



**UNTO THE RIGHT HONOURABLE
LORDS OF COUNCIL AND SESSION**

P E T I T I O N

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PETITIONERS

Judicial review on the *vires* of Ministers of the Crown to advise the Queen to prorogue the Westminster Parliament

HUMBLY SHEWETH:

The Parties

1. That the petitioners are as designed in the instance. All the petitioners - other than the second petitioner - are members of the Westminster legislature, whether MPs in the House of Commons or Peers with a right to sit in the House of Lords. The second petitioner is a Queen's Counsel at the Bar of England and Wales. He is Director and Founder of the Good Law Project. The Good Law Project, under the second petitioner's auspices, acts as a crowdfunding promoter and also pursues litigation in the public interest (both within the United Kingdom and elsewhere in the European Union) to defend, define, and clarify the law in particular areas, including notably around the United Kingdom's decision to leave the European Union. The first and second petitioner were named petitioners in the judicial review proceedings culminating in Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199 (made in response to a preliminary reference from the Inner House of the Court of Session in *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111). Those petitioners who are Members of the Westminster Parliament are entrusted, under the constitution, with functions that include holding the UK Government to account, as well as legislating and making decisions as to public policy options on issues of national importance notably, for the purposes of this petition, the terms (if any) upon which the United Kingdom may, or may not, leave the European Union.
2. That "Exit Day" has the meaning given by Section 20(1) of the European Union (Withdrawal) Act 2018 and is subject to amendment by a Minister of the Crown by regulations made under Section 20(4). The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations most recently changed Exit Day to 31 October 2019. The question which is raised in the present petition – namely whether or not it is within the powers of Ministers of the Crown to advise the Queen to prorogue the Westminster Parliament for the purpose of denying before Exit Day any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union – raises issues of profound constitutional importance which is of the upmost concern to the petitioners, whether as parliamentarians in the exercise of their constitutional functions or as active campaigning members of civil society.
3. That the principle of access to justice dictates that, as a generality, anyone who wishes to do so can apply to the court to determine what the law is in a given situation. In all the circumstances, all and each of the Petitioners have and has sufficient interest and therefore

standing to make this application to this court's supervisory jurisdiction: *Christian Institute v Lord Advocate*, 2016 SC 47 and *Wightman v Secretary of State for Exiting the European Union (No 2)*, 2019 SC 111.

4. That the respondent is designed in Part 1 of the Schedule for Service. Under the Crown Suits (Scotland) Act 1857 the respondent represents, in proceedings in Scotland, the Crown in right of the United Kingdom: *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453. The respondent is convened in that capacity in the present proceedings under and in terms of Section 4A(b) of the 1857 Act, as amended. This court has jurisdiction: *Tehrani v Secretary of State for the Home Department*, 2007 SC (HL) 1.
5. That separately, the person specified in Part 2 of the Schedule for Service may have an interest and is called for such interest.

The date on which grounds giving rise to the petition first arose

6. That in May and June 2019, a number of backbench members of the House of Commons raised the possibility that the Prime Minister should advise the Queen to exercise the prerogative power to prorogue the Westminster Parliament in or before October 2019, ahead of and anticipation of the currently-scheduled Exit Day of 31st October 2019. Subsequently, during the recent Conservative Party leadership contest, a number of former, current and aspiring Ministers of the Crown - including the ultimate winner of that contest, and now Prime Minister, Boris Johnson MP – either stated their willingness to advise (or refused to rule out the possibility of their advising) the Queen that she prorogue the Westminster Parliament in advance of Exit Day, with a view to denying any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union. When specifically questioned in the House of Commons on 25 July 2019, the Leader of the House of Commons again declined on behalf of the UK Government to rule out the use of prorogation in this way in order to prevent the Westminster Parliament from carrying out its duties in holding the UK Government to account ahead of Exit Day.
7. That in any event, the issues raised in the petition concern the effects of what is said to be an ongoing “position” which has the potential to influence future government and parliamentary action: *Wightman v Advocate General for Scotland (No 1)*, 2018 SC 322.

The extent of the court's supervisory jurisdiction in constitutional issues

8. That the consequences of the United Kingdom leaving the European Union are plainly a matter of enormous importance, constitutionally, economically and as regards the rights of individuals, both EU citizens and others. But there remains uncertainty about the terms under which the United Kingdom will leave the European Union, given that the mechanism

established under Article 50 of the Treaty on European Union (TEU) has not yet produced a finalised and approved Withdrawal Agreement as anticipated by that Treaty provision. The options available to Members of Parliament – whether to approve a Withdrawal Agreement within the terms of Section 13 of the European Union (Withdrawal) Act 2018, or to accept withdrawal from the EU without an agreement with the European Union, or (as established by the CJEU in Case C-621/18 *Wightman*) to require the Prime Minister to revoke the Article 50 TEU withdrawal notification – remain open until at least 31 October 2019. The final decision about the United Kingdom’s withdrawal from the European Union and the arrangements that will replace the existing law are matters for the Westminster Parliament, *not* for the UK Government: *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2018] AC 61. And it is not open to the UK Government, in respect of the exercise of *any* of the Crown’s prerogative powers (including the exercise of the power to prorogue Parliament) to wrest that final decision from the Westminster Parliament.

