

FEDERAL CONSTITUTIONAL COURT

– 2 BvQ 22/19 –

Pronounced
on 15 April 2019
Fischböck
Amtsinspektorin
as Registrar
of the Court Registry



IN THE NAME OF THE PEOPLE

**In the proceedings
on the application to declare inapplicable,
by way of a preliminary injunction,**

§ 6a(1) nos. 2 and 3 of the European Elections Act (*Europawahlgesetz*) – also in conjunction with § 6a(2) no. 1 of the European Elections Act – with respect to the ninth elections of the members of the European Parliament from the Federal Republic of Germany (cf. Federal Law Gazette – *Bundesgesetzblatt*, BGBl I 2018 page 1646)

Applicants: Members of the German *Bundestag*

1. Doris Achelwilm,
2. Grigorios Aggelidis,
3. Gökay Akbulut,
4. Renata Alt,
5. Luise Amtsberg,
6. Kerstin Andreae,
7. Christine Aschenberg-Dugnus,
8. Lisa Badum,

9. Annalena Baerbock,
10. Simone Barrientos,
11. Dr. Dietmar Bartsch,
12. Nicole Bauer,
13. Margarete Bause,
14. Dr. Danyal Bayaz,
15. Canan Bayram,
16. Jens Beeck,
17. Nicola Beer,
18. Matthias W. Birkwald,
19. Heidrun Bluhm,
20. Dr. Jens Brandenburg,
21. Mario Brandenburg,
22. Michael Brandt,
23. Dr. Franziska Brantner,
24. Agnieszka Brugger,
25. Christine Buchholz,
26. Birke Bull-Bischoff,
27. Dr. Marco Buschmann,
28. Karlheinz Busen,
29. Jörg Cezanne,
30. Dr. Anna Christmann,
31. Carl-Julius Cronenberg,
32. Sevim Dagdelen,

33. Britta Katharina Dassler,
34. Dr. Diether Dehm,
35. Ekin Deligöz,
36. Fabio De Masi,
37. Bijan Djir-Sarai,
38. Katja Dörner,
39. Anke Domscheit-Berg,
40. Katharina Dröge,
41. Christian Dürr,
42. Hartmut Ebbing,
43. Harald Ebner,
44. Klaus Ernst,
45. Dr. Marcus Faber,
46. Susanne Ferschl,
47. Daniel Föst,
48. Brigitte Freihold,
49. Otto Fricke,
50. Sylvia Gabelmann,
51. Matthias Gastel,
52. Kai Gehring,
53. Stefan Gelbhaar,
54. Katrin Göring-Eckardt,
55. Nicole Gohlke,
56. Erhard Grundl,

57. Dr. Gregor Gysi,
58. Thomas Hacker,
59. Heike Hänsel,
60. Dr. André Hahn,
61. Anja Hajduk,
62. Britta Haßelmann,
63. Katrin Helling-Plahr,
64. Markus Herbrand,
65. Torsten Herbst,
66. Katja Hessel,
67. Dr. Gero Clemens Hocker,
68. Manuel Höferlin,
69. Matthias Höhn,
70. Dr. Bettina Hoffmann,
71. Dr. Christoph Hoffmann,
72. Dr. Anton Hofreiter,
73. Ottmar von Holtz,
74. Reinhard Houben,
75. Andrej Hunko,
76. Ulla Ihnen,
77. Olaf in der Beek,
78. Dieter Janecek,
79. Ulla Jelpke,
80. Gyde Jensen,

81. Dr. Christian Jung,
82. Dr. Kirsten Kappert-Gonther,
83. Kerstin Kassner,
84. Uwe Kekeritz,
85. Thomas L. Kemmerich,
86. Dr. Achim Kessler,
87. Katja Keul,
88. Sven-Christian Kindler,
89. Katja Kipping,
90. Karsten Klein,
91. Maria Klein-Schmeink,
92. Dr. Marcel Klinge,
93. Daniela Kluckert,
94. Pascal Kober,
95. Dr. Lukas Köhler,
96. Carina Konrad,
97. Jan Korte,
98. Sylvia Kotting-Uhl,
99. Jutta Krellmann,
100. Oliver Krischer,
101. Wolfgang Kubicki,
102. Christian Kühn,
103. Renate Künast,
104. Konstantin Kuhle,

105. Alexander Kulitz,
106. Markus Kurth,
107. Alexander Graf Lambsdorff,
108. Caren Lay,
109. Monika Lazar,
110. Ulrich Lechte,
111. Sven Lehmann,
112. Sabine Leidig,
113. Steffi Lemke,
114. Ralph Lenkert,
115. Michael Leutert,
116. Stefan Liebich,
117. Christian Lindner,
118. Dr. Tobias Lindner,
119. Michael Georg Link,
120. Dr. Gesine Löttsch,
121. Oliver Luksic,
122. Thomas Lutze,
123. Till Mansmann,
124. Dr. Jürgen Martens,
125. Christoph Meyer,
126. Irene Mihalic,
127. Cornelia Möhring,
128. Amira Mohamed Ali,

- 129.Niema Movassat,
- 130.Alexander Müller,
- 131.Claudia Müller,
- 132.Norbert Müller,
- 133.Roman Müller-Böhm,
- 134.Beate Müller-Gemmeke,
- 135.Frank Müller-Rosentritt,
- 136.Zaklin Nastic,
- 137.Ingrid Nestle,
- 138.Dr. Alexander S. Neu,
- 139.Prof. Dr. Martin Neumann,
- 140.Thomas Nord,
- 141.Dr. Konstantin von Notz,
- 142.Omid Nouripour,
- 143.Friedrich Ostendorff,
- 144.Cem Özdemir,
- 145.Petra Pau,
- 146.Lisa Paus,
- 147.Sören Pellmann,
- 148.Victor Perli,
- 149.Tobias Pflüger,
- 150.Filiz Polat,
- 151.Hagen Reinhold,
- 152.Bernd Reuther,

- 153. Bernd Riexinger,
- 154. Tabea Rößner,
- 155. Claudia Roth,
- 156. Dr. Manuela Rottmann,
- 157. Corinna Rüffer,
- 158. Dr. Stefan Ruppert,
- 159. Dr. h.c. Thomas Sattelberger,
- 160. Manuel Sarrazin,
- 161. Christian Sauter,
- 162. Frank Schäffler,
- 163. Ulle Schauws,
- 164. Dr. Wieland Schinnenburg,
- 165. Dr. Frithjof Schmidt,
- 166. Stefan Schmidt,
- 167. Eva-Maria Schreiber,
- 168. Jimmy Schulz,
- 169. Kordula Schulz-Asche,
- 170. Matthias Seestern-Pauly,
- 171. Frank Sitta,
- 172. Dr. Petra Sitte,
- 173. Judith Skudelny,
- 174. Dr. Hermann Otto Solms,
- 175. Helin Evrim Sommer,
- 176. Bettina Stark-Watzinger,

177. Kersten Steinke,
178. Dr. Marie-Agnes Strack-Zimmermann,
179. Friedrich Straetmanns,
180. Benjamin Strasser,
181. Dr. Wolfgang Strengmann-Kuhn,
182. Margit Stumpp,
183. Katja Suding,
184. Dr. Kirsten Tackmann,
185. Jessica Tatti,
186. Linda Teuteberg,
187. Michael Theurer,
188. Stephan Thomae,
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190. Dr. Florian Toncar,
191. Markus Tressel,
192. Jürgen Trittin,
193. Prof. Dr. Andrew Ullmann,
194. Gerald Ullrich,
195. Alexander Ulrich,
196. Dr. Julia Verlinden,
197. Johannes Vogel,
198. Kathrin Vogler,
199. Dr. Sahra Wagenknecht,
200. Andreas Wagner,

- 201. Daniela Wagner,
- 202. Sandra Weeser,
- 203. Harald Weinberg,
- 204. Katrin Werner,
- 205. Nicole Westig,
- 206. Katharina Willkomm,
- 207. Hubertus Zdebel,
- 208. Pia Zimmermann,
- 209. Sabine Zimmermann,
- 210. Gerhard Zickenheiner,

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– authorised representative: Prof. Dr. Ulrich Hufeld,
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the Federal Constitutional Court – Second Senate –
with the participation of Justices

President Voßkuhle,
Huber,
Hermanns,
Müller,
Kessal-Wulf,
König,
Maidowski,
Langenfeld

held on the basis of the oral hearing of 15 April 2019:

Judgment:

§ 6a(1) nos. 2 and 3 of the European Elections Act and § 6a(2) no. 1 in conjunction with § 6a(1) nos. 2 and 3 of the European Elections Act must not be applied in relation to applications for voter registration (§§ 17, 17a of the European Electoral Regulations, *Europawahlordnung*) nor in relation to objections and complaints concerning the accuracy and completeness of the voters' registers (§ 21 of the European Electoral Regulations) for the ninth elections of the members of the European Parliament on 26 May 2019.

