Headnotes

to the Order of the First Senate of 27 April 2022 - 1 BvR 2649/21 -

Proof of vaccination (COVID-19)

1. **State measures that have an indirect or de facto impact may be functionally equivalent, in terms of their objective and effects, to a direct interference with fundamental rights. Such measures must then be treated in the same way as a direct interference. As a defensive right against state interference, Art. 2(2) first sentence of the Basic Law in principle also protects the individual against state measures that impair physical integrity and the related right to self-determination in a purely indirect manner, in cases where a law attaches a negative consequence to the exercise of a fundamental freedom with the aim of discouraging the exercise of this freedom.**

2. **In terms of its objective and effects, the obligation to provide proof of vaccination against COVID-19 laid down in § 20a of the Protection Against Infection Act is functionally equivalent to a direct interference with Art. 2(2) first sentence of the Basic Law. The law creates disadvantages for persons who decide not to get vaccinated – a decision that falls within the scope of physical integrity. Being confronted with these disadvantages is intended to encourage affected persons to get vaccinated. As this effect is in line with the legislative objective, the impairment of physical integrity is not merely an unintended side effect of the law.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 2649/21 -

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

[of 54 complainants]

– authorised representative: (…) –

against § 20a, § 22a and § 73(1a) nos. 7e to 7h of the Act on the Prevention and Control of Infectious Diseases in Humans (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen, Infektionsschutzgesetz,* Protection Against Infection Act) of 20 July 2000 (Federal Law Gazette, *Bundesgesetzblatt* I page 1045), last amended by Article 1 nos. 2 and 4 of the Act Amending the Protection Against Infection Act and Other Acts of 18 March 2022 (Federal Law Gazette I page 466)

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Harbarth,

Paulus,

Baer,

Britz,

Ott,

Christ,

Radtke,

Härtel

held on 27 April 2022:

The constitutional complaint is rejected.

R e a s o n s:

A.

The constitutional complaint is directed against amendments to the Protection Against Infection Act. The challenged amendments are set out in § 20a and § 73(1a) nos. 7e to 7h of the Act on the Prevention and Control of Infectious Diseases in Humans (*Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen, Infektionsschutzgesetz,* Protection Against Infection Act – IfSG), which took effect on 12 December 2021. The newly inserted provisions impose an obligation on staff of certain institutions and organisations [in the health and care sectors] to provide proof of vaccination, recovery or contraindication to vaccination against COVID-19. This obligation applies to persons working in the health and care sectors, for example in hospitals, doctors' and dentists' practices, emergency medical services, retirement and nursing homes, facilities for the disabled and outpatient care. 1

The complainants initially challenged the provisions in the version of the Act to Promote Vaccination Against COVID-19 and to Amend Other Provisions in the Context of the COVID-19 Pandemic (*Gesetz zur Stärkung der Impfprävention gegen COVID-19 und zur Änderung weiterer Vorschriften im Zusammenhang mit der COVID-19-Pandemie*) of 10 December 2021 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 5162). Following the amendment of § 20a IfSG by Art. 1 no. 2 of the Act Amending the Protection Against Infection Act and Other Acts of 18 March 2022 (BGBl I p. 466) that took effect on 19 March 2022, the complainants changed their submissions to reflect this amendment by application of 26 March 2022. Their constitutional complaint thus also extends to the amendment of § 20a IfSG, which now makes reference to the newly inserted § 22a IfSG. 2

I.

The challenged provisions were enacted in the context of the global pandemic caused by the SARS-CoV-2 virus and the COVID-19 disease that has been ongoing since spring 2020. 3

1. a) Both at the federal and at the *Land* level, a number of measures were taken from March 2020 onwards in response to the high case numbers and unpredictable developments caused by the COVID-19 pandemic. The measures taken included contact restrictions, curfews, school and business closures (cf. in summary, Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 6 ff. – Federal pandemic emergency brake I). 4

By the end of 2021, the pandemic entered a fourth wave, exacerbating the situation. The fourth wave entailed not only rising case numbers, but also more cases of severe illness and death. At the same time, intensive care capacities were strained in many regions – in some regions, demand for intensive care treatment exceeded existing capacities, requiring patients to be moved to hospitals in other regions (cf., e.g., Weekly situation report by the Robert Koch Institute on coronavirus disease 2019 5

<COVID-19> – hereinafter: RKI, Weekly situation report – of 2 December 2021, p. 3). […] The Delta variant (B.1.617.2) continued to be the dominant variant, accounting for almost all new cases. At the time, there were only a few infections that could be attributed to the new Omicron variant (B.1.1.529). Reports on this new variant first emerged from South Africa on 24 November 2021. As early as 26 November 2021, the World Health Organisation classified Omicron as a variant of concern.

Following the adoption of the Act challenged in these proceedings on 10 December 2021, case numbers fell slightly until the end of the year ([…]). However, in February and March 2022, a fifth wave led to case numbers reaching peak levels of at times more than a million reported COVID-19 cases per week ([…]). This wave was mainly caused by the Omicron variant, which is more infectious than earlier variants of the virus, but on average results in less severe illness. According to the Robert Koch Institute, the peak of this current wave has now passed ([…]). 6

b) […] 7-9

2. a) The challenged provisions impose an obligation to provide proof of vaccination against or recovery from COVID-19 on staff in the health and care sectors. They are based on a draft act of 6 December 2021 submitted to the 20th German *Bundestag* by the governing coalition (*Bundestag* document, *Bundestagsdrucksache* – BT-Drucks 20/188). […] Following the consent of the *Bundesrat* on 10 December 2021 (*Bundesrat* document, *Bundesratsdrucksache* – BRDrucks 830/21 <Beschluss>), the act was published in the Federal Law Gazette on 11 December 2021 (BGBl I p. 5162) and – to the extent that it is challenged here – entered into force the following day. 10

b) According to the explanatory memorandum to the draft act, § 20a IfSG serves to protect public health and vulnerable groups from COVID-19 (cf. BTDrucks 20/188, pp. 4, 30). The legislator submitted that while most people do not fall severely ill when they contract COVID-19, some people have a higher risk of severe illness or death because of their general health and/or their age (vulnerable groups). Moreover, vaccination is less effective for some groups, who are therefore dependent on their carers being fully vaccinated. According to the legislator, these vulnerable groups include (elderly) persons in need of long-term care, in particular residents of retirement homes; given their age and/or pre-existing conditions, these groups typically also include recipients of care in the context of services for people with disabilities or impairments (cf. BTDrucks 20/188, p. 28). 11

The legislator stated that safe and highly effective vaccines are available to prevent infection. Vaccination not only protects the vaccinated, it also reduces transmission of the disease. According to the legislator, vaccinated and recovered persons are less likely to get infected and therefore also less likely to transmit the virus. Moreover, if they do get infected despite having been vaccinated, such persons are less infectious and only infectious for a shorter period. Vulnerable groups in particular stand to benefit from reduced transmission risks since vaccination does not always prevent infection, especially for older and immunocompromised persons (cf. BTDrucks 20/ 12

188, pp. 1 f., 28, 37). In order to reduce the risk of infection for vulnerable groups, very high vaccination levels are especially important among staff in the health sector and staff working with persons in need of long-term care or persons with disabilities as this can lower the risk of vulnerable persons getting infected with SARS-CoV-2 (cf. BTDrucks 20/188, pp. 2, 28; 20/250, p. 4).

c) As of 15 March 2022, staff in certain healthcare or care institutions and organisations have been required to be fully vaccinated against COVID-19 or to have recovered from the illness and must provide the management of their institution or organisation with proof to that effect (§ 20a(1) first sentence, § 20a(2) first sentence IfSG).Only persons with a certificate of a medical contraindication to vaccination are exempt from this obligation (§ 20a(1) second sentence IfSG). If no proof of vaccination or recovery is submitted by 15 March 2022 or if there are doubts as to its authenticity or accuracy, the management of the respective institution or organisation must inform the local public health authority (*Gesundheitsamt*) without undue delay (§ 20a(2) second sentence IfSG). If someone then fails to comply with a demand by the public health authority pursuant to § 20a(5) first sentence IfSG to submit the required proof within a reasonable deadline, the authority can issue an order banning them from entering the relevant institutions and organisations, or from working there (§ 20a(5) third sentence IfSG). 13

Persons who only start to work at the institutions or organisations listed in § 20a(1) first sentence IfSG from 16 March 2022 onwards must submit the required proof before taking up their work (cf. § 20a(3) first sentence IfSG). Otherwise, they may neither be employed by, nor work at such institutions or organisations from the outset (§ 20a(3) fourth and fifth sentence IfSG). […] Non-compliance with a number of the rules contained in § 20a IfSG is punishable by fine ([...]). § 20a IfSG and the provisions governing fines cease to have effect on 1 January 2023 (Art. 2 nos. 1 and 2a in conjunction with Art. 23(4) of the Act to Promote Vaccination Against COVID-19 and to Amend Other Provisions in the Context of the COVID-19 Pandemic). 14

d) § 20a(1) first sentence and § 20a(2) first sentence IfSG in the version of 10 December 2021 initially defined the terms vaccination, recovery and proof of vaccination or recovery by making reference to § 2 nos. 2 to 5 of the Ordinance Governing Allowances and Exemptions from Protective Measures to Prevent the Spread of COVID-19 (*Verordnung zur Regelung von Erleichterungen und Ausnahmen von Schutzmaßnahmen zur Verhinderung der Verbreitung von COVID-19, COVID-19-Schutzmaßnahmen-Ausnahmenverordnung*, COVID-19 Ordinance on Exemptions from Protective Measures of 8 May 2021, Federal Gazette Official Publications, *Bundesanzeiger Amtlicher Teil* – BAnz AT of 8 May 2021 V1) in the version in force at the relevant time. In its amended version (as revised by the Ordinance Amending the Ordinance on COVID-19 Entry Regulations of 14 January 2022, BAnz AT of 14 January 2022 V1), this ordinance in turn makes reference to details published on the websites of the Paul Ehrlich Institute and of the Robert Koch Institute for the purpose of specifying the requirements regarding proof of vaccination or re- 15

covery.