9. That the courts exist as one of the three pillars of the State with the role of providing authoritative and binding rulings on what the law is and, in particular, as to how the powers of the executive may lawfully be exercised. That is their fundamental function, and it is independent of the constitutional functions of both Parliament and the executive. Although they perform different tasks, collectively, these three pillars work together in ensuring the good government of this country. Each institution must display due respect towards the powers and duties of the other elements of government, while ensuring that the system of government as a whole respects and upholds the values and principles inherent in the constitution on behalf, and for the benefit, of the citizens and peoples of the constituent nations of the United Kingdom. This is the rule of law, express statutory recognition of which as a constitutional principle is given in section 1 of the Constitutional Reform Act 2005.
10. That the court’s supervisory jurisdiction in public law matters is therefore *not* confined to the review of actual decisions, or failures to act: *Wightman and others v Secretary of State for Exiting the European Union* 2019 SC 111. The essential constitutional function of the court being the preservation of the rule of law, its role extends beyond the protection of individuals’ legal rights: *AXA General Insurance Ltd v Lord Advocate* 2012 SC (UKSC) 122. Rather, the constitutional scope of the supervisory jurisdiction is to secure that the rule of law is maintained by ensuring that, within the bounds of practical possibility, executive decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise: *R (Cart) v Upper Tribunal* [2012] 1 AC 663.
11. That the preservation of the rule of law requires the courts to determine, for all concerned, the requirement of the law as it presently exists and, where necessary, to provide effective remedies to enforce that law. A predominant purpose for the invocation of this court’s, and its exercise of, its supervisory jurisdiction is to ensure that all government, whether at a

national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is basic to the rule of law; public authorities of every sort, from national government downwards, must observe the law: *Wightman and others v Secretary of State for Exiting the European Union (No. 2)*, 2019 SC 111.

12. That the law can compel the Crown to do its duty or restrain it from exceeding its powers: *Davidson v Scottish Ministers*, 2006 SC (HL) 42. The Crown acts in this instance on the advice of and through the medium of its Ministers and other executive servants: *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [2009] 1 AC 453. If a Minister of the Crown refuses to carry out any duty, or if he exceeds his duty to the injury of the subjects, the law gives redress: *Edwards v Cruickshank* (1840) 3 D 282.
13. That the present application to the supervisory jurisdiction seeks precisely a determination of a question of law, namely the scope and limits of the lawful authority of Ministers of the Crown to advise the Queen to prorogue the Westminster Parliament. It is neither academic nor premature to seek a determination from this court on whether it is legally competent for a Prime Minister to advise the Queen to prorogue the Westminster Parliament with a view either to avoid Parliamentary debate over the terms and conditions under which the United Kingdom will leave the European Union, or to inhibit parliamentarians from exercising their parliamentary functions in respect of the options available to the United Kingdom. The issue is of great constitutional importance and of direct relevance to parliamentarians' fulfilment of their constitutional responsibilities on behalf of the people and nations whose interests they either represent or must protect.
14. That whether and when it is, or is not, competent for Ministers of the Crown to advise the Queen to prorogue Parliament prior to Exit Day is a question of law, and of interpretation of the UK constitution, and as such it is a question for the court. What to do once the answer to the question has been given is a matter for politicians and therefore beyond the scope of the remedies sought in this petition. Frequently the answers to legal questions may have political consequences, but that fact cannot absolve the court from its duty to consider and, if possible, answer those legal questions.
15. That the court's consideration of this question does not infringe the boundaries of parliamentary privilege. No issue of impermissible questioning of what is or was said in the Westminster Parliament is raised in the present application. A determination of the law, such as that sought in this petition, does not criticise or call into question anything that has been said in the Westminster Parliament. It does not fetter or otherwise interfere with the options open to the legislature. It does not challenge freedom of speech in the Westminster Parliament or its parliamentary sovereignty. The court is not being asked to advise the Westminster Parliament on what it must, or ought, to, do. The court is not being asked

otherwise to seek to influence the Westminster Parliament's direction of travel. The court is being asked merely to declare the law as it applies to Ministers of the Crown, which is a matter within the jurisdiction of the court and is part of its central function. How Parliament chooses to react to the court's determination of the law is entirely a matter for that institution.

