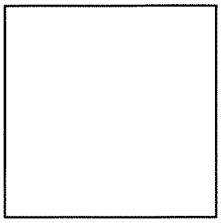

UNTO THE RIGHT HONOURABLE
LORDS OF COUNCIL AND SESSION

PETITION

of

(FIRST) JOANNA CHERRY QC MP, House of Commons, London SW1A 0AA
(SECOND) JOLYON MAUGHAM QC, Devereux Chambers, Devereux Court, London WC2R 3JH
(THIRD) JOANNE SWINSON MP, House of Commons, London SW1A 0AA
(FOURTH) IAN MURRAY MP, House of Commons, London SW1A 0AA
(FIFTH) GERAINT DAVIES MP, House of Commons, London SW1A 0AA
(SIXTH) HYWEL WILLIAMS MP, House of Commons, London SW1A 0AA
(SEVENTH) HEIDI ALLEN MP, House of Commons, London SW1A 0AA
(EIGHTH) ANGELA SMITH MP, House of Commons, London SW1A 0AA
(NINTH) THE RT HON PETER HAIN, THE LORD HAIN OF NEATH, House of Lords, London SW1A 0PW
(TENTH) JENNIFER JONES, THE BARONESS JONES OF MOULESCOOMB, House of Lords, London SW1A 0PW
(ELEVENTH) THE RT HON JANET ROYALL, THE BARONESS ROYALL OF BLAISDON, House of Lords, London SW1A 0PW
(TWELFTH) ROBERT WINSTON, THE LORD WINSTON OF HAMMERSMITH, House of Lords, London SW1A 0PW
(THIRTEENTH) STEWART WOOD, THE LORD WOOD OF ANFIELD, House of Lords, London SW1A 0PW
(FOURTEENTH) DEBBIE ABRAHAMS MP, House of Commons, London SW1A 0AA
(FIFTEENTH) RUSHANARA ALI MP, House of Commons, London SW1A 0AA
(SIXTEENTH) TONIA ANTONIAZZI MP, House of Commons, London SW1A 0AA
(SEVENTEENTH) HANNAH BARDELL MP, House of Commons, London SW1A 0AA
(EIGHTEENTH) DR ROBERTA BLACKMAN-WOODS MP, House of Commons, London SW1A 0AA
(NINETEENTH) BEN BRADSHAW MP, House of Commons, London SW1A 0AA
(TWENTIETH) THE RT HON TOM BRAKE MP, House of Commons, London SW1A 0AA
(TWENTY-FIRST) KAREN BUCK MP, House of Commons, London SW1A 0AA
(TWENTY-SECOND) RUTH CADBURY MP, House of Commons, London SW1A 0AA
(TWENTY-THIRD) MARSHA DE CORDOVA MP, House of Commons, London SW1A 0AA
(TWENTY-FOURTH) RONNIE COWAN MP, House of Commons, London SW1A 0AA
(TWENTY-FIFTH) NEIL COYLE MP, House of Commons, London SW1A 0AA
(TWENTY-SIXTH) STELLA CREASY MP, House of Commons, