly, the Quebec Court of Appeal found in *Environnement Jeunesse v Procureur Général du Canada* that Canadian courts do not have the power to order the government to take particular action to combat the climate crisis.[56] The Court thus reversed the trial court's decision in finding the action justiciable. Similarly, in a set of cases, the ECtHR has determined that it is either poorly placed to assess a Contracting State's political determination or lacks the authority to do so. At the Court, this "extremely deferential" approach is frequently employed in cases involving emergency derogations from the Convention under Article 15 or other national security determinations.[57]

IV. Conclusion

31. As highlighted by the parties and in other interventions presented to this court, climate change widely impacts human rights in ways that are foreseeable and may be protected against. International human rights law confers positive obligations on nations to mitigate greenhouse gas emissions to protect threatened human rights, informed by principles of precaution, intergenerational equity, and rationality. This case provides the ECtHR with the first opportunity to assess the justiciability and merits of climate-related claims pertaining to human rights and obligations. Throughout this brief, the Sabin Center for Climate Change Law has sought to assist the Court with a variety of climate decisions by high courts, and in some instances, lower courts, from around the world with respect to the issue of victim status and separation of powers. For the reasons presented in this brief, the Sabin Center respectively suggests that this case should be admissible, and that the Court may resolve the merits of the questions presented in a manner informed on the principles and emerging practices evident in adjudication of climate litigation.

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[55] *Ibid* 5.
[56] *Ibid*, ¶32.
[57] Richard Smith, *The Margin of Appreciation and Human Rights Protection in the 'War on Terror'*, ESSEX HUMAN RIGHTS LAW REVIEW 124, 128 (2011).