16. That if the legal rights and powers of the relevant constitutional actors cannot be determined before the prerogative to prorogue the Westminster Parliament is exercised by the Crown on the advice of the Prime Minister, the country will be, metaphorically, sleepwalking into the consequences, with no remedy available for their reversal. Once the prerogative is exercised, its political and legal consequences in respect of the UK's membership of the European Union and the application or cessation of the law of the European Union as a source of law in the United Kingdom will no longer be subject to parliamentary control. In these circumstances, ascertaining the legal and constitutional principles that apply in respect of the use of the power to prorogue the Westminster Parliament and its consequences are a matter of immediate practical and constitutional importance to the petitioners.
17. It is certainly not a reasonable or responsible course for the petitioners simply to wait and see if and what advice is given to the Queen by Ministers of the Crown forming the present UK Government in relation to the exercise of the power of prorogation of the Westminster Parliament. As noted, the exercise of the power of prorogation would have irreversible legal, constitutional and practical implications for the United Kingdom. Any decision from this court made after the Westminster Parliament has been ordered to be prorogued would come too late, and would not be sufficient to resolve the constitutional and legal implications of such a decision. In order to be enabled properly to carry out their proper constitutional duties, the petitioners require a definitive ruling from this court at this time on the legality or otherwise of proroguing the Westminster Parliament in advance of Exit Day.

Remedies Sought

18. The petitioners seek:
 - (1) A declarator that it is *ultra vires et separatim* unconstitutional for any Minister of the Crown, including the Prime Minister, with the intention and aim of denying before Exit Day any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to purport to advise the Queen to prorogue the Westminster Parliament.
 - (2) Interdict against Ministers of the Crown from advising the Queen, with the view or intention of denying before Exit Day any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to prorogue the Westminster Parliament and for interdict *ad interim*.

(3) Such further orders (including an order for expenses) as may seem to the court to be just and reasonable in all the circumstances of the case.

19. The petitioners bring this petition for judicial review on the grounds set out in more detail below.

Background

20. That on 23 June 2016, a referendum was held in the United Kingdom and in Gibraltar. The question posed in that referendum was “*Should the United Kingdom remain a member of the European Union or leave the European Union?*”. The choice for the franchised and registered voters as at the referendum day was either “*Remain a member of the European Union*” or “*Leave the European Union*”. Of those who chose to vote among the franchised and duly registered electorate for this referendum 51.89% voted for the option for the United Kingdom to leave the European Union on terms to be determined.

21. That only the Westminster Parliament can authorise the Prime Minister to notify the European Union under Article 50(2) TEU of the intention of the United Kingdom to withdraw as a member state of the European Union: *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61. In the exercise of this competency, the Westminster Parliament enacted the European Union (Notification of Withdrawal) Act 2017. That Act of the Westminster Parliament was given Royal Assent on 16 March 2017. That Act provides in section 1 that “*The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom’s intention to withdraw from the EU*”. In the exercise of this delegated authority from the Westminster Parliament, the then Prime Minister, Theresa May MP, sent on 29th March 2017 a notification to the European Union of the United Kingdom’s intention to withdraw from the European Union.

22. That the UK Government introduced before the Westminster Parliament the European Union (Withdrawal) Bill in order to “grandparent” into domestic law all European Union law that currently applies to the United Kingdom and its constituent jurisdictions prior to the United Kingdom’s withdrawal from the European Union. This Bill received royal assent on 26 June 2018 as the European Union (Withdrawal) Act 2018 (the “2018 Act”).

23. That the 2018 Act requires - prior to any ratification or implementation of any withdrawal deal resulting from the United Kingdom Government’s negotiations with the European Union - that the Westminster Parliament decide whether or not to approve the terms of any proposed withdrawal agreement, all as described in more detail in the second ground of challenge below.