By order of 10 February 2022, the Federal Constitutional Court rejected the application for preliminary injunction lodged by complainants nos. 1) to 46). However, the Court expressed doubts as to the constitutionality of the legislative technique chosen in § 20a IfSG – a two-stage dynamic reference. The Court held that this legislative technique gave rise to the question whether and to what extent there was a sufficient legislative basis for the binding external effects resulting from a dynamic reference to the rules of the aforementioned federal institutes. Even if there was a sufficient basis, the Court found that further examination would be necessary to establish whether and to what extent there were tenable reasons why the task of specifying the requirements for the proof of vaccination or recovery that a person must submit, and thus for determining which persons are considered to be vaccinated and recovered within the meaning of the law, had been left to the aforementioned federal institutes rather than to the authority responsible for issuing the ordinance (cf. Federal Constitutional Court, Order of the First Senate of 10 February 2022 - 1 BvR 2649/21 -, para. 14). 16

After the constitutional complaint was lodged, the legislator amended § 20a(1) first sentence and § 20a(2) first sentence IfSG with effect from 19 March 2022. The requirements concerning the proof of vaccination or recovery that a person must submit are now set out in the newly inserted § 22a(1) and (2) IfSG ([…]). According to the explanatory memorandum to the draft act, one purpose of this amendment was to lay down definitions of these terms in the Protection Against Infection Act itself, given the particular importance of proof of vaccination and recovery (cf. BTDrucks 20/958, pp. 2, 13). 17

§ 22a(1) first sentence IfSG defines proof of vaccination as proof that a person has been fully vaccinated. In this respect, § 22a(1) second sentence IfSG specifies the vaccines to be used (no. 1), the three doses necessary (no. 2) and the interval of at least three months between the second and third vaccine dose (no. 3). […] § 22a(2) IfSG defines proof of recovery as proof regarding immune protection against SARS-CoV-2 acquired through previous infection in cases where previous infection was detected through a nucleic acid amplification test and this test was taken at least 28 and no longer than 90 days ago. […] 18

II.

[…] 19-20

III.

1. Complainants nos. 4) to 7), 24) to 50), 53) and 54) work in the health and care sectors. 21

a) Complainants nos. 4) to 7), 24) to 34), 36), 38) to 50), 53) and 54) challenge the provisions at issue here in their capacity as persons who are subject to the obligation to provide proof of vaccination or recovery. 22

aa) […] 23-28

bb) The complainants claim a violation of their rights under Art. 1(1) first sentence, Art. 2(1) in conjunction with Art. 1(1) first sentence (right to informational self-determination), Art. 2(2) first sentence, Art. 2(2) second sentence in conjunction with Art. 104, Art. 3(1), Art. 4(1), Art. 6(2), Art. 10(1), Art. 11(1), Art. 12(1), Art. 13(1) and (7), Art. 19(1) second sentence, Art. 19(4), Art. 33(2) and (5) and Art. 2(1) in conjunction with Art. 103(2) of the Basic Law (*Grundgesetz* – GG). 29

[…] 30-37

Complainants nos. 25), 32), 33) and 36), who work as fire brigade officers and are also deployed as paramedics or emergency services staff in this context, additionally claim a violation of Art. 33(2) and (5) GG. [...] 38

b) Complainants nos. 4) to 6), 35), 37), 42) and 43) challenge the provisions in question in their capacity as institutions or organisations in the health and care sectors. 39

[…] 40

The complainants assert a violation of Art. 12(1) GG because they may not continue to employ unvaccinated staff members from 15 March 2022 onwards; complainants nos. 5), 35), 37), 42) and 43) also assert a violation of Art. 12(1) GG on the grounds that they cannot employ new unvaccinated staff members from 16 March 2022. Moreover, all complainants claim that their obligation to provide personal data to the local public health authority violates their right to informational self-determination. They also challenge the fines that can be imposed in case of non-compliance. 41

2. Complainants nos. 1) to 3), 8) to 23), 51) and 52) submit that they are patients of unvaccinated doctors, dentists and other medical professionals. They assert a violation of their freedom of contract, which is protected by fundamental rights and from which they derive a right to freely choose their doctor. They claim that § 20a IfSG makes this impossible since they can no longer be treated by unvaccinated medical professionals. 42

IV.

The *Bundestag*, the *Bundesrat*, the Federal Government as well as all *Land* governments were given the opportunity to submit statements and to answer questions of fact in the constitutional complaint proceedings. In accordance with § 27a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the opportunity to submit statements on questions of fact by 2 February 2022 was given to the following expert third parties: the Robert Koch Institute (RKI), the Paul Ehrlich Institute (PEI), the German Medical Association (*Bundesärztekammer*), the Association of Doctors for Autonomy in Deciding on Vaccination (*Verein der Ärztinnen und Ärzte für individuelle Impfentscheidung e.V.*), the Professional Association of Doctors for Microbiology, Virology and Infectious Disease Epidemiology (*Berufsverband der Ärzte für Mikrobiologie, Virologie und Infektionsepidemiologie e.V.*), the Federal As- 43

sociation of Doctors Working in Public Healthcare (*Bundesverband der Ärztinnen und Ärzte des Öffentlichen Gesundheitsdienstes e.V.*), the German Society for Epidemiology (*Deutsche Gesellschaft für Epidemiologie e.V.* – DGEpi), the German Society of Infectious Diseases (*Deutsche Gesellschaft für Infektiologie e.V.*), the German Interdisciplinary Association for Intensive Care and Emergency Medicine (*Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin* – DIVI), the Society of Virology (*Gesellschaft für Virologie e.V.* – GfV) and the Helmholtz Centre for Infection Research (*Helmholtz-Zentrum für Infektionsforschung GmbH* – HZI). The questions of fact raised by the Court were as follows:

a) To what extent is it (still) tenable to assume that elderly people and people with acute or chronic conditions have a significantly higher risk of developing severe symptoms after contracting COVID-19?

To what extent is it (still) tenable to assume that vaccination against COVID-19 is less effective for certain groups and that these groups are therefore at higher risk of contracting SARS-CoV-2 despite being vaccinated?

b) To what extent is it (still) tenable to assume that persons who are vaccinated against or have recovered from COVID-19 are less likely to get infected with SARS-CoV-2 and that they are less infectious of infectious for shorter periods if they do get infected despite being vaccinated?

c) To what extent can vaccination against COVID-19 reduce the likelihood of getting infected with future variants of SARS-CoV-2?

The Court also gave third parties the opportunity to answer questions regarding the constitutionality of the dynamic reference made by § 20a(1) first sentence and § 20a(2) first sentence nos. 1 and 2 IfSG (old version) to § 2 nos. 2 to 5 of the COVID-19 Ordinance on Exemptions from Protective Measures (old version), which, in turn, makes reference to the websites of the Paul Ehrlich Institute and the Robert Koch Institute for the purpose of specifying the requirements applicable to the proof of vaccination or recovery that a person must submit. In this respect, the legislator has since amended the law (see para. 17). 44

[…] 45-66

B.

The constitutional complaint of complainants nos. 4) to 7), 24) to 28), 35), 42) and 43) is admissible. The complainants have standing. By contrast, complainants nos. 1) to 3), 8) to 23), 30) to 34), 36) to 41) and 44) to 54) failed to sufficiently demonstrate that the challenged provisions may have violated their own fundamental rights (see I. below). The constitutional complaint satisfies the principle of subsidiarity (see II. below). Complainant no. 29) failed to demonstrate that he continues to have a recognised legal interest in bringing proceedings (*Rechtsschutzinteresse*) (see III. below). 67

I.

Complainants nos. 4) to 7) and 24) to 29) have standing insofar as they challenge the provisions addressing them in § 20a(1) first sentence nos. 1a, 1h, 1k, no. 3, § 20a(2) first sentence, § 20a(4) first sentence and § 20a(5) IfSG and insofar as they assert a violation of Art. 2(2) first sentence and Art. 12(1) GG. Moreover, they have standing – just as complainants nos. 35), 42) and 43) as heads of an institution or organisation do – insofar as they challenge the fines that can be imposed in case of non-compliance […] and that are addressed to them, asserting that these violate Art. 2(1) in conjunction with Art. 103(2) GG. 68

[…] 70-87

1. […]

2. Insofar as the complainants are individually, presently and directly affected by the challenged provisions, they have only in part satisfied the substantiation requirements derived from § 23(1) second sentence and § 92 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) (cf. in this respect Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 151, 67 <84 f. para. 49> with further references) by demonstrating the possibility that the challenged provisions have violated their fundamental rights or rights that are equivalent to fundamental rights. 88

a) Insofar as they are themselves subject to the obligation to provide proof of vaccination or recovery, complainants nos. 4) to 7) and 24) to 29) have demonstrated the possibility that the provisions affecting them in § 20a(1) first sentence nos. 1a, 1h, 1k, no. 3 and § 20a(2) first sentence, § 20a(4) first sentence and § 20a(5) IfSG may violate their fundamental rights to physical integrity (Art. 2(2) first sentence GG) and to occupational freedom (Art. 12(1) GG). This also applies insofar as they – like complainants nos. 35), 42) and 43) as heads of an institution or organisation – additionally assert that the fines that can be imposed on them in case of non-compliance […] violate Art. 2(1) in conjunction with Art. 103(2) GG. 89

b) Insofar as the complainants that are subject to the obligation to provide proof of vaccination or recovery claim a violation of other fundamental rights or rights that are equivalent to fundamental rights, their submissions do not satisfy the statutory substantiation requirements. 90

[…] 91-97

c) Insofar as complainants nos. 5), 35), 37), 42) and 43) claim a violation of fundamental rights or rights that are equivalent to fundamental rights in their capacity as institutions or organisations covered by § 20a(1) first sentence IfSG, their submissions do not satisfy the statutory substantiation requirements. 98

[…] 99-100

d) Complainants nos. 1) to 3), 8) to 23), 51) and 52), who assert a violation of their 101

“right to freely choose their doctor”, which they claim is protected by fundamental rights, fail to demonstrate a possible violation of their general freedom of action (Art. 2(1) GG) or of a more specific fundamental right or right equivalent to a fundamental right. […]

II.

The constitutional complaint satisfies the principle of subsidiarity. 102

[…] 103-104

III.

1. The complainants no longer have a recognised legal interest in bringing proceedings (*Rechtsschutzinteresse*) to determine whether § 20a(1) first sentence and § 20a(2) first sentence IfSG in the version of 10 December 2021 were constitutional. The complainants changed their application to reflect the amended version of the challenged provisions. They now merely seek a review of its previous version by way of subsidiary application, in the event that § 20a IfSG were found to be void – which is not the case. 105

Given that the provisions initially challenged with the constitutional complaint have become moot, a legal interest in bringing proceedings also no longer persists as an exception on the grounds that a constitutional issue of fundamental significance could otherwise not be resolved and the challenged interference with fundamental rights would be particularly intrusive or it would have to be feared that the challenged measure could be repeated (cf. BVerfGE 81, 138 <140>; Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 98). The provisions in the version of 10 December 2021 no longer have legal effects vis-à-vis the complainants. While the risks associated with SARS-CoV-2 persist, there are no indications that the legislator might again use the legislative technique chosen in § 20a(1) first sentence and § 20a(2) first sentence IfSG (old version). Given the particular importance of proof of vaccination and recovery, the legislator expressly intended the amendment of § 20a IfSG to define these terms in the Protection Against Infection Act itself, rather than using a dynamic reference to an ordinance that in turn makes reference to further details specified in online publications of the Paul Ehrlich Institute and the Robert Koch Institute (cf. BTDrucks 20/958, pp. 2, 13). Insofar as the obligation to provide proof of vaccination and recovery in itself raises concerns regarding particularly intrusive fundamental rights violations with far-reaching consequences (cf. in this respect BVerfGE 81, 138 <140>), the questions arising therefrom must equally be resolved with regard to the amended provisions challenged by the complainants (cf. also BVerfGE 81, 138 <140>; 100, 271 <281 f.>; 155, 119 <158 f. para. 68>; established case-law). 106

2. […] 107

C.