Reasons:

A.

The applicants are seeking a temporary suspension of § 6a(1) nos. 2 and 3 of the European Elections Act (*Europawahlgesetz – EuWG*) and § 6a(2) no. 1 in conjunction with § 6a(1) nos. 2 and 3 EuWG in the ninth elections of the members of the European Parliament on 26 May 2019. After pronouncing the operative part of the judgment, the Senate later stated the reasons for its decision in writing pursuant to § 32(5) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*).

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I.

1. § 6a(1) nos. 2 and 3 EuWG exclude German citizens from the right to vote in European elections if they are placed under full guardianship or if they are confined in a psychiatric hospital on the basis of a court order issued pursuant to § 63 in conjunction with § 20 of the Criminal Code (*Strafgesetzbuch – StGB*). Pursuant to § 6a(2) no. 1 EuWG, these instances of exclusion from the right to vote also apply to EU citizens. § 6a EuWG reads as follows:

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(1) German citizens are excluded from voting rights if

1. they do not have voting rights on the grounds of a judicial decision,

2. they have been placed under full guardianship in cases where guardianship is not merely temporary following a preliminary injunction; this also applies where the affairs designated in § 1896(4) and § 1905 of the Civil Code (*Bürgerliches Gesetzbuch*) are not part of the guardian's responsibilities,

3. they are confined in a psychiatric hospital on the basis of a court order issued pursuant to § 63 in conjunction with § 20 of the Criminal Code.

(2) Citizens of the European Union are excluded from voting rights if

1. one of the conditions stated in subsection (1) no. 1 to 3 applies to them, or

2. they do not have voting rights in elections to the European Parliament in the Member State of the European Union whose citizens they are (Member State of origin) on the grounds of a judicial decision in an individual case under civil or criminal law.

2. By Order of 29 January 2019, the Second Senate of the Federal Constitutional Court declared the exclusion from voting rights in elections of the German *Bundestag* laid down in § 13 no. 2 of the Federal Elections Act (*Bundeswahlgesetz* – BWahlG), which is identical in wording to § 6a(1) no. 2 EuWG, incompatible with Art. 38(1) first sentence and Art. 3(3) second sentence of the Basic Law (*Grundgesetz* – GG). In addition, the Court declared void the exclusion from voting rights under § 13 no. 3 BWahlG, which is identical in wording to § 6a(1) no. 3 EuWG (Federal Constitutional Court – BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –).

The Senate stated in this respect that § 13 no. 2 BWahlG interferes with the principle of universal suffrage under Art. 38(1) first sentence GG by excluding persons who are placed under full guardianship from exercising their voting rights. The Senate held that this interference is not justified, since the group of persons affected by the exclusion from voting rights is determined in a manner that violates the right to equality without sufficient factual reasons. Whether or not persons are deprived of their voting rights depends on whether a guardian is appointed based on the specific need for guardianship, or whether no such appointment is necessary. Yet this circumstance, which is actually coincidental, does not constitute a reason inherent in the matter which could justify the unequal treatment under electoral law of persons with an equal need for guardianship (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – paras. 86 and 87, 100, 103). Accordingly, § 13 no. 2 BWahlG also violates the prohibition of discrimination on grounds of disability pursuant to Art. 3(3) second sentence GG (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, para. 107 et seq.).

Neither is § 13 no. 3 BWahlG compatible with the principle of universal suffrage under Art. 38(1) first sentence GG or with the prohibition of discrimination on grounds of disability pursuant to Art. 3(3) second sentence GG (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – para. 112). Furthermore, exclusion from voting rights of such persons who are confined in a psychiatric hospital based on an order issued pursuant to § 63 StGB in conjunction with § 20 StGB is not justified by compelling reasons. The provision is not suitable for identifying persons who are generally incapable of participating in the democratic communication process. In addition, the provision leads to unequal treatment for which factual reasons are not discernible (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – para. 113 et seq., 133 et seq.).