24. That further and in any event, Part 2 of the Constitutional Reform and Governance Act 2010 requires the United Kingdom Government to place before both Houses of Parliament a copy of any proposed agreement between the United Kingdom and the European Union for a period of at least 21 sitting days. The United Kingdom Government may only ratify any such agreement if the House of Commons does not vote against it.
25. That the UK Government has placed before the Houses of Parliament on three occasions in 2019 the proposed withdrawal agreement of the United Kingdom from the EU. On each of those occasions, the House of Commons has voted against approving the agreement.
26. That the notification made by the then Prime Minister under Article 50 TEU may be revoked by the United Kingdom at any time prior to Exit Day: *Case C-621/18 Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199. On 21 March 2019 and again on 10 April 2019, the United Kingdom and the European Union agreed, as a matter of EU law, to an extension to “Exit Day” in accordance with Article 50(3) TEU. Exit Day is currently scheduled to be 31 October 2019.
27. That by operation of EU law, unless Exit Day is further extended by agreement with all the Member States of the European Union, or the United Kingdom revokes the notification of its intention to leave the European Union, the United Kingdom will leave the European Union on 31 October 2019 whether or not a withdrawal agreement has been concluded and ratified.
28. That in May and June 2019, it was reported that a number of backbench member of the House of Commons had raised the possibility of the Prime Minister asking the Queen to prorogue the Westminster Parliament in October 2019. The effect and intent of this would be to prevent members of the Westminster Parliament from, among other things: deciding whether the United Kingdom should leave the EU by operation of EU law on 31 October 2019 even in the absence of a deal or, instead, mandating the UK Government to seek an extension to Exit Day, as the Westminster Parliament did with the European Union (Withdrawal) Act 2019; determining the terms on which the United Kingdom might leave the European Union on 31 October 2019; deciding on the conditions under which the United Kingdom might otherwise determine its future relationship with the European Union, including legislating for a further referendum on the UK’s EU Membership (the “People’s Vote”), or directing the UK Government simply to revoke the Article 50 TEU notification.
29. That this idea of the UK Government proroguing the Westminster Parliament with a view to ensuring that the United Kingdom leave the EU on 31 October 2019 with or without a deal, was then taken up by various candidates during the Conservative Party leadership contest, including the victor of that contest, the current Prime Minister, Boris Johnson. The avowed intention of seeking such a prorogation was and is to prevent the Westminster Parliament from considering further the withdrawal of the United Kingdom from the European Union.

30. That the Westminster Parliament's immediate response to these suggestions that the UK Government might use the power to prorogue Parliament to avoid further Parliamentary participation in the withdrawal of the UK from the EU was to amend the Northern Ireland (Executive Formation etc.) Bill so as to require that the Westminster Parliament sit at specified intervals between September 2019 and, at the latest, December 2019 to consider, among other things, reports from the UK Government to be presented to the Westminster Parliament advising on any progress achieved in reconvening the Northern Ireland executive and the restoration of devolved government in Northern Ireland. But these amendments were passed with the express purpose of ensuring not only that the Westminster Parliament would be advised on the issue of devolved government in Northern Ireland, but would also continue to sit to ensure its continued scrutiny of the process of the United Kingdom's withdrawal from the European Union. It was noted in Parliament that even a short prorogation, if suitably timed, would permanently deprive Westminster Parliament of its voice on this most significant of political issues with irreversible consequences. Advice by Ministers of the Crown to the Queen to prorogue the Westminster Parliament in such circumstances would subvert the principle that the Government is accountable to Parliament.
31. For the grounds set out below in more detail, seeking to use the power to prorogue Parliament to avoid further Parliamentary participation in the withdrawal of the UK from the EU is both unlawful and unconstitutional.

The power to prorogue the Westminster Parliament

32. That among the "constitutional instruments" which make up the United Kingdom constitution are the Claim of Right 1689: *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2018] AC 61. The fundamental constitutional nature of the settlement that was achieved by the Claim of Right 1689 in itself renders it incapable of being altered by Parliament otherwise than by an express enactment. The provisions of the Claim of Right 1689 are not vulnerable to alteration by implication from some later enactment unless an intention to alter it is set forth expressly on the face of that statute: cf *BH v. Lord Advocate*, 2012 SC (UKSC) 308. In addition, the common law also recognises certain principles as fundamental to the rule of law in the United Kingdom. (*R (Buckinghamshire County Council) v Secretary of State for Transport: re HS2* [2014] UKSC 3).
33. That the power to prorogue the Westminster Parliament is a power exercised by the Queen by and with the advice of the Privy Council: Prorogation Act 1867, section 1. In practical terms, the advice is almost always given to the Crown by the Prime Minister. But the Crown is distinct from Ministers of the Crown. It remains unclear whether, as a matter of

constitutional convention, the Crown may ignore or reject the advice of the Ministers of the Crown on this matter of proroguing the Westminster Parliament. But, in any event, the Crown and Ministers of the Crown are subject to and bound by the law: *Edwards v Cruickshank* (1840) 3 D 282.