Insofar as the constitutional complaint of complainants nos. 4) to 7), 24) to 28), 35), 42) and 43) is admissible, it is unsuccessful on the merits. The obligation to provide proof of vaccination against COVID-19 imposed on staff of certain institutions and organisations in the health and care sectors violates neither Art. 2(2) first sentence GG (see I. below) nor Art. 12(1) GG (see II. below). The fines that can be imposed [...] are also not objectionable as regards their compatibility with Art. 2(1) in conjunction with Art. 103(2) GG (see III. below). 108

I.

I. The obligation to provide proof of vaccination or recovery imposed on staff of certain institutions and organisations pursuant to § 20a IfSG interferes with the fundamental right to physical integrity, which is protected by Art. 2(2) first sentence GG (see 1. below). However, this interference is justified under constitutional law (see 2. and 3. below). 109

1. The obligation amounts to an interference with Art. 2(2) first sentence GG. 110

a) Art. 2(2) first sentence GG protects the physical integrity of fundamental rights holders, and thus their right to self-determination in this regard (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 128, 282 <300>; 129, 269 <280>; 146, 294 <310 para. 26>; 158, 131 <152 f. para. 56>). In principle, fundamental rights holders can decide freely whether they want to make use of medical measures and what medical measures they want to make use of. The right to self-determination also encompasses decisions that are unreasonable from a medical perspective as long as these are made autonomously (cf. BVerfGE 142, 313 <339 para. 74>). 111

b) The guarantee of Art. 2(2) first sentence GG is curtailed by the obligation to provide proof, especially proof of vaccination, imposed on staff of certain institutions and organisations, even though an impairment of physical integrity through § 20a IfSG only occurs once affected persons have taken the necessary interim step of reaching a decision on vaccination. 112

Fundamental rights protection is not limited to interferences that are directly addressed to the persons affected by them. Even state measures that have an indirect or de facto impact may be functionally equivalent, in terms of their objective and effects, to a direct interference with fundamental rights. Such measures must then be treated in the same way as a direct interference (cf. BVerfGE 148, 40 <51 para. 28>; 153, 182 <265 para. 215>; each with further references). As a defensive right against state interference, Art. 2(2) first sentence GG in principle protects the individual against state measures that result in impairments of physical integrity (cf. in this regard BVerfGE 66, 39 <60>) and the related right to self-determination, including where these impairments are merely an indirect effect of the measures. In particular, this may be the case if a law attaches a negative consequence to the exercise of a 113

fundamental freedom with the aim of discouraging the exercise of this freedom (cf. BVerfGE 110, 177 <191>; cf. also ECtHR <GC>, Vavřička and Others v. the Czech Republic, Judgment of 8 April 2021, no. 47621/13, § 263 f.).

Based on these standards, the interference in question is a targeted indirect interference with physical integrity. It is true that before being vaccinated against COVID-19, the persons concerned have to give their consent after a medical consultation. However, where persons decide not to be vaccinated, this entails negative consequences (cf. also ECtHR <GC>, Vavřička and Others v. the Czech Republic, Judgment of 8 April 2021, no. 47621/13, § 263). Therefore, the decision on whether to get vaccinated – that is, the decision on whether to introduce a substance into one's body –, which as such should be taken on a self-determined basis, is governed by external constraints in both factual and legal terms. Persons who do not want to be vaccinated but wish to continue their work must expect that proof of vaccination will be demanded ([…]), and, if the required proof is not provided, they must expect to be banned from entering the [...] [relevant] institutions and organisations or from working there, with non-compliance in all of those cases punishable by fine ([…]). The only alternatives available to such persons are to give up their occupation altogether, change their workplace, or at least change the particular job they do there. As regards its indirect and de facto impact, § 20a IfSG is functionally equivalent to a direct interference. Being confronted with the disadvantages set out above is intended to encourage affected persons to get vaccinated; this is also in line with the legislative objective. Therefore, the impairment of physical integrity is not merely an unintended side effect of the law (cf. in this regard BVerfGE 106, 275 <299>; 116, 202 <222>), but is the intended consequence of state action and thus a targeted indirect impairment of Art. 2(2) first sentence GG. 114

c) This interference requires justification under constitutional law. In principle, interferences with the fundamental right to physical integrity can be justified; according to Art. 2(2) third sentence GG, this fundamental right is subject to a general limitation clause (*einfacher Gesetzesvorbehalt*), i.e. this right may be interfered with only pursuant to a law. Constitutional justification requires that the challenged provisions are compatible with the Constitution in formal and substantive terms (cf., foundationally, BVerfGE 6, 32 <41>). 115

2. The challenged provisions are formally constitutional. 116

[…] 117-122

3. The challenged provisions and the interference with the right to physical integrity they entail are also constitutional in substantive terms. They satisfy the requirement that this right may be interfered with only pursuant to a law (see a) below) and are sufficiently specific and clear (see b) below). The provisions are also justified with regard to the principle of proportionality when taking into consideration the burdens resulting from them (see c) below). 123

a) The legislator satisfied the requirements arising from the general limitation clause. In drafting § 20a IfSG, the legislator took all the essential decisions itself. The legislative technique chosen […] to define the proof of vaccination and recovery that a person must submit is also not objectionable insofar as § 22a(4) IfSG authorises the Federal Government to issue an ordinance, with the consent of the *Bundesrat*, setting requirements for the proof of vaccination or recovery that deviate from the requirements set out in § 22a(1) and (2) IfSG, in line with current scientific findings. 124

aa) The principles of democracy (Art. 20(1) and (2) GG) and the rule of law (Art. 20(3) GG) require that the legislator itself determines essential matters. Firstly, “essential” means “essential for the exercise of fundamental rights”. In certain situations, it may be incumbent upon the legislator itself to provide the necessary guidance for the area of life in question. This may be the case, for example, where competing freedoms conflict with one another and their boundaries are fluid and difficult to discern. Secondly, the legislator is required to determine those matters that are of great significance for state and society (cf. BVerfGE 139, 19 <45 f. para. 52>; 150, 1 <97 para. 194>). 125

The requirements arising from the essential matters doctrine (*Wesentlichkeitsgrundsatz*) are further set out in Art. 80(1) second sentence GG (cf. BVerfGE 150, 1 <99 para. 199>), which expressly lays down the specificity requirements applicable to provisions that delegate the determination of such matters to the authority responsible for issuing ordinances in the area in question. According to this provision, the Federal Government can only be authorised to issue ordinances if the contents, purpose and scope of the authorisation are specified in the law. In what scenarios and to what extent a matter must be regulated by the legislator can only be determined in light of the respective subject area and the nature of the matter to be regulated. […] 126

[…] 127

bb) § 20a and § 22a IfSG satisfy these constitutional requirements. 128

(1) In setting out the obligation to provide proof of vaccination or recovery for staff in the health and care sectors in § 20a(1) first sentence and § 20a(2) first sentence IfSG, the legislator itself provided the guidance necessary for the area of life in question and balanced the conflicting freedoms against one another. The legislator decided that persons working in an institution or organisation listed in § 20a(1) first sentence IfSG are required to be vaccinated or recovered, only exempting persons with a medical contraindication to vaccination (cf. § 20a(1) second sentence IfSG). The legislator thereby determined the general scope of the obligation and the persons and entities addressed by the provisions. Moreover, § 20a(2) first sentence IfSG sets out the obligation to submit the required proof. […] The specific requirements regarding the proof of vaccination or recovery that a person must submit are set out in § 22a(1) and (2) IfSG, which also lays down the conditions subject to which it can be assumed, in accordance with the legislative purpose, that the persons concerned have sufficient immunity. 129

(2) It is not objectionable under constitutional law that § 22a(4) IfSG authorises the Federal Government to issue an ordinance, with the consent of the *Bundesrat*, setting requirements for the proof of vaccination or recovery that deviate from the requirements set out in § 22a(1) and (2), in line with current scientific findings. 130

[…] 131-140

b) The obligation to provide proof set out in § 20a IfSG satisfies the general requirements regarding specificity and clarity of provisions that authorise fundamental rights interferences. 141

aa) The principles of specificity and clarity serve to make interferences foreseeable for citizens, to effectively limit public authorities' powers and to enable effective judicial review (cf. BVerfGE 156, 11 <44 f. para. 85>). Furthermore, they ensure – including in their capacity as a manifestation of the essential matters doctrine – that the law subjects the government and administration to standards that direct and limit their actions (cf. BVerfGE 145, 20 <69 f. para. 125>; 150, 1 <98 para. 196>; 156, 11 <45 para. 86>). The degree of specificity required under constitutional law depends on the subject area in question and the circumstances that led to the provisions being enacted. In this regard, the significance of the legislative subject matter and the intensity of the interferences with fundamental rights effected by a provision or measures taken pursuant to that provision must be taken into account, as must the persons and entities that have to apply the provision or are affected by it and their specific need to prepare for the application of the provision (BVerfGE 150, 1 <98 para. 196; established case-law). It is sufficient if, when interpreting the relevant provisions in line with the accepted rules of interpretation, it is possible to determine whether the actual conditions that trigger the legal consequence laid down in the provisions have been met (cf. BVerfGE 156, 11 <45 para. 86>). 142

bb) Based on these standards, there are no doubts that these requirements have been met. 143

[…] 144-148

c) The interference with the right to physical integrity under Art. 2(2) first sentence GG is justified. It serves a legitimate purpose (see aa) below) and is suitable (see bb) below) as well as necessary (see cc) below) for achieving this purpose. The interference also does not place an unreasonable (*unzumutbar*) burden on fundamental rights holders; in particular, it is not disproportionate in the strict sense when taking into account the special need for protection of vulnerable persons (see dd) below). 149

aa) The obligation to provide proof of vaccination or recovery imposed on staff of certain institutions and organisations by § 20a IfSG serves a legitimate purpose. 150

(1) When statutory provisions result in interferences with fundamental rights, such interferences may only be justified if the legislator is pursuing constitutionally legitimate purposes. Whether the legislator pursues legitimate purposes is subject to re- 151

view by the Federal Constitutional Court. In this regard, the Federal Constitutional Court is not limited to reviewing purposes that were expressly set out by the legislator. For laws that the legislator adopts with the aim of tackling situations that it assumes to endanger either the general public or the legal interests of individuals, the review conducted by the Federal Constitutional Court will include an examination of whether such assumptions made by the legislator are based on sufficiently robust foundations. Thus, both the legislator's assessment of the existence of such danger and the reliability of the foundations from which this assessment was or could be derived are subject to review by the Court (cf. Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 169 f.).