3. In its 87th session on 15 March 2019, the German *Bundestag* rejected the reso-

lutions calling for an immediate and complete repeal of the respective voting right exclusions under the Federal Elections Act and the European Elections Act submitted by the parliamentary groups of FDP (*Bundestag* document – *Bundestagsdrucksache*, BTDrucks 19/3171) and BÜNDNIS 90/DIE GRÜNEN and DIE LINKE (BTDrucks 19/4568). Instead, the *Bundestag* adopted a resolution submitted by the governing parliamentary groups of CDU/CSU and SPD (BTDrucks 19/8261) endorsing the decision by the Federal Constitutional Court of 29 January 2019. The resolution also contains the announcement to repeal the voting right exclusions under § 13 nos. 2 and 3 BWahlG and § 6a(1) nos. 2 and 3 EuWG by 1 July 2019, to introduce a possibility to receive election assistance and to specify the criminal offence of electoral fraud laid down in § 107a StGB (cf. BTDrucks 19/8261, p. 2). In its reasoning, the parliamentary majority stated that it was impossible to amend the European Elections Act prior to the European elections on 26 May 2019. An amendment to electoral law provisions must always be introduced within a timeframe that is long enough to allow for its implementation before the respective elections. Amending the European Elections Act a few weeks prior to the European elections might interfere with the on-going preparations of the elections. In addition, the European Commission for Democracy through Law (Venice Commission) has determined that amendments to electoral law provisions must be adopted at least one year prior to an election. Amending electoral law directly before an election always carries the risk of exerting impermissible influence on the election process (cf. BTDrucks 19/8261, p. 1).

On 9 April 2019, the government coalition submitted a draft act to amend the Federal Election Act and other acts (BTDrucks 19/9228) which takes up the key aspects for the introduction of an inclusive electoral law set out in the resolution.

II.

The applicants are seeking a preliminary injunction ordering that § 6a(1) nos. 2 and 3 EuWG and § 6a(2) no. 1 in conjunction with § 6a(1) nos. 2 and 3 EuWG are not to be applied for the European election on 26 May 2019.

[...]

III.

1. The German *Bundestag* requests that the application be dismissed.

[...]

2. [...]

IV.

At the oral hearing of 15 April 2019, the parties reaffirmed and elaborated on their statements. The Federal Returning Officer (*Bundeswahlleiter*), the State Secretary of the Ministry of the Interior, Digitisation and Migration of the *Land* Baden-Württemberg, the *Land* Returning Officers of Baden-Württemberg, the Free State of Bavaria

and North Rhine-Westphalia submitted statements pursuant to § 27a BVerfGG.

B.

The application for a preliminary injunction is admissible. This is not altered by the fact that an admissible application in the principal proceedings has not been filed yet, given that it is sufficient for the admissibility of an application for a preliminary injunction that filing an application in the principal proceedings is possible, unless such an application is inadmissible from the outset or manifestly unfounded (cf. Decisions of the Federal Constitutional Court – BVerfGE 3, 267 <277>; 27, 152 <156>; 35, 193 <195>; 42, 103 <119>; 71, 350 <352>; 105, 235 <238>; 108, 34 <40>; established case-law). Nor does it bear on the admissibility of the application that a final decision on the participation in elections of persons who are excluded from voting rights pursuant to § 6a(1) nos. 2 and 3 EuWG and § 6a(2) no. 1 EuWG is made in the present preliminary injunction proceedings since a decision in the principal proceedings would be too late and sufficient legal protection could not be guaranteed in any other way (cf. BVerfGE 34, 160 <162 and 163>; 67, 149 <151>; 108, 34 <40>; 113, 113 <122>; 130, 367 <369>; 147, 39 <46 and 47 para. 11>; established case-law).

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C.

The application for a preliminary injunction is well-founded to the extent recognised by the Court.

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I.