34. That the authority of Ministers of the Crown to advise the Queen as to the exercise of Sovereign authority to prorogue the Westminster Parliament is not absolute. It must be exercised non-abusively and within enforceable legal and constitutional limits under the supervision of the courts. In particular if the Prime Minister, or any other Minister of the Crown, were to purport to advise the Queen to prorogue the Westminster Parliament with a view to denying, prior to Exit Day, any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union, this would be an unlawful abuse of power, *ultra vires et separatim* unconstitutional because, among other things, it would be in breach of the provisions of the Claim of Right 1689 which expressly and by necessary implication (*Lord Advocate v Dumbarton District Council*, 1990 SC (HL) 1) bind the Crown and which provides, among other things, (emphasis added):

“That for redress of all greivances and for the amending strenthneing and preserveing of the lawes *Parliaments ought to be frequently called and allowed to sit* and the freedom of speech and debate secured to the members”

35. That the issues raised by this petition are matters of fundamental legal and constitutional importance concerning the lawful authority of Ministers of the Crown and the constitutional relationship between the executive and the legislature. These matters are also of direct concern to citizens of the United Kingdom in terms of their rights to effective democratic representation and their legal rights as citizens of the European Union whose protection is wholly dependent on the terms under which the United Kingdom withdraws from the European Union.
36. That it is of fundamental legal and constitutional importance that the Westminster Parliament be able to sit in the period leading up to Exit Day to ensure the political accountability of the Government, to exercise such legislative powers as may be necessary to determine the terms and timing of the UK’s withdrawal from the European Union or to take any other decision as regards the United Kingdom’s relationship with the European Union. The principles of democratic accountability would be denied if the Westminster Parliament were to be suspended and so prevented from sitting during that period as a result of an abuse of ministerial power.

First Ground of Challenge

37. That the Westminster Parliament represents the peoples and nations of the United Kingdom as its sovereign legislature. The sovereignty of Parliament derives from the consent of the peoples and nations of the United Kingdom to form a system of government under law and

under the authority of its Parliament. The UK Government, as the executive, is on all matters politically accountable and answerable to the Westminster Parliament. Separately, the UK Government is legally accountable and answerable to the courts.

38. That advising the Queen to prorogue the Westminster Parliament prior to Exit Day with a view to preventing the Westminster Parliament from considering the withdrawal of the United Kingdom from the European Union would undermine the United Kingdom's system of constitutional and democratic government in respect of the principle of the political accountability of the executive to the Westminster legislature and its legal accountability to the courts. Both such principles are fundamental to the constitutional tradition of the United Kingdom and a breach of them would accordingly be unconstitutional and therefore *ultra vires*.
39. That a Minister of the Crown does not, in advising the Queen to prorogue the Westminster Parliament, have any of the Sovereign's personal immunities. The business of Government is subject to the courts and subordinate to the law. Subjects in Scotland are entitled to go to the courts in Scotland against the Crown as of right and do not need the permission or consent of the Crown or its officers: *A v B* (1534) Mor 7321; *Somerville v Lord Advocate* (1893) 20 R 1050. Unlawful actions by a Minister of the Crown may be reduced or invalidated and a Minister of the Crown may be compelled to perform actions or fulfil the Crown's and his or her legal and constitutional duties: *Edwards v Cruickshank* (1840) 3 D 282 and *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] 1 AC 453. While Article XVIII of the Treaty and Acts of Union in 1707 *permitted*, it did not of itself *effect*, harmonisation of the systems of public law in Scotland and in England: cf *King v Cowle* 97 ER 587. There is no presumption that the powers and prerogatives of the Crown as recognised in English law were automatically received, recognised and are to be applied in a post-Union Scotland: *Admiralty v Blair's Trustees*, 1916 SC 247.
40. That the constitutional role and status of the Westminster Parliament are rooted in democratic principles: *Moohan v Lord Advocate*, 2015 SC (UKSC) 1 and *AXA General Insurance Ltd v Lord Advocate*, 2012 SC (UKSC) 122. These principles are defined by the constitutional traditions of each of the constituent nations of the United Kingdom: *Jackson v Attorney General* [2006] 1 AC 262. The UK Government and the Westminster Parliament to which it is answerable and accountable are bound to adhere to these principles. The principle of parliamentary sovereignty is built upon the notion that Parliament represents the people whom it exists to serve: *Jackson v Attorney General* [2006] 1 AC 262. In adhering to the will of Parliament, the courts protect the role ascribed to Parliament within this constitutional order.
41. That the goal of all statutory interpretation is to discover the intention of the legislation and that intention is to be gathered from the words used by Parliament: *R (Black) v. v Secretary*

of State for Justice [2018] AC 215. The Claim of Right 1689 expressly provides that Parliament is “be frequently called and allowed to sit”. This provision was included precisely in response to the Crown’s abuse of the power of prorogation of Parliament during the reigns of both Charles II and James VII (*cf Lord Shaftesbury’s case*, 1 Mod. 144, 1 Lords Journals, 195, 15 February 1676-7 and *R v. The City of London*, 8 How. St. Tr. 1039), and to set down enforceable legal limits on the use of the Crown’s power of proroguing or suspending Parliament and allow for effective legal remedies from the court against its abuse: *Edwards v Cruickshank* (1840) 3 D 282.