152 However, the Constitution also gives the legislator a certain leeway with regard to both questions, which limits judicial review. The Federal Constitutional Court must review whether the legislator's assessment and prognosis of the dangers to the individual or the general public are based on sufficiently reliable foundations. Depending on the nature of the subject matter in question, the significance of the affected legal interests, and the legislator's possibilities to draw sufficiently reliable conclusions, the Court's review can range from a mere review of evident errors to a review of reasonableness and even to a more comprehensive substantive review. If serious interferences with fundamental rights are at issue, it is not, in principle, permissible for uncertainties in the assessment of facts to simply be interpreted to the detriment of fundamental rights holders. However, the state's duty of protection can be guided by "acute needs for constitutional protection" – as is the case here. Where scientific knowledge is tentative and the legislator's possibilities to draw sufficiently reliable conclusions are therefore limited, it is enough for the legislator to proceed on the basis of a factually accurate and tenable assessment of the available information and evidence. This leeway is based on the legislator's responsibility to decide conflicts between high-ranking and highest-ranking interests despite uncertainties – a responsibility that the legislator, with its unique form of democratic legitimation, is accorded by the Basic Law (cf., for a comprehensive overview, Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 171 with further references).

153 (2) Based on these standards, the legislator pursues a legitimate purpose with the challenged provisions: to provide vulnerable groups with particular protection against infection with SARS-CoV-2 (see (a) below). The legislator assumed that there is considerable danger for important legal interests, which requires legislative action. This assumption is based on sufficiently robust findings (see (b) below).

154 (a) According to the explanatory memorandum to the draft act, the obligation to provide proof of vaccination against or recovery from COVID-19, imposed by § 20a IfSG with effect until 31 December 2022, serves to protect public health and to protect especially vulnerable groups from contracting COVID-19 (cf. BTDrucks 20/188, pp. 4, 30). It is true that the draft act refers to the general legislative purpose of "protecting public health". Yet it is clear from the further reasons given that the legislator merely

intends to protect persons who are considered especially vulnerable. The legislator submitted that while most people do not fall severely ill when they contract COVID-19, certain people have a higher risk of severe illness or even death because of their general health and/or their age (vulnerable groups). Especially older and immunocompromised persons also face a higher risk of contracting the virus as vaccination is less effective for them (cf. BTDrucks 20/188, pp. 1 f., 28; 20/250, p. 49). According to the legislator, these vulnerable groups include persons in need of long-term care, in particular residents of retirement homes; given their age and/or pre-existing conditions, these groups typically also include recipients of care in the context of services for people with disabilities or other impairments. The legislator argued that these groups need higher levels of support and care and that it is hard for them to influence what contacts they have. Their risk of infection is further increased by shared accommodation, participation in joint activities and/or frequent, prolonged and close physical contact as they receive care by changing staff members. The legislator also submitted that since the start of the pandemic, hospitals, retirement homes and facilities for people with disabilities have time and again been the sites of COVID-19 outbreaks, in part resulting in high numbers of deaths. In particular, persons with mental or psychological disabilities who spend time in institutions generally have a higher risk of infection due to their cognitive impairments (cf. BTDrucks 20/188, pp. 1 f., 37).

155 It is evident that, in introducing the obligation to provide proof of vaccination or recovery, the legislator wanted to fulfil its duty of protection arising from Art. 2(2) first sentence GG. Protecting life and health are exceptionally significant interests of the common good in their own right, and are thus constitutionally legitimate legislative objectives. The state's duty of protection arising from Art. 2(2) first sentence GG does not take effect only after violations have already occurred. It is also oriented towards the future (BVerfGE 157, 30 <111 para. 146>). Therefore, Art. 2(2) first sentence GG – which encompasses the protection of individuals against impairments to their physical integrity and health (cf. BVerfGE 142, 313 <337 para. 69> with further references) – can impose a duty of protection on the state, including a duty to take precautionary measures against health impairments (cf. Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 176 with further references; cf. also Federal Constitutional Court, Order of the Second Chamber of the First Senate of 28 July 1987 - 1 BvR 842/87 -). This duty encompasses the protection of vulnerable groups from any risk to health and life following from infection with SARS-CoV-2, in particular from severe illness and long-term effects; it applies in particular in cases where the persons concerned can neither effectively protect themselves (cf. in this respect ECtHR <GC>, Vavřička and Others v. the Czech Republic, Judgment of 8 April 2021, no. 47621/13, § 272), – as is the case here –, nor avoid the contacts in question as they rely on medical treatment, (long-term) care, or other support services (cf. also Federal Constitutional Court, Order of the First Senate of 16 December 2021- 1 BvR 1541/20 -, paras. 109, 121, 130 – Risks of disadvantages for persons with disabilities in triage situations).

(b) The legislator assumed that there was considerable danger to the life and health of vulnerable persons at the time the law was adopted. This assessment is based on findings that are considered sufficiently robust on the basis of the standards relevant here. 156

(aa) At the time the law was adopted, the legislator could assume that the pandemic situation was generally worsening. According to the assessment of the Robert Koch Institute and the Standing Committee on Vaccination (*Ständige Impfkommission*), Germany had entered the fourth wave, marked by an exponential rise in case numbers that had been underway since November 2021 (cf., e.g., RKI, Epidemiological Bulletin 48/2021, p. 15 f.). This wave had not yet reached its peak; it had to be expected that the pandemic situation would be exacerbated further, in particular since it could be assumed that the Omicron variant, which had been detected at the end of November 2021 and had soon been classified as a variant of concern by the World Health Organisation, would spread rapidly (see para. 5 above). 157

[…] 158-160

(bb) The legislator also assumed that vulnerable groups were particularly at risk in the context of the worsening pandemic situation; this assumption is also based on sufficiently robust findings. 161

At the start of December 2021 – the time relevant here – it could be assumed that the experts largely agreed that the risks resulting from infection with SARS-CoV-2 were higher for older people and people with pre-existing conditions, especially immunocompromised people (cf. RKI, Epidemiological Bulletin 48/2021, pp. 6, 9 ff.; RKI, Weekly situation report of 16 December 2021, p. 11). Among those hospitalised, intensive care was most frequently needed for persons older than 60; the median age of persons requiring ventilation was 73 years. For hospitalised persons over 80, the mortality rate was 40% ([…]). Of all deaths recorded since week 10 in 2020, 85% were over 70; the median age was 83 ([…]). 162

[…] 163

(cc) These assumptions underlying the legislative purpose, in particular regarding the risk for vulnerable groups, are still tenable. The scientific associations heard in the present proceedings agree in substance that, even though the Omicron variant on average causes less severe illness, the composition of particularly vulnerable groups and the generally greater risk they face have not changed (see para. 50 ff. above). [...] 164

bb) The obligation to provide proof of vaccination or recovery is also suitable under constitutional law for achieving the legislative purpose. 165

(1) Under constitutional law, a provision is considered suitable if there is a possibility that it will achieve the legislative purpose (cf. BVerfGE 155, 238 <279 para. 102>; 156, 63 <116 para. 192>; established case-law). A provision can only be found to be 166

unsuitable if it cannot further the legislative purpose pursued in any way or if it counteracts this purpose (BVerfGE 158, 282 <336 para. 131> with further references – Interest on back taxes and tax refunds). When assessing whether a provision is suitable, the legislator has a certain leeway in terms of evaluating the factual situation, making any necessary prognoses and choosing the means by which the legislative aims are to be achieved. The extent of this leeway is not always the same, but depends on factors such as the nature of the subject matter in question, the possibilities to draw sufficiently reliable conclusions and the significance of the affected legal interests. The significance of the affected legal interests may also be determined by the right affected by the interference and the severity of the interference. If a measure gives rise to serious interferences with fundamental rights, it is not in principle permissible for uncertainties in the assessment of facts to simply be interpreted to the detriment of fundamental rights holders. But if the interference is carried out in order to protect significant constitutional interests, and if the legislator's possibilities to draw sufficiently reliable conclusions are limited in view of factual uncertainties, the Federal Constitutional Court's review is in turn limited to assessing whether the legislator's prognosis is tenable (cf. BVerfGE 153, 182 <272 f. para. 238> with further references – Assisted suicide; for an overview Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 185 with further references).

Where a legal provision is based on prognostic decisions, its suitability cannot be assessed on the basis of the actual developments that subsequently occurred, but must be based on the question whether the legislator's assumption as to the measure's suitability was suitable at the time, that is, whether the legislator's prognosis was factually accurate and tenable. If a prognosis later turns out to be false, this does not call into question the initial suitability of the law. For a law to be suitable, it is thus not required that there is unequivocal empirical evidence regarding the effects or effectiveness of the measures in question (cf. BVerfGE 156, 63 <140 para 264>). However, a provision that was initially constitutional may later become unconstitutional for the future if the legislator's initial assumptions are no longer tenable (Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 186 with further references). 167

(2) In the present scenario, the legislator was afforded leeway for assessing whether the obligation to provide proof was suitable to protect vulnerable persons. The legislative prognosis regarding the effects of the measures is therefore subject to a review of reasonableness by the Federal Constitutional Court. This includes a review of whether the legislative prognosis is sufficiently reliable (cf. BVerfGE 152, 68 <119 para. 134>). There are no grounds for a stricter suitability review that goes beyond the aspects set out above. 168

The weight of the interference with the right to physical integrity (Art. 2(2) first sentence GG) resulting from the obligation to provide proof of vaccination or recovery for staff in the health and care sectors is considerable (see para. 209 ff. below); occupa- 169

tional freedom, which is protected by Art. 12(1) GG, is typically also affected. If affected persons want to avoid the interference, the only alternatives available to them are to give up their occupation altogether, change their workplace, or at least change the particular job they do there. If they do not comply with the obligation to provide proof even upon request of the local public health authority, or if they continue to work despite the imposition of a ban on entering their workplace and on working there, such non-compliance is punishable by fine ([…]). In addition, there may be consequences under labour law, such as leave of absence without pay or dismissal. Yet this must be weighed against the purpose of § 20a IfSG, which is to protect the life and health of vulnerable groups, and thus to protect exceptionally significant legal interests.