1. Pursuant to § 32(1) BVerfGG, the Federal Constitutional Court may provisionally decide a matter in dispute by way of a preliminary injunction if this is urgently required to avert severe disadvantage, prevent imminent violence or for other important reasons in the interest of the common good. In assessing whether the requirements of § 32(1) BVerfGG are fulfilled, the Court must generally apply a strict standard, given the potentially far-reaching consequences of a preliminary injunction (cf. BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216 and 217>; 104, 23 <27>; 106, 51 <58>; 132, 195 <232 para. 86>). When deciding on the application for a preliminary injunction, the reasons submitted for the unconstitutionality of the challenged measure are not to be taken into account unless the declaration sought or the application made in the principal proceedings is inadmissible from the outset or manifestly unfounded (cf. BVerfGE 89, 38 <43 and 44>; 103, 41 <42>; 118, 111 <122>; established case-law). In case the outcome of the principal proceedings cannot be foreseen, the Federal Constitutional Court must weigh the potential consequences that would arise if the preliminary injunction sought were not issued but the application in the principal proceedings were ultimately successful against the consequences that would arise if the preliminary injunction sought were issued but the application in the principal proceedings were ultimately unsuccessful (cf. BVerfGE 105, 365 <371>; 106, 351 <355>; 108, 238 <246>; 125, 385 <393>; 126, 158 <168>; 129, 284 <298>; 132, 195 <232 and 233 para. 87>; established case-law).

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2. The standard for assessing whether the requirements of § 32(1) BVerfGG are fulfilled becomes even stricter if the preliminary injunction seeks suspension of a statute (cf. BVerfGE 3, 41 <44>; 6, 1 <4>; 7, 367 <371>; 64, 67 <69>; 81, 53 <54>; 117, 126 <135>), given that such a suspension amounts to a considerable interference with the inherent powers of the legislature (cf. BVerfGE 104, 23 <27>; 104, 51 <55>; 112, 284 <292>; 122, 342 <361>; 131, 47 <61>; 140, 99 <106 and 107 para. 12>; 140, 211 <219 para. 13>; established case-law). In general, the reasons in favour of a preliminary injunction must already be of such weight that issuing the injunction becomes indispensable; yet where suspension of a statute is sought, the underlying reasons must have even greater significance in order to prevail in the weighing of consequences (cf. BVerfGE 82, 310 <313>; 104, 23 <27 and 28>; 117, 126 <135>; 122, 342 <361 and 362>; 140, 99 <107 para. 12>; 140, 211 <219 para. 13>; established case-law).

II.

Based on this standard, the application for a preliminary injunction must be granted to the extent set out in the operative part of the judgment. An application in abstract judicial review proceedings, which the applicants have yet to file, might be successful (1.). The weighing of consequences required in such proceedings is in favour of the applicants (2.).

1. An application for judicial review, which the applicants have yet to file, would neither be inadmissible (a) nor manifestly unfounded (b).

a) [...]

b) An application in the principal proceedings would not be manifestly unfounded. It cannot be ruled out that the exclusions from voting rights challenged here are incompatible with Art. 3(1) and (3) second sentence GG and thus in breach of substantive constitutional law. Rather, in light of the Order of the Second Senate of 29 January 2019 on the identical exclusions from voting rights pursuant to § 13 nos. 2 and 3 BWahlG (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, para. 83 et seq.), it seems likely that the exclusions from voting rights in § 6a(1) nos. 2 and 3 EuWG violate the general right to equality under Art. 3(1) GG, which is applied when reviewing provisions of the European Elections Act (cf. BVerfGE 51, 222 <234>; 129, 300 <317>; 135, 259 <284 para. 44>), and the prohibition of discrimination on grounds of disability pursuant to Art. 3(3) second sentence GG.

The same applies to the exclusions from voting rights under § 6a(1) nos. 2 and 3 EuWG where they affect citizens of other EU Member States pursuant to § 6a(2) no. 1 EuWG. The scope of protection of the general right to equality or of the prohibition of discrimination on grounds of disability is not limited to German citizens. If, pursuant to § 6(3) EuWG, citizens of other EU Member States are entitled to vote in the election of German members of the European Parliament, they must be treated equally to German voters.

2. The required balancing must weigh the consequences that would arise if the preliminary injunction sought were not issued but § 6a(1) nos. 2 and 3 EuWG and § 6a(2) no. 1 in conjunction with § 6a(1) nos. 2 and 3 EuWG would ultimately be found unconstitutional (a) against the consequences that would arise if the preliminary injunction were issued, suspending the provisions, but the provisions would later be found constitutional (b). In the case at hand, the reasons in favour of issuing a preliminary injunction offering the persons presently excluded from voting pursuant to § 6a(1) nos. 2 and 3 EuWG and pursuant to § 6a(2) no. 1 in conjunction with § 6a(1) nos. 2 and 3 EuWG the possibility to participate in the next European elections prevail (c). This does not constitute an impermissible interference with the inherent powers of the legislature (d).