42. That the proper exercise by the Westminster Parliament of its constitutional role may not be usurped by the executive branch. The Westminster Parliament may choose to act in relation to the terms of the United Kingdom’s withdrawal from the European Union in any manner that it chooses but it must not be prevented from acting in whatever manner it determines. Standing the aforesaid provisions of the Claim of Right 1689, any advice tendered to the Queen by a Minister of the Crown to prorogue the Westminster Parliament in order to prevent further Parliamentary scrutiny of such plans as the UK Government has for the United Kingdom to leave the European Union, or otherwise to call the UK Government to account on this issue, would be unconstitutional and unlawful.

Second Ground of Challenge

43. That it is clear, in terms of the European Union (Withdrawal) Act 2018, that MPs will be required to vote on whether to ratify any agreement between the UK Government and the EU Council. If no other proposal is proffered, a vote against ratification will result in the departure of the United Kingdom from the European Union on 31 October 2019 unless Parliament instructs the UK Government to revoke the Article 50 TEU notice before that date: Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199. The prorogation of the Westminster Parliament in advance of Exit Day would frustrate the will of the Westminster Parliament as expressed by sections 13 and 20 of the European Union (Withdrawal) Act 2018 and separately would deprive the Westminster Parliament of the opportunity, if so advised, of timeously enacting legislation requiring the UK Government to revoke the Article 50 TEU notice.
44. That section 13 of the 2018 Act requires that, before any agreement on the terms of the United Kingdom’s exit from the European Union can be ratified, (i) the agreement must be placed before both Houses of Parliament, (ii) the agreement must be approved by a resolution of the House of Commons and debated by the House of Lords, and (iii) a further Act of Parliament must be passed which provides for the implementation of the agreement.

45. That section 20 of the 2018 Act permits a Minister of the Crown to amend the date of Exit Day by regulation. Any such regulation is subject to annulment by resolution by either the House of Commons or the House of Lords: 2018 Act, schedule 7, para 14.
46. That accordingly, sections 13 and 20 expressly require the scrutiny by the Westminster Parliament of the terms and timing of the exit of the United Kingdom from the European Union. Any advice from any Minister of the Crown to the Queen to prorogue the Westminster Parliament in advance of Exit Day would frustrate this intention of Parliament. Were there to be such prorogation, the terms of section 13 of the 2018 Act could not be fulfilled. Parliament would not be able to consider the terms of any agreement with the European Union. Parliament's intention, as expressed by section 13, would accordingly be irreversibly frustrated. In such circumstances, the terms of section 20 of the 2018 Act would also be frustrated.
47. That it is possible for a Minister of the Crown to make regulations during a period of prorogation. Any such regulations would be laid before the Westminster Parliament when it returns after the period of prorogation. If Exit Day were to be moved to a date during a period of prorogation, the regulation would not be laid before the Westminster Parliament until such time as Exit Day had passed and the matter, as a *fait accompli*, would be irreversible. Parliament's intention that the regulation should be subject to the scrutiny of the Westminster Parliament would accordingly be frustrated.
48. That separately in the course of Parliamentary consideration of the Northern Ireland (Executive Formation etc.) Bill (which was a House of Lords Bill introduced to the Westminster Parliament by the Government), significant amendments were promoted and moved by backbenchers in both Houses of Parliament in the face of Government opposition, to the provisions of, in particular, Clause 3 of the Bill as originally introduced. In particular, relevant amendments to Clause 3 of the Bill were moved by: Dominic Grieve MP on 9 July 2019 in the House of Commons; by [Lord Anderson of Ipswich](#) on 17 July 2019 in the House of Lords; and by Hilary Benn MP on 18 July 2019 in the House of Commons. A Government backed amendment proposed by [Lord Duncan of Springbank](#) on 22 July 2019 was defeated. The amendments to Clause 3 of the Bill as ultimately passed by the Westminster Parliament provide that: a Minister must report to the House of Commons every two weeks until December 2019 on the progress of talks on restoring the Northern Ireland Assembly; these fortnightly reports must then be debated before the House of Commons within five calendar days of being produced; and if Ministers could not meet the obligation to update the House of Commons because it was prorogued or adjourned, the Westminster Parliament must still meet on the day necessary to comply with the obligation, and for the following five weekdays. The Northern Ireland (Executive Formation etc.) Bill in its amended form as passed by the

Westminster Parliament received Royal Assent on 24 July 2019 as the Northern Ireland (Executive Formation etc.) Act 2019.