In view of the lack of sufficiently reliable findings, at the time the law was adopted, regarding the details of the further spread of COVID-19 and the specific effectiveness of individual vaccines, the Federal Constitutional Court's review is limited to assessing whether the legislator's prognosis is tenable. There are no grounds for an ex post restriction of the legislator's leeway; it is not ascertainable that more reliable findings to the contrary are available now, nor did the legislator fail to ensure that efforts were made to improve the findings available (cf. also Federal Constitutional Court, Orders of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 189 f. and - 1 BvR 971/21 inter alia -, para. 177 f., each with further references). 170

(3) Based on these standards, the obligation to provide proof imposed on staff in the health and care sectors is a suitable means for protecting the life and health of vulnerable persons. The legislator's assumptions regarding the suitability of the obligation to provide proof are tenable and based on sufficiently robust foundations. 171

(a) The legislator could assume that the obligation to provide proof of vaccination or recovery […] imposed on the entire staff of certain institutions and organisations can contribute to protecting the life and health of vulnerable groups. By limiting the obligation to certain institutions and organisations in the health and care sectors, the legislator covered the institutions and organisations that are typically frequented by vulnerable persons. 172

(b) The legislator could also assume that the proof of vaccination or recovery of staff working in such institutions and organisations contributes to protecting the life and health of vulnerable persons. At the time the law was adopted, a significant majority of scientists assumed that vaccinated and recovered persons were less likely to get infected with SARS-CoV-2 and were less likely to transmit the virus than persons who are unvaccinated or have not yet had COVID-19. Scientists also assumed that if they do get infected, vaccinated persons are less infectious and only infectious for a shorter period of time than unvaccinated persons (cf. RKI, Epidemiological Bulletin 48/ 2021, p. 25 f.; RKI, Epidemiological Profile of SARS-CoV-2 and COVID-19, last accessed: 26 November 2021). Moreover, it was assumed that vaccination against COVID-19 contributes to the protection of others (cf. PEI, Dossier "Coronavirus – COVID-19 Vaccines"; RKI, Weekly situation report of 16 December 2021, p. 26). The 173

benefits derived from vaccinating the persons who are in contact with vulnerable groups were therefore considered to be particularly great (cf. PEI, Dossier “Coronavirus – COVID-19 Vaccines”; RKI, Epidemiological Bulletin 48/2021, p. 4).

The legislator was not constitutionally required, in the context of its suitability prognosis, to refrain from enacting § 20a IfSG because of factual uncertainties regarding the effectiveness of vaccines against the Omicron variant, which was still novel at the start of December 2021. The legislator was entitled to take into consideration that the Delta variant continued to be the dominant variant at the time, accounting for more than 99% of new cases, while very few persons had yet been infected with the Omicron variant. It was therefore at least tenable for the legislator to assume that the Delta variant would continue to dominate pandemic activity, at least for a certain period of time. Regardless of uncertainties in the assessment of facts ([…]), it was tenable to assume, on the basis of the data available at the start of December 2021 that had been collected and analysed by researchers, that the vaccines would in principle also be effective against the Omicron variant, at least after a booster, even though their effectiveness against Omicron might decrease more rapidly over time ([…]). […] 174

(c) The legislator laid down specific requirements in § 20a(1) first sentence and § 20a(2) first sentence in conjunction with § 22a(1) and (2) IfSG with effect from 19 March 2022 regarding proof of vaccination or recovery, and thus regarding sufficient immune protection; these requirements, too, contribute to the protection of vulnerable people. These requirements, which have in part become stricter since the obligation to provide proof was introduced in December 2021, help reduce the potential transmission risk posed by vaccinated and recovered persons. This applies in particular to the third vaccine dose, which, since 1 October 2022, has generally been required for achieving fully vaccinated status. In this regard, scientists largely agree that a vaccine booster offers considerable benefits (see para. 50 ff. above). Given that immune protection acquired through previous infection wanes over time (cf., e.g., RKI, Weekly situation report of 9 December 2021, p. 25), the limitation of the recovered status to 90 days after a positive test also contributes to the protection of vulnerable groups. 175

(d) […] 176

(e) It was also tenable for the legislator to assume that a possible time limit on the validity of the required proof of vaccination or recovery, which needs to be renewed once expired, contributes to the protection of vulnerable groups (cf. § 20a(4) IfSG). The legislator has thereby taken precautions to ensure that persons working in the health and care sectors always have sufficient immune protection. […] 177

[…] 178

(f) There are no doubts as to the suitability of the challenged provisions with regard to their broad scope, whereby all persons working in the health and care sectors are subject to the obligation in question – including persons who have no direct contacts 179

with vulnerable persons.

In this respect, largely reliable scientific findings exist with regard to SARS-CoV-2 transmission by exposure to respiratory fluids. It is true that transmission primarily occurs via direct contact between people through droplets and aerosol particles. However, transmission can also occur indirectly via accumulated infectious particles in the air (infection through aerosols) without any direct contact with an infected person. For indirect transmission to occur, infectious aerosol particles must be suspended in the air for a longer time. […] 180

Transmission of the virus thus mainly occurs indoors and it is only of limited relevance whether there was any direct contact with an infected person. Therefore, it was tenable for the legislator to assume that vaccination of generally all staff in the health and care sectors would contribute to protection against infection, and would thus be suitable to protect life and health, even if some staff do not come into direct contact with vulnerable persons. […] 181

(g) The obligation to provide proof set out in § 20a IfSG is also not unsuitable on the grounds that it would counteract its purpose. At least some of the staff working in the institutions and organisations in question will want to remain unvaccinated and will therefore terminate their employment on their own initiative, or be subject to a ban on entering the relevant institutions and organisations or from working there. Yet this does not render the legislative suitability prognosis untenable. It is true that this might jeopardise the proper functioning of such institutions and organisations and thus ultimately adversely affect vulnerable persons. However, at the time the law was adopted, there were no reliable findings indicating the existence of such threats to the system. In the legislative procedure, the legislator obtained many statements of professional and social organisations, none of which expressed concerns that the number of persons […] that might choose to terminate their employment to avoid getting vaccinated or that would have to stop working because they are not vaccinated might be so high as to pose a threat to the system. 182

It also does not stand in the way of the suitability of § 20a IfSG that vulnerable persons may continue to be in contact with unvaccinated persons who have not yet had COVID-19 both in their private environment and in the institutions and organisations in question. It is irrelevant for constitutional review whether the legislator has chosen the best legislative concept possible; the Federal Constitutional Court only reviews whether the legislator has chosen a concept that furthers the legislative purpose. This is the case here since § 20a IfSG serves to reduce contacts with unvaccinated persons, thus lowering the risk of infection for vulnerable groups. It is also not objectionable in this respect that staff in the health and care sectors with a medical contraindication to vaccination are exempt from the obligation to provide proof of vaccination or recovery ([…]), especially since this probably only concerns few cases ([…]). 183

(h) The legislative assumptions underlying the challenged provisions continue to be tenable. If the relevant circumstances change after a law has entered into force, the 184

legislator's prerogative of assessment regarding suitability may become narrower over time, and might possibly render the law untenable at some point (cf. BVerfGE 158, 282 <365 f. para. 199>; Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 189 f. with further references). According to the scientific organisations heard as expert third parties in the present proceedings, the further development of the pandemic after the law was adopted did not render the legislator's suitability prognosis any less tenable with regard to the assumption that the vaccines available would also confer relevant protection against the Omicron variant ([…]). […]

[…] 185

cc) The obligation to provide proof of vaccination or recovery is also necessary under constitutional law to protect vulnerable groups. Taking into account the margin of appreciation afforded the legislator in the present scenario, no other means were available that would have been as clearly effective while at the same time restricting the affected fundamental rights to a lesser extent. 186

(1) Interferences with fundamental rights may not go beyond what is necessary to achieve the legislative purpose. A measure falls short of this standard if an equally effective means is available to achieve the legislative objective that would be less intrusive for fundamental rights holders and would not entail greater burdens for third parties or the general public. In this regard, it must be clearly established that the alternative measure is equally effective for achieving the purpose pursued. In principle, the legislator is afforded a margin of appreciation, including when assessing the necessity of a law. This margin of appreciation concerns, among other things, projecting the effects of the chosen measures, also in comparison with other, less intrusive measures. The margin may become narrower depending on the affected fundamental right or the severity of interference (cf. BVerfGE 152, 68 <119 para. 134>). Conversely, the margin is broader the more complex the matter addressed by the legislator is (cf. BVerfGE 122, 1 <34>; 150, 1 <89 para. 173> with further references). If a measure gives rise to serious interferences with fundamental rights, it is not in principle permissible for uncertainties in the assessment of facts to simply be interpreted to the detriment of fundamental rights holders. But if the interference is carried out in order to protect significant constitutional interests, and if the legislator's possibilities to draw sufficiently reliable conclusions are limited in view of factual uncertainties, the Federal Constitutional Court's review is in turn limited to assessing whether the legislator's prognosis is tenable (cf. BVerfGE 153, 182 <272 f. para. 238>; for a comprehensive overview cf. Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 204). 187

(2) In the present case, the legislator had a wide margin of assessment, given that the pandemic is characterised by its dangerous and unpredictable nature, making for a complex situation. The considerable interference with legal interests of persons affected by the obligation, which are protected by fundamental rights, had to be 188

weighed against the interest in protecting vulnerable persons from severe physical impairments and in protecting their life. Based on the information about the transmissibility of the virus and the possibilities for curbing its spread that was available at the time the law was adopted, it is not objectionable under constitutional law that the legislator assumed that no other means were available that would certainly be equally effective.

(a) Limiting the obligation to provide proof of vaccination or recovery to persons who are regularly in direct contact with vulnerable persons would not be equally effective. Exempting all persons from the obligation who have no or only infrequent direct contacts with vulnerable persons would, it is true, avoid impairing the fundamental rights of these persons. However, such a measure would not be equally suitable for protecting vulnerable persons. Unintended direct contacts may occur. Moreover, the virus can be transmitted indirectly via aerosol particles, either if premises are used by one group after another or through the joint use of entry and exit areas; it may also be passed on by a person who does come into contact with vulnerable persons. 189

(b) The legislator was also not required to further differentiate § 20a IfSG in such a way that it would have to be determined in the individual case which persons are actually at risk in a given institution or situation. Notwithstanding the question of whether such differentiation would be equally suitable, the legislator was allowed to base its assumptions on the 'typical' scenario when exercising its power to typify (*Typisierungskompetenz*) (cf. BVerfGE 126, 268 <279>; 133, 377 <412>; 151, 101 <145 f.>; 152, 274 <314 f.>), using the broadest possible basis that includes all groups concerned and all subject matters (cf. BVerfGE 133, 377 <232 and 233>; 152, 274 <314 f.>). 190

[…] 191

(c) An obligation to get tested for infection with SARS-CoV-2 prior to entering an institution or organisation – and thus prior to possible contacts with vulnerable persons – is not an equally suitable means. In the explanatory memorandum to the draft act, the legislator made it clear that regular testing may detect acute infections at a certain time and thus reduce the risk of introducing the virus to an institution. However, the legislator stated that testing could not provide the same level of protection as immunisation, especially when it comes to contacts with particularly vulnerable persons (cf. BTDrucks 20/188, p. 37). 192

This assessment is robust. […] 193

[…] 194-196

(d) Other rules of conduct, such as physical distancing, wearing a (medical) face mask, observing hygiene rules, regular ventilation or using air filters, are not equally effective either. There is a risk of deliberate or unintentional errors in applying these measures. Therefore, it was sufficiently tenable for the legislator to decide not to forgo the protection that is generally conferred by vaccination or recovery and that ben- 197

efits vulnerable persons.