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a) If the persons affected by § 6a(1) nos. 2 and 3 EuWG and § 6a(2) no. 1 in conjunction with § 6a(1) nos. 2 and 3 EuWG were barred from participating in the European elections on an unconstitutional basis, they would, in these elections, be irreversibly deprived of the most noble right conferred upon citizens in a democratic state (cf. BVerfGE 1, 14 <33>; BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 –, para. 106). The right to vote is essential to the participation of citizens in the exercise of state power (cf. BVerfGE 8, 104 <115>; 83, 60 <71>) so that an unconstitutional deprivation of the right to vote bears significant weight.

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Furthermore, an unconstitutional exclusion from voting rights would adversely affect the legitimation of the members of the European Parliament elected in Germany. It cannot be ruled out that the outcome of the elections would be different if the persons excluded from the right to vote were allowed to cast their vote in the upcoming European elections, since the number of persons excluded from voting in them exceeds the number of persons excluded from voting in the elections to the *Bundestag* pursuant to § 13 nos. 2 and 3 BWahlG given that citizens from other EU Member States, to whom the conditions of § 6a(1) nos. 2 and 3 EuWG apply, are excluded from voting pursuant to § 6a(2) no. 1 EuWG.

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In the context of the required weighing of consequences, it must also be taken into account that the Second Senate of the Federal Constitutional Court has already dealt with the identical exclusions from voting rights under § 13 nos. 2 and 3 BWahlG and found them to be unconstitutional by Order of 29 January 2019 (2 BvC 62/14). The parties to the proceedings did not submit that a different constitutional assessment was required with regard to § 6a(1) nos. 2 and 3 EuWG, and there is no other indication for it. Nor does a different assessment follow from the fact that § 6a(1) nos. 2 and 3 EuWG are not measured against the standard of Art. 38(1) first sentence GG, but of Art. 3(1) GG (cf. in this respect BVerfGE 51, 222 <234>; 129, 300 <317>; 135, 259 <284 para. 44>). Therefore, it can be assumed that the European elections would be held on the basis of unconstitutional election law provisions if the preliminary injunction was not issued. The fact that the Federal Constitutional Court has already declared the challenged exclusions from voting rights unconstitutional with regard to the *Bundestag* elections is an extraordinary situation that carries special weight for the

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decision on the preliminary injunction.

b) aa) If, in contrast, the preliminary injunction is issued, an impairment of the function of elections as integrative processes for the formation of the political will of the people cannot be ruled out from the outset (cf. in this respect BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – para. 88 et. seq.). In this context, the Senate held with regard to § 13 no. 2 BWahlG that the legislature’s assumption that the appointment of a guardian for all affairs typically relates to cases in which persons lack the mental capacity required to participate in the democratic communication process is at least not implausible. However, the provision fails to satisfy the constitutional requirements regarding statutory categorisation since the group of persons affected by the exclusion from voting rights is determined in a manner that violates the right to equality without sufficient factual reasons (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – paras. 99, 100). Based on these considerations, it is for the legislature to decide how to remedy the unconstitutional unequal treatment under electoral law of persons with an equal need for guardianship, while balancing the principle of universal suffrage and the aim of safeguarding the function of the election as an integrative process for the formation of the political will of the people (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – para. 139). Accordingly, it cannot be ruled out that in case the preliminary injunction sought is issued, persons lacking the mental capacity required to participate in the democratic communication process will participate in the European elections, which will in turn impair the integrative function of the election.

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bb) The arguments presented in the oral hearing do not suggest any other weighty disadvantages potentially precluding the issuing of the preliminary injunction.