49. That the clear intention and purpose of the Westminster Parliament in passing what is now Section 3 of the Northern Ireland (Executive Formation etc.) Act 2019 was to ensure that the Westminster Parliament continues to sit throughout September 2019 to December 2019 to ensure, among other things, the Westminster Parliament's continued scrutiny of the process of the UK's withdrawal from the European Union and to maintain the accountability of the Government to the Westminster Parliament on this issue: *Pepper v. Hart* [1993] AC 593.
50. That any action by the executive branch that would frustrate the will of Parliament as expressed in statute is unlawful: *R v Secretary of State for the Home Department Ex p Fire Brigades Union* [1995] 2 AC 513 and *Craig v Advocate General for Scotland*, 2019 SC 230. The prorogation of the Westminster Parliament at any time throughout September 2019 to December 2019 - or any attempt to do so in advance of Exit Day with a view to avoiding further Parliamentary participation in the withdrawal of the UK from the EU - would clearly frustrate the will of Parliament as expressed by sections 13 and 20 of the European Union (Withdrawal) Act 2018 and separately in Section 3 of the Northern Ireland (Executive Formation etc.) Act 2019 both as set out above. It would, therefore, be unlawful.

Interdict

51. That in light of the public statements made by among others the current Prime Minister and, separately, in light of the refusal by the current Leader of the House of Commons to rule out the possibility of the UK Government seeking to advise the Queen to prorogue the Westminster Parliament other than as required on the authority of the House of Commons under the terms of the Fixed-term Parliaments Act 2011 (which ended the powers of the Crown to order, if and when advised by the Prime Minister, the dissolution of Parliament), the petitioners are reasonably apprehensive that the UK Government intends to advise the Queen to prorogue the Westminster Parliament in advance of Exit Day, with a view to denying the Westminster Parliament an opportunity to scrutinise the terms of any exit of the United Kingdom from the European Union and hold to account the Government as is its role on behalf of the people of the United Kingdom.
52. That the current Prime Minister has made it clear that the current UK government's policy under his premiership is that the United Kingdom will be leaving the European Union by 31 October 2019. He has stated that he will seek to ensure that UK government will seek to achieve this end by any means possible. The current Prime Minister therefore refuses to rule out advising the Queen to prorogue Westminster Parliament with the intention of preventing the Westminster Parliament from holding the UK Government under his leadership to account. When asked to rule out such a policy on 27 June 2019, the current Prime Minister

said that it would be “absolute folly” to do so. The petitioners have set out above that such actions would have irreversible and damaging consequences. The petitioners have set out above why such action would be unlawful and unconstitutional. The UK Government is subject to the rule of law and to the jurisdiction of this court. The UK Government must, in these circumstances, be interdicted from taking action that undermines these proceedings and the constitution and renders ineffective the role of this court.

53. That additionally, as the effect of the tendering of such advice to the Queen would be irreversible and cause irreparable constitutional damage, during the subsistence of this petition and until its ultimate disposal, it is essential that this court maintains the *status quo* and prevents the UK Government from seeking to undermine the authority of the judiciary by tendering the advice before this court has had an opportunity to make a determination.
54. That, were the interdict granted and the petitioners ultimately were not vindicated by this court as regards the declarator sought, the worst possible outcome for the UK Government would be a delay in its ability to tender the advice to the Queen. Conversely, if the interdict were not granted and the petitioners were vindicated by this court, the petitioners would not be able to seek any meaningful practical remedy from this court or anywhere else that would rectify the Westminster Parliament having been prorogued with a view to denying the Westminster Parliament the opportunity to hold the UK Government to account on and prior to Exit Day. There is a greater risk of irreparable harm if the interdict sought by the petitioners is not granted *ad interim* than would be the case if the interdict were to be granted *ad interim*. The UK Government has been called upon by the petitioners in their pre-action letter to give an undertaking that no advice shall be given to the Queen to prorogue the Westminster Parliament ahead of Exit Day.
55. That despite being called upon to do so, the respondent has refused to give such an undertaking on behalf of the UK Government or, at least, delays in doing so. Reference is made to the letter dated 29 July 2019 from the respondent to the petitioners’ solicitors. The balance of convenience favours the granting of interdict *ad interim*. This court has the power to grant interdict *ad interim* in the manner sought: *Davidson v Scottish Ministers* 2006 SC (HL) 42. Interdict *ad interim* should accordingly in all the circumstances be granted by this court.

Jurisdiction and Justiciability

56. That the issues raised in this petition clearly concern a live constitutional issue on which there is a real and practical necessity to have the court’s determination as a matter of urgency. The answer sought in this petition by way of declarator will have the effect of clarifying the options open to the parliamentary petitioners and the matter therefore cannot be hypothetical: *Wightman and others v Secretary of State for Exiting the European Union*, 2019 SC 111.