(e) Medical treatment for vulnerable persons cannot be considered an equivalent alternative. It is true that there has been progress in developing drug treatments against COVID-19; the Expert Group on Intensive Care, Infectious Diseases and Emergency Medicine (*Fachgruppe Intensivmedizin, Infektiologie und Notfallmedizin*, COVRIIN) is one body providing overviews of possible medications. However, such treatments still do not guarantee a safe cure from infection with COVID-19, nor is it clearly certain that they can prevent severe illness and death ([…]). Therefore, the concept chosen by the legislator to protect vulnerable persons in § 20a IfSG is more effective since it helps avoid infection in the first place. 198

(f) Under constitutional law, the legislator is not required to limit the obligation to provide proof of vaccination or recovery to vulnerable persons. The persons that the law in question serves to protect are vulnerable precisely because they have no or limited possibilities of effectively protecting themselves from infection and its consequences by getting vaccinated. Vulnerable people are at higher risk of not responding to vaccination, or of only having a limited response. Moreover, the initial protection conferred by vaccination wanes more quickly for these groups. They are therefore especially dependent on the protection that vaccination confers on the people who treat, support and take care of them. The legislator could base its decision in this regard on robust factual foundations (see para. 50 ff. above). 199

(g) Ultimately, less strict requirements than the requirements the legislator set […] regarding proof of vaccination or recovery, and thus regarding sufficient immune protection, are not certainly equally effective for protecting vulnerable persons. This applies in particular to the requirement of generally having three individual vaccine doses with certain intervals between the doses. It also applies to the recovered status, which expires 90 days after a positive test result. 200

[…] 201

dd) Measured against the information available when the law was adopted, which is the decisive point in time for the review of constitutionality, the obligation to provide proof of vaccination or recovery is proportionate in the strict sense. 202

(1) For a measure to be appropriate and thus proportionate in the strict sense, the purpose pursued by a measure, and its likelihood of achieving that purpose, may not be disproportionate to the severity of the interference (cf. BVerfGE 155, 119 <178 para. 128>; established case-law). It is for the legislator to strike a balance between the extent and severity of the interference with fundamental rights, on the one hand, and the provision's importance for achieving legitimate aims on the other (cf. BVerfGE 156, 11 <48 para. 95>). Particularly in cases of conflict between fundamental rights in their dimension as defensive rights against state interference on the one hand and as rights giving rise to state duties of protection on the other, it is primarily for the democratically elected legislator to balance the conflicting constitutional inter- 203

ests against one another and to reconcile them using its margin of assessment and appreciation as well as its leeway to design. The prohibition of excessive measures (*Übermaßverbot*) requires that the more severely individual freedom is restricted, the more significant the protected legal interests must be. Conversely, the need to take legislative action becomes more urgent, the greater the dangers and adverse effects are that could potentially arise if fundamental rights were to be freely enjoyed with no restriction whatsoever (Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 216 with further references).

With regard to appropriateness too, the legislator in principle has a margin of appreciation. The Federal Constitutional Court reviews whether the legislator has taken tenable decisions within its margin of appreciation. With regard to prognostic decisions, this requires that the legislator's prognosis be based on sufficiently reliable foundations (Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 217 with further references). 204

(2) Based on these standards, the legislator had to take into account that the obligation to provide proof of vaccination or recovery imposed by § 20a IfSG results in considerable interferences with the affected fundamental rights (see (a) below). Yet it was not constitutionally objectionable for the legislator to assume that the restrictions serve to protect the exceptionally significant legal interests of third parties, the protection of which is crucial (see (b) below). The legislator struck an appropriate balance between the interests of third parties pursued through the obligation to provide proof of vaccination or recovery on the one hand and impairments of fundamental rights on the other (see (c) below); this balance is constitutionally tenable, including in view of more recent factual developments (see (d) below). 205

(a) The obligation to provide proof of vaccination or recovery imposed by § 20a IfSG results in considerable interference with the right to physical integrity under Art. 2(2) first sentence GG. 206

(aa) The vaccinations required to comply with the obligation to provide proof amount to a considerable interference with physical integrity. In order to safeguard the right to self-determination regarding one's own body, the introduction of a substance into the body generally requires the consent of affected persons. Vaccinations trigger physical reactions, which are a sign of the body's immune response to the administration of the vaccine. While these effects wear off completely after a relatively short time, the immune response often also involves side effects, such as headaches and aching limbs, which can significantly impair the physical well-being of those affected for several days. 207

In addition, serious and/or longer-term side effects or adverse events may occur in rare cases. It is true that the reported cases of serious side effects are only suspected cases, not all of which have demonstrably been caused by vaccination. Moreover, the reported serious side effects have been very rare and usually not long-lasting (cf. PEI, Safety Report of 26 October 2021 – Suspected cases of adverse events and 208

vaccine-related complications following vaccination against COVID-19, pp. 5 f., 14, 43). However, it must still be assumed that vaccination may be fatal in some extreme and exceptional cases. This increases the severity of interference, also because the vaccine is usually administered to healthy people, and it is generally administered twice, and from 1 October 2022 even three times.

That being said, it must also be taken into account when assessing the severity of the interference that § 20a IfSG does not give rise to a vaccine mandate that can be enforced by the state; rather, the provision ultimately leaves it up to the persons working in the institutions and organisations listed in § 20a(1) first sentence IfSG to decide whether to provide the required proof. The legislator thus lessened the severity of the interference with Art. 2(2) first sentence GG by refraining from imposing a vaccine mandate (cf. also ECtHR <GC>, Vavřička and Others v. the Czech Republic, Judgment of 8 April 2021, no. 47621/13, § 276). However, affected persons are de facto confronted with a choice between giving up their occupation or consenting to impairments of their physical integrity. In this respect, the occupational freedom of persons working in the health and care sectors is typically also affected. If they refuse to get vaccinated, they can generally no longer practise their occupation, especially if they work in a typical and specialised role in the health and care sectors. At least as long as the law is in force, such people can only find employment if they practise a different occupation for which they have no training. This places a particular burden on those who had to undergo a long phase of training, for example to obtain their medical or dentistry license. Insofar as other occupations are affected, the persons concerned at least lose their current job or have to change the tasks they perform within the institution or organisation or switch to working from home. The intensity of the impairments to freedom resulting from the obligation to provide proof of vaccination or recovery is further aggravated by the fact that affected persons who fail to comply with a demand by the public health authority to submit the required proof within a reasonable deadline can be subject to a ban from entering the relevant institutions and organisations or from working there, with non-compliance in both cases punishable by fine ([…]). In addition, employees are generally faced with consequences under labour law, such as leave of absence without pay or dismissal. 209

Affected persons cannot completely counter or compensate for the loss of freedom resulting from the obligation to provide proof of vaccination or recovery once the challenged provisions cease to have effect; the provisions may continue to have negative consequences. Vaccination is irreversible. It is also not certain that a change of one's workplace or specific tasks can be reversed after more than nine months – despite the high demand for staff in the health and care sectors. This applies all the more to self-employed professionals, whose livelihoods may be at risk if they have to close their medical office for more than nine months. 210

[…] 211

(bb) However, the intensity of the interferences is in part mitigated by the legislative 212

framework.

In case of medical contraindication, § 20a(1) second sentence IfSG provides for an exemption from the obligation to get vaccinated, thereby taking into account potential risks to life and physical integrity from the outset. Furthermore, the safety of COVID-19 vaccines is continuously monitored by the Paul Ehrlich Institute. The Standing Committee on Vaccination responds to findings of even low risks posed by such vaccines, adapting its vaccine recommendations as a result. This ensures that vaccine safety is constantly evaluated on an institutionalised basis (cf. in this respect ECtHR <GC>, Vavřička and Others v. the Czech Republic, Judgment of 8 April 2021, no. 47621/13, § 301). 213

From the outset, the obligation to provide proof of vaccination or recovery only applies to persons who work at the institutions and organisations listed in § 20a(1) first sentence IfSG. For reasons of appropriateness alone, the purpose pursued with the provisions – protecting vulnerable persons from infection with SARS-CoV-2 – suggests that the provisions should be understood as being limited to jobs in which contacts with vulnerable persons may occur. […] 214

[…] 215-216

(b) The interference with physical integrity, which is protected by fundamental rights, must be weighed against other exceptionally high-ranking constitutional interests. It is incumbent upon the legislator to fulfil its duties of protection, which likewise follow from Art. 2(2) first sentence GG, by protecting the life and physical integrity of the individual (see para. 155 above). This does not just concern the abstract significance of these constitutional interests. Rather, the legislator's duties of protection vis-à-vis vulnerable people took on specific shape at the start of December 2021. Following a brief improvement of the situation, the pandemic at that time entered the fourth wave, which was again marked by elevated levels of transmissibility and high case numbers, with an increased probability of contracting the virus. This was associated with a high risk for vulnerable groups in particular; the legislator felt compelled to take immediate action, which is tenable. 217

The state duties of protection vis-à-vis vulnerable people were of especially critical importance at that time given that, in addition to the higher risk of falling severely ill or even dying from COVID-19, vulnerable people are not, or only to a limited extent, able to reduce their risk of contracting the virus by getting vaccinated. To a disproportionately greater extent than other people, they depend on transmission chains being interrupted at an early stage. The institutions and organisations listed in § 20a(1) IfSG are all institutions that provide services for elderly people, people in need of medical care, long-term care and/or people with disabilities. Most of these people cannot freely decide whether to make use of such services, as they typically concern essential basic needs. Affected persons therefore cannot simply avoid such institutions and organisations and their staff members in order to lower their risk of contracting SARS-CoV-2. 218

(c) The legislative decision to give precedence to the protection of vulnerable groups over the individual's ability to reach an entirely free vaccination decision is not objectionable under constitutional law. Despite the great intensity of the interference resulting from § 20a IfSG, the fundamental rights interests of the complainants who work in the health and care sectors ultimately have to stand back. 219