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(1) First of all, this applies to the statement that a repeal of the exclusions from voting rights challenged in these proceedings cannot be implemented before the European elections on 26 May 2019 in a manner that is in line with the principle of legal certainty. In this regard, the Federal Returning Officer and the returning officers of the *Land* Baden-Württemberg, of the Free State of Bavaria and of the *Land* North Rhine-Westphalia concurringly submitted that in case of a repeal of the challenged exclusions from voting rights, an *ex officio* correction of the voters’ register for the 2019 European elections would require considerable administrative effort because residence registers do not state the grounds for an exclusion from voting rights, which would therefore have to be established manually. In their opinion, however, the corrections could be carried out in due time. The returning officer of the Free State of Bavaria submitted that the Free State of Bavaria has an extraordinarily high number of persons excluded from voting rights and that individual municipalities would be unequally affected by the implementation effort caused in case of a suspension of the exclusion provisions. Yet, contrary to the view of the Federal Ministry of the Interior, Building and Community, he did not consider an *ex officio* correction of the voters’ registers in time for the 2019 European elections to be factually impossible. He only pointed out that municipalities with large care facilities for persons with disabilities

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might have to face particular challenges, which would have to be met by supporting them with additional personnel where necessary. Ultimately, however, he did not rule out that a timely *ex officio* correction of the voters' registers for the 2019 European elections in a manner that is in line with legal certainty would be possible in case a respective preliminary injunction is issued.

The expected administrative effort is also limited by the fact that the Senate restricted the preliminary injunction to suspending § 6a(1) nos. 2 and 3, § 6a(2) no. 1 EuWG in cases of an application for voter registration pursuant to §§ 17, 17a of the European Election Regulations (*Europawahlordnung* – EuWO), or of objections to or complaints concerning the accuracy or completeness of the voters' register pursuant to § 21 EuWO. Accordingly, a complete *ex officio* review of the voters' registers for the 2019 European elections is not required. They must be corrected only following respective applications filed pursuant to §§ 17, 17a EuWO or objections pursuant to § 21 EuWO. In such a case, persons filing an application seeking their entry in the voters' register must provide the necessary evidence to prove the facts they alleged (§ 21(2) second sentence EuWO). Overall, the expected administrative effort is limited, and does not provide sufficient reason to assume that implementation of the issued preliminary injunction is impossible or highly prone to errors.

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(2) Nor does issuing the preliminary injunction give rise to additional grounds to contest the elections.

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(a) Persons affected by an exclusion from voting rights pursuant to § 6a EuWG did not participate in the election preparation and were barred from the right to stand for election since pursuant to § 6b(3) no. 1 and § 6b(4) no. 2 EuWG, this right cannot be exercised in case of an exclusion from the right to vote. However, the question whether and to what extent these circumstances cause electoral irregularities in the 2019 European elections must be answered independently of issuing of the preliminary injunction sought. In this respect, it is decisive to establish whether the non-participation of the persons affected violates their right to vote given that the exclusion from voting rights pursuant to § 6a EuWG does not meet the requirements under constitutional law. In this regard, limited non-applicability of § 6a(1) nos. 2 and 3 and § 6a(2) no. 1 EuWG ordered by way of a preliminary injunction is not decisive.

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(b) Nor is the statement relevant that, when the preliminary injunction is issued, the European elections on 26 May 2019 are more prone to errors given that, at the same time, municipal elections to which exclusions from voting rights continue to apply are held in several *Länder*. Even if a preliminary injunction is not issued, it cannot be avoided that different exclusions from voting rights are applicable simultaneously. For instance, the *Land* Baden-Württemberg adopted a law on 3 April 2019 (*Landtag* document – *Landtagsdrucksache*, LTDDrucks 16/6027) allowing all persons who have an appointed guardian to attend to all their affairs to participate in the municipal elections taking place at the same time as the European elections on 26 May 2019. Consequently, not issuing the preliminary injunction would precisely lead to the application

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of different exclusions from voting rights to the elections held on 26 May 2019 in Baden-Württemberg. In addition, the *Land* Returning Officer of North Rhine-Westphalia stated in the oral hearing that the introduction of inclusive voting rights at municipal and *Land* level did not cause significant implementation problems for the *Land* although the challenged exclusions from voting rights for *Bundestag* and European elections continued to apply.

(3) Ultimately, issuing the preliminary injunction would not violate the Venice Commission Code of Good Practice in Electoral Matters (Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report – of 30 October 2002, CDL-AD <2002> 23) .

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(a) This is supported by the fact that statements from committees and similar treaty bodies of international organisations are not directly binding at the domestic level (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2BvC 62/14 – para. 64 with further references) and that, pursuant to Art. 1 of its Statute of 21 February 2002 (Committee of Ministers’ Resolution <2002> 3: Revised Statute of the European Commission for Democracy through Law, 21 February 2002), the Venice Commission (only) is a consultative body with cooperative function (cf. Grabenwarter, *Jahrbuch des öffentlichen Rechts der Gegenwart, neue Folgen* – JöR N.F., vol. 66 <2018>, p. 21 <23>).