57. That the petitioners who are parliamentarians, being entrusted under the constitution to make determinations and decisions as regards public policy on issues of such national significance, require legal certainty of the lawful options available. This is particularly the case where, as in this matter, the options must be known in advance of a date or decision or action because the decision is irreversible, final and of significant national and constitutional importance.
58. That it is essential that this matter be dealt with expeditiously and in advance of any advice from a Minister of the Crown to the Queen. It is highly likely that there will not be scope to review any such advice after it is given. The exercise of the power to prorogue by the Crown often follows very quickly the tendering of the advice by a Minister of the Crown. Once the power has been exercised in advance of Exit Day and the Westminster Parliament has been suspended, a retrospective review of the lawfulness of the advice would be rendered academic as coming too late. It is accordingly essential that the declarator sought by the petitioners from this court is given in advance of any such advice being given.

Permission to Proceed

59. That the petitioners satisfy requirement for permission provisions of section 27B(2) of the Court of Session Act 1988. The petition has a real prospect of success per *Wightman v Advocate General for Scotland (No 1)*, 2018 SC 322
60. That a list of authorities relevant to the determination of permission will be lodged in the process to follow hereon. In addition, documents are listed in the Schedule of Documents appended to this petition to assist the court in its determination of permission.

PLEAS-IN-LAW

1. It being *ultra vires et separatim* unconstitutional for any Minister of the Crown, including the Prime Minister, to purport to advise the Queen to prorogue the Westminster Parliament with the intention of denying before Exit Day any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union, declarator to that effect as sought by the petitioners should be made by this court.
2. The petitioners having a reasonable apprehension that the UK Government intends to advise the Queen to prorogue the Westminster Parliament with the intention of denying before Exit Day any further parliamentary consideration of the withdrawal of the United Kingdom from the European Union, interdict should be granted as sought.

3. In any event, in order to maintain the status quo pending the ultimate disposal of this petition and in order to prevent irreversible harm that will undermine this court's ability to deal properly with the issues raised, the balance of convenience favours the granting of interdict *ad interim* and interdict *ad interim* should accordingly be granted as sought.

According to Justice etc.

SCHEDULE FOR SERVICE

RESPONDENT

- The Rt Hon Richard Keen QC, The Lord Keen of Elie, The Advocate General for Scotland, Victoria Quay, Edinburgh EH6 6QQ

INTERESTED PARTY

- Rt Hon Boris Johnson, Prime Minister, 10 Downing Street, London SW1A 2AG

SCHEDULE OF DOCUMENTS

1. Pre-application letter sent on behalf of the petitioners to the Prime Minister and to the Advocate General for Scotland
2. Response on behalf of the respondent and the interested party dated 29 July 2019
3. Hansard record of 9 July 2019 of House of Commons discussion and vote on Dominic Grieve MP proposed amendment to the Northern Ireland (Executive Formation etc.) Bill - [https://hansard.parliament.uk/commons/2019-07-09/debates/87A66283-DF13-4CC8-9069-48974EA40346/NorthernIreland\(ExecutiveFormation\)Bill](https://hansard.parliament.uk/commons/2019-07-09/debates/87A66283-DF13-4CC8-9069-48974EA40346/NorthernIreland(ExecutiveFormation)Bill)
4. Hansard record of 17 July 2019 of House of Lords discussion and vote on [Lord Anderson of Ipswich](#) proposed amendment to the Northern Ireland (Executive Formation etc.) Bill - [https://hansard.parliament.uk/lords/2019-07-17/debates/D0194A4B-4275-4E81-AB72-61237033616D/NorthernIreland\(ExecutiveFormation\)Bill](https://hansard.parliament.uk/lords/2019-07-17/debates/D0194A4B-4275-4E81-AB72-61237033616D/NorthernIreland(ExecutiveFormation)Bill)

5. Hansard record of 18 July 2019 of House of Commons discussion and vote on **Hilary Benn** MP proposed amendment to the Northern Ireland (Executive Formation etc.) Bill - [https://hansard.parliament.uk/commons/2019-07-18/debates/87117472-D2D2-420D-9A11-00A35551D4E/NorthernIreland\(ExecutiveFormation\)Bill](https://hansard.parliament.uk/commons/2019-07-18/debates/87117472-D2D2-420D-9A11-00A35551D4E/NorthernIreland(ExecutiveFormation)Bill)

6. Hansard record of 22 July 2019 of House of Lords discussion and vote against **Lord Duncan of Springbank** proposed amendment to the Northern Ireland (Executive Formation etc.) Bill - [https://hansard.parliament.uk/lords/2019-07-22/debates/DCB90AC3-CDF5-4268-83BA-136BA2998942/NorthernIreland\(ExecutiveFormationEtc\)Bill](https://hansard.parliament.uk/lords/2019-07-22/debates/DCB90AC3-CDF5-4268-83BA-136BA2998942/NorthernIreland(ExecutiveFormationEtc)Bill)