(aa) When balancing the conflicting fundamental rights interests, it must be taken into account that the legislator was clearly guided by the consideration of not wishing to intensify the interference in a one-sided manner while only focusing on the protection of vulnerable groups. When looking at the legislative framework in detail, it follows from the mitigating measures integrated into § 20a IfSG or supplementing the provision that the legislator has not gone beyond the limits of what is reasonable. The legislator limited the group of those affected by the obligation to provide proof and subjected it to a time limit. Moreover, the legislator provided for exemptions from the obligation to provide proof of vaccination or recovery for persons with a medical contraindication; it also ensured that persons who had already worked in the relevant institutions before 15 March 2022 could be banned from entering these institutions or from working there only on the basis of a discretionary decision in the individual case. This shows that the legislator did not one-sidedly give precedence to the interests of vulnerable groups alone, but also took into consideration the interests of those affected by the obligation in question. 220

(bb) The legislator also did not itself take the decision on vaccination for affected persons, as is the case when the legislator allows medical coercive treatment or drug treatment of persons in confinement (cf. BVerfGE 128, 282 <302>; 146, 294 <311 para. 29>). Therefore, affected persons in principle retain their right to self-determination arising from Art. 2(2) first sentence GG. Anyone addressed by § 20a(1) IfSG can in principle refuse to get vaccinated, even though such refusal typically entails a considerable interference with Art. 12(1) GG and the legislator requires affected persons to make a difficult choice that may entail far-reaching consequences and specific disadvantages. 221

(cc) Insofar as the intensity of the interference resulting from the obligation to provide proof of vaccination is primarily determined by the type, extent and probability of vaccination risks, § 20a IfSG was based on a tenable legislative decision with regard to the aspect of vaccine safety that was supported by reliable facts. The health risks imposed on the persons addressed by the law are not so unreasonable under constitutional law as to no longer be justified even when there are acute risks for vulnerable people. 222

Frequent reactions after vaccination, which are a sign of the body's immune response to the administration of the vaccine, do not amount to absolutely unreasonable impairments, neither in terms of their weight nor in terms of their duration. The legislator decided that adverse events or side effects that go beyond such vaccination reactions were not sufficient grounds for refraining from imposing an obligation 223

to provide proof of vaccination or recovery. On the basis of the information available when the law was adopted, this decision was ultimately tenable. According to the valid findings of the Paul Ehrlich Institute, such side effects are statistically possible, but extremely rare ([…]). […]

[…] 224-227

(dd) Another important factor in the balancing of interests is the particularly acute need for protection among those groups the legislator intends to protect. Vulnerable groups are not free to take their own precautions to ensure sufficient protection of their life and health. They cannot simply rely on getting vaccinated themselves since vaccination of vulnerable persons often only confers limited protection or protection that declines more quickly over time. They typically also cannot avoid making use of the services provided by the institutions and organisations listed in § 20a(1) first sentence IfSG since these services are a relevant and often decisive factor in covering the essential basic needs of those treated, cared for and housed there. 228

Thus, vulnerable people can neither stay away from the relevant institutions and organisations in the long run, nor can they sufficiently protect themselves by getting vaccinated. Rather, in order to lower their comparatively high risk – relative to the general population – of falling severely ill or even dying from COVID-19, they are dependent on the reduced levels of transmission that result from other people being vaccinated against COVID-19. Nevertheless, in order to also give effect to conflicting fundamental rights interests, the legislator refrained from deploying the maximum range of possible measures to protect vulnerable people; it designed § 20a(1) first sentence IfSG with a more specific focus on their actual vulnerability. Instead of pursuing a strategy that obliged all contact persons to provide proof of vaccination or recovery, the legislator limited the group of persons that is subject to such an obligation. While this results in particular burdens being placed on professional groups that have been especially hard hit since the start of the pandemic, it is ultimately justified by the special importance of the services they provide, which is even greater for vulnerable people than for others (see para. 265 below). 229

(ee) Ultimately, the very low probability of serious consequences resulting from vaccination must be weighed against the significantly higher probability of harm to the life and limb of vulnerable persons. Serious and/or long-lasting side effects or consequences of vaccination only occur as extreme exceptions ([…]), whereas the risk for vulnerable groups of getting infected, subsequently falling severely ill, and in a considerable number of cases even dying, was tangible at the time relevant here. 230

Even though it cannot be ruled out with certainty that vaccination against COVID-19 may have serious consequences, including a fatal outcome, such consequences only occur in extremely rare cases. These risks had to be weighed against the fourth wave, which was already well under way but had not yet reached its peak at the start of December 2021. It had already resulted in a significant increase in incidence rates, hospitalisation rates and deaths, while also leading to a significant increase in out- 231

breaks affecting medical institutions and care homes. The legislator acted on the tenable assumption that the pandemic situation would worsen and quick legislative action was necessary. The scale of the developments was difficult to judge in light of the Omicron variant, which had just emerged at the time. In that situation, it was constitutionally permissible for the legislator to consider vaccination as the most effective means to prevent or at least reduce the anticipated large number of vulnerable persons falling severely ill or dying.

When these aspects – the great potential risk for vulnerable groups, the fact that serious side effects and severe consequences resulting from vaccination only occur in rare cases, and the fact that the legislator provided for mitigating measures, including above all the leeway granted to those affected by the obligation in question – are considered as part of an overall assessment that also takes into account the legislator's margin of appreciation and discretion, it is not objectionable under constitutional law for the legislator to view the interference resulting from the obligation to provide proof as the less significant factor in its balancing of interests, even though the intensity of this interference remains considerable. The significance of the purpose pursued by § 20a IfSG and the expectation that the legislation in question could at least further this purpose were not disproportionate to the severity of the interference. 232

Thus, the legislator's decision to impose the obligation to provide proof of vaccination or recovery challenged here was constitutionally tenable in the specific situation of the pandemic and on the basis of the information available at the time regarding the effects of COVID-19 vaccines and the great risks to the life and health of vulnerable persons; even when taking into account the severity of the interference resulting from the measure, the legislator's decision was compatible with Art. 2(2) first sentence GG. 233

(d) The course the pandemic has taken since the law was adopted does not merit a different assessment with regard to the appropriateness of the challenged provisions. 234

The constitutionality of a provision can initially only be assessed from an ex ante perspective in consideration of the information and evidence available (cf. Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 inter alia -, para. 193 – Federal pandemic emergency brake II). However, a provision that was initially constitutional may later become unconstitutional for the future if the legislator's initial assumptions are no longer tenable (Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 186 with further references) because they have been rebutted by ex post findings or developments (cf. also BVerfGE 68, 287 <309>). By contrast, if it is still not possible to resolve remaining uncertainties because researchers in particular are not able to improve the available data, this does not necessarily call into question the constitutionality of further legislative action (cf. Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 inter alia -, para. 177). 235

In light of this, it is not ascertainable that the obligation to provide proof of vaccina- 236

tion or recovery imposed on staff in the health and care sectors has become unconstitutional. The legislator itself took precautions to take account of changing factual circumstances and new scientific evidence – albeit only to a limited extent. The legislator limited the provisions to a specific time period (cf. also Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 inter alia -, para. 198). By inserting § 20a(4) IfSG into the law, the legislator also made provision for the possibility that the period of validity of the required proof of vaccination or recovery might have to be extended or shortened on the basis of new findings.

Yet even after the law was adopted, no new developments have occurred and no better understanding of the situation has emerged that would be capable of rebutting the initial assumptions made by the legislator. 237

(aa) Firstly, this applies to the legislator's prognosis that the vaccines available could protect against infection and that they could reduce the transmission risk if affected persons were infected nonetheless. In the time since the challenged law was adopted, no changed circumstances have occurred or new findings emerged that would have been capable of rebutting this prognosis (see para. 184 above). It is still tenable to assume that vaccines confer relevant protection against infection, including with the currently dominant Omicron variant of SARS-CoV-2 – albeit protection that wanes over time (cf. also RKI, Weekly situation report of 17 March 2022, p. 27 ff., of 31 March 2022, p. 26 ff., 32, and of 21 April 2022, p. 26 ff.). 238

[…] 239

(bb) The risks posed by the pandemic have not been reduced to an extent that would lead to a significantly lower need for protection of vulnerable groups, and thus require a balancing of interests that would accord lesser importance to their constitutional interests. Rather, case numbers have risen steadily, albeit in waves, since the law was adopted. […] 240

The scientific organisations heard in the present proceedings largely agree that, even though the dominant Omicron variant on average causes less severe illness, the composition of vulnerable groups and the generally greater risk they face have not changed (see paras. 50 ff. and 164 above). Vulnerable persons continue to face a particular risk – higher than that of the general population – of falling severely ill or even dying from COVID-19. This risk is also reflected by the very high case numbers attributed to outbreaks in medical facilities and retirement and care homes ([…]). 241

(cc) The vaccination risks that must be taken into account in the balancing of interests have likewise not changed in a significant manner. 242

II.

The complainants' occupational freedom under Art. 12(1) GG has not been violated. 243

Insofar as the obligation to provide proof of vaccination for staff in the health and care sectors set out in § 20a(1) first sentence and § 20a(2) first sentence IfSG is de- 244

signed as a prerequisite for practising one's occupation, Art. 12(1) GG does not afford further-reaching protection than the fundamental right under Art. 2(2) first sentence GG, which protects highly personal legal interests. Although § 20a(5) third sentence IfSG, which authorises the banning of individuals from entering the relevant institutions and organisations or from working there, does give rise to a separate interference with occupational freedom (see 1. below), this interference is justified under constitutional law (see 2. below).

1. § 20a(5) third sentence IfSG authorises the local public health authority to issue orders banning persons who work in the institutions and organisations listed in § 20a(1) first sentence IfSG from entering these institutions or from working there; this authorisation interferes with Art. 12(1) GG. 245

a) aa) Art. 12(1) GG guarantees the freedom to practise one's occupation. An occupation in this sense means any long-term activity pursued to create and maintain a livelihood (cf. BVerfGE 141, 121 <130 f.>; 155, 238 <276>). The protection afforded by this fundamental right is comprehensive in scope, as reflected by the fact that the provision specifically refers to choosing one's occupation or profession, one's place of training, one's place of work and practising one's occupation (cf. BVerfGE 113, 29 <48>). It not only protects the decision to enter an occupation, but also the decision on whether and for how long the occupation is practised once it has been taken up (cf. BVerfGE 44, 105 <117> with further references). This fundamental right not only protects the individual's choice of a specific workplace in their chosen occupation, but also their decision to keep or give up a job. It protects against all state measures that limit this freedom of choice (cf. BVerfGE 96, 152 <163>), and that, for example, force someone to leave a specific job (cf. BVerfGE 149, 126 <141 para. 38> with further references). 246

bb) The work the complainants do in the health and care sectors is covered by the constitutional protection of Art. 12(1) GG. […] 247

b) § 20a(5) third sentence IfSG interferes with the complainants' occupational freedom protected by Art. 12(1) GG. 248

aa) Art. 12(1) GG in particular protects against impairments that specifically relate to occupational activities by directly preventing or restricting the practice of an occupation (cf. BVerfGE 113, 29 <48>; 155, 238 <277 para. 95>). Interferences with occupational freedom include, for instance, provisions that generally prohibit the practice of an occupation or that permit it only if the authorities grant approval in the individual case (cf. BVerfGE 8, 71 <76>; 145, 20 <70 f. para. 129>). 249

bb) The obligation set out in § 20a(1) first sentence and § 20a(2) first sentence IfSG impairs not only the general parameters of the complainants' occupations, but, in conjunction with § 20a(5) third sentence IfSG, also directly restricts the practice of the occupations of the persons working in the institutions and organisations listed in § 20a(1) first sentence IfSG – even though the measure is not directed at occupation- 250

al activities as such.