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(b) Furthermore, the substantive standards of the Code of Good Practice are not in conflict with an increase of voters eligible to participate in the upcoming elections in a timely manner. Pursuant to number II. 2. b of the Code of Good Practice guidelines, the fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election. Under numbers 63 and 64, the explanatory report to these guidelines states the following:

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63. Stability of the law is crucial to credibility of the electoral process, which is itself vital to consolidating democracy. Rules which change frequently – and especially rules which are complicated – may confuse voters. Above all, voters may conclude, rightly or wrongly, that electoral law is simply a tool in the hands of the powerful, [...].

64. In practice, however, it is not so much stability of the basic principles which needs protecting (they are not likely to be seriously challenged) as stability of some of the more specific rules of electoral law, especially those covering the electoral system per se, the composition of electoral commissions and the drawing of constituency boundaries. These three elements are often, rightly or wrongly, regarded as decisive factors in the election results, and care must be taken to avoid not only manipulation to the advantage of the party in power, but even the mere semblance of manipulation.

According to these considerations, the stability of electoral law is intended to guarantee the credibility of the electoral process, which itself is vital to consolidating democracy. Voters must have confidence that their vote decides on the outcome of the elections and that it will not be undermined by changes of electoral law to the advantage of the majority in power. The mere semblance of manipulation must be avoided. 50

Adding the persons designated in § 6a(1) nos. 2 and 3 and § 6a(2) no. 1 EuWG to the group of persons eligible to vote is not in conflict with this protective purpose. It is far-fetched to assume that a suspension of such exclusions from voting rights shortly before holding an election has the manipulative effect of keeping existing government majorities in power. Voters do not require special protection if the outcome of the upcoming election is thus provided with a broader democratic basis. 51

c) In the required weighing of consequences, the grounds in favour of a preliminary injunction reflecting the content of the operative part of the judgment outweigh the ones against it. If the preliminary injunction were not issued and the application in the principal proceedings were held to be well-founded, which is highly likely, considering the Order of the Senate of 29 January 2019, the persons affected by the provisions would irreversibly be deprived of their right to vote in the 2019 European elections. The severe disadvantage arising from this outweighs the disadvantage of a potential impairment of the function of an election as integrative processes for the formation of the political will of the people by including individual persons who lack the mental capacity required to participate in the democratic communication process. Accordingly, the Federal Constitutional Court found that the exclusion from voting rights pursuant to § 13 no. 2 BWahlG, which is identical in wording to § 6a(1) no. 2 EuWG, is incompatible with Art. 38(1) first sentence and Art. 3(3) second sentence GG, and did not combine this finding with an order of continued applicability of the provision (cf. BVerfG, Order of the Second Senate of 29 January 2019 – 2 BvC 62/14 – para. 139). 52

d) Moreover, the grounds for issuing the preliminary injunction in the present proceedings are of sufficient weight to justify the interference with the legislature's inherent powers resulting from the suspension of the challenged exclusions from voting rights. The preliminary injunction serves to protect the right to vote, which is the most important right to democratic participation. In this context, the interference with the legislature's inherent powers is of minor impact given that the preliminary injunction only concerns the 2019 European elections and that it only orders to grant persons affected by exclusions from voting rights the right to cast their vote, who exercised their right to file an application, an objection or a complaint pursuant to §§ 17, 17a or § 21 EuWO. Otherwise, the legislature is free to decide how to balance the principle of universal suffrage with safeguarding the function of elections as an integrative process. In particular, the legislature is free, in line with the resolution by the German *Bundestag* (cf. BTDrucks 19/8261), to repeal the exclusions from voting rights under the Federal Elections Act and under the European Elections Act and to combine the repeal with provisions on election assistance, protection against manipulations and 53

provisions specifying the criminal offence of electoral fraud.

Voßkuhle

Huber

Hermanns

Müller

Kessal-Wulf

König

Maidowski

Langenfeld

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Zitiervorschlag BVerfG, Urteil des Zweiten Senats vom 15. April 2019 - 2 BvQ 22/19 - Rn. (1 - 53), http://www.bverfg.de/e/qs20190415_2bvq002219en.html

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