(1) Bans on entering organisations and on working there imposed pursuant to § 20a(5) third sentence IfSG have inherent regulatory effects on occupations (*objektiv berufsregelnde Tendenz*). It is true that § 20a IfSG covers all tasks performed in the relevant institutions and organisations, regardless of whether they are performed and delegated as part of one's occupation. Thus, it is not only workers who are addressed by § 20a(1) first sentence and § 20a(2) first sentence IfSG, but also other groups such as volunteers. Nevertheless, the challenged provisions primarily concern tasks that are typically performed as part of one's occupation (cf. in this regard BVerfGE 97, 228 <254>). 251

(2) § 20a(5) third sentence IfSG also has direct restrictive effects on occupations. Based on the legislative technique used in § 20a IfSG, fundamental rights holders who want to remain unvaccinated but continue their work have to expect that they will be banned from entering the institutions and organisations listed in § 20a(1) first sentence IfSG and from working there (cf. § 20a(5) third sentence IfSG). 252

It is true that the law itself does not provide for a ban on entering the organisations in question or on working there as a direct consequence of an individual decision not to get vaccinated against COVID-19 or not to provide the required proof by 15 March 2022 (cf. § 20a(2) first sentence IfSG). However, the local public health authority can use its discretion to issue such a ban pursuant to § 20a(5) third sentence IfSG if the required proof is not submitted within a reasonable deadline following a demand by the authority (cf. § 20a(5) first sentence IfSG). In this respect, it is irrelevant that the legislator's primary aim is a targeted restriction of the fundamental right to physical integrity – in line with the purpose of the law (see para. 114 above). According to the legislative aim, being confronted with possible occupational disadvantages is not just intended to influence the decision on whether to get vaccinated. Rather, the ban on entering the organisations in question and on working there is of distinct significance that goes beyond the level of exerting influence; it amounts to a direct and targeted impairment of Art. 12(1) GG. 253

2. This interference with Art. 12(1) GG is justified to protect vulnerable persons. 254

Constitutional justification requires that the challenged provisions are compatible with the Constitution in formal and substantive terms (cf., foundationally, BVerfGE 6, 32 <41>). The provisions are formally constitutional. In particular, failure to mention Art. 12 GG in § 20a(8) IfSG does not result in a violation of the requirement following from Art. 19(1) second sentence GG that the law expressly specify affected fundamental rights (*Zitiergebot*). Laws with regulatory effects on occupations do not give rise to a duty to specify affected fundamental rights (cf. BVerfGE 64, 72 <80>). The provisions are also constitutional in substantive terms. They serve a legitimate purpose (see a) below) and are suitable and necessary (see b) below) to achieve this purpose. No unreasonable burdens are placed on fundamental rights holders; in particular, the purpose and the intensity of the interference are in adequate proportion to 255

one another (see c) below).

a) § 20a(5) third sentence IfSG serves a legitimate purpose. Bans on entering the organisations in question and on working there serve to protect vulnerable persons in cases where persons affected by the obligation to provide proof of vaccination or recovery decide not to get vaccinated and yet continue their work nonetheless. § 20a(5) third sentence IfSG aims to protect the health and life of vulnerable persons, who are at particular risk, and thus to protect exceptionally significant legal interests (cf. also BVerfGE 121, 317 <356>; 126, 122 <140>; Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 176 with further references; cf. also Conseil constitutionnel, Décision n°2021-824 DC of 5 August 2021, para. 123). 256

b) The challenged § 20a(5) third sentence IfSG is also suitable under constitutional law for achieving its purpose. The legislator could assume that bans on entering the organisations in question or on working there imposed on persons who are not vaccinated or recovered are capable of protecting the life and health of vulnerable persons. Such bans help avoid direct or indirect contacts between the persons addressed by § 20a(1) first sentence IfSG on the one hand and the vulnerable persons to be protected on the other, and thereby help prevent vulnerable persons from getting infected (see also para. 179 ff. above). The challenged provisions are also necessary for the reasons set out above with regard to Art. 2(2) first sentence GG, which equally apply to Art. 12(1) GG. No less intrusive means are ascertainable that could be equally effective in pursuing the legislative aim (see para. 189 ff. above). 257

c) When the purpose of the law is balanced against the severity of the interference, the provisions must be considered appropriate. 258

aa) The negative consequences resulting from § 20a(5) third sentence IfSG differ according to the type of work performed. The imposition of a ban on entering the organisations in question and on working there typically prevents self-employed professionals in the health and care sectors from continuing to practise their occupation and/or perform their work as long as the challenged law remains in effect. But employees in the health and care sectors are also significantly affected by such a ban. While the employment relationship underlying the performed work remains unaffected, persons who are subject to a ban will typically at least lose their claim to remuneration ([…]). […] 259

The provision places a particular burden on persons who, if they changed their workplace, would still be subject to the requirement of being vaccinated or recovered and could only avoid this requirement by practising a different occupation for which they have no training. This concerns nursing staff, doctors, psychotherapists, medical assistants, etc. If they do not provide proof of vaccination or recovery, these professional groups are not only barred from their current workplace, they are also barred from any workplace in Germany in the occupation for which they trained until 31 December 2022. It is thus made largely impossible for them to freely choose whether 260

they want to continue to practise their occupation.

By contrast, administrative, cleaning and kitchen staff may be required to be vaccinated or have recovered from COVID-19 at their current workplace. However, these groups can continue to practise their occupation if they change their workplace, as long as they do not work for an institution or organisation covered by § 20a(1) first sentence IfSG. They are therefore not forced into a complete change of their occupation, but only into a change of their workplace. The same applies accordingly to service providers who do not exclusively work for institutions and organisations covered by § 20a(1) first sentence IfSG. 261

bb) The negative consequences are in part mitigated as the legislator does not ignore the interests of affected professional groups. Firstly, the imposition of a ban on entering the relevant institutions and organisations or on working there is at the discretion of the public health authority, which must take into account the fundamental right under Art. 12(1) GG when making its decision, especially with regard to the duration of the ban (cf. also BTDrucks 20/188, p. 42). Secondly, the legislator provided for a transitional period of approximately three months from the entry into force of the law until 15 March 2022 to enable affected persons to make provision for the implications for their career if they do not want to get vaccinated. Moreover, a ban on entering the relevant institutions and organisations or on working there must be lifted as soon as valid proof within the meaning of § 20a(2) first sentence IfSG is provided. 262

cc) Ultimately, § 20a(5) third sentence IfSG is also appropriate. The law's purpose is to protect vulnerable groups from falling severely ill with, or even dying from, COVID-19; this is an especially significant interest (see para. 155 above) that is capable of justifying the imposition of a ban. Even when it is taken into account that § 20a IfSG prevents many affected persons from pursuing their occupation for a certain time period, the provision does not violate the principle of proportionality in its strict sense. 263

The different burdens imposed on various professional groups thus also reflect the significance of vaccination or recovery for achieving the purpose pursued. Given the nature of their work, the staff in the health and care sectors especially affected by § 20a(5) third sentence IfSG are typically in intense and close contact with vulnerable persons, which makes the increased transmission risk posed by staff who have not been vaccinated and have not recovered more relevant and leads to a considerable increase in the need for protection of vulnerable persons. By contrast, the administrative, cleaning and kitchen staff concerned usually have no or only brief direct contacts with vulnerable persons, and therefore usually have only indirect dealings with the persons who must be protected, for example through the joint use of facilities or via medical or other care and nursing staff. 264

In this respect, it must also be taken into account that staff not only have the general obligation to ensure their own safety and health as well as the safety and health of the persons affected by their actions or failures to act at work (for example their col- 265

leagues) (cf. § 15(1) of the Safety and Health at Work Act, *Arbeitsschutzgesetz*), but that the staff in the health and care sectors especially affected by § 20a(5) third sentence IfSG also have a particular responsibility vis-à-vis the persons treated and cared for by them. Patients trust doctors with their health and often even with their life. They equally entrust their health to all medical and care professionals. Members of these professional groups must be aware of this special responsibility, which also informs the law in question (cf. BTDrucks 20/188, p. 2), when they choose their occupation.

3. Insofar as the complainants are not German citizens, they cannot invoke occupational freedom under Art. 12(1) GG, but are protected by the general freedom of action under Art. 2(1) GG. However, the general freedom of action does not provide more extensive protection than Art. 12(1) GG (cf. BVerfGE 78, 179 <197>). 266

III.

The fines that can be imposed pursuant to § 73(1a) nos. 7e to 7h IfSG have been challenged in an admissible manner; they interfere with Art. 2(1) in conjunction with Art. 103(2) GG. However, this interference is justified under constitutional law. 267

1. Insofar as non-compliance with certain obligations imposed by § 20a IfSG or orders issued on the basis of § 20a IfSG is punishable by fine, this amounts to an interference with the general freedom of action (Art. 2(1) GG) (cf. also BVerfGE 153, 182 <307 para. 333> with further references; Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 237). However, this interference is justified under constitutional law. 268

2. […] 269

3. The interference with the general freedom of action is […] compatible with the Basic Law. In particular, the provisions are sufficiently specific and clear (see a) below). The provisions are also justified with regard to the principle of proportionality when taking into consideration the burdens resulting from them (see b) below). 270

a) The administrative offences set out in § 73(1a) nos. 7e to 7h IfSG as blanket references satisfy the specificity requirements following from Art. 103(2) GG. The provision to which the blanket references refer, § 20a IfSG, also satisfies both the general requirements regarding the clarity and specificity of provisions authorising fundamental rights interferences (see para. 141 ff.) and the stricter requirements arising from Art. 103(2) GG. 271

[…] 272-280

b) There are also no doubts as to the proportionality of the sanctions that can be imposed pursuant to § 73(1a) nos. 7e to 7h IfSG, which serve to increase compliance with the rules in § 20a IfSG (cf. also Federal Constitutional Court, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 inter alia -, para. 237). 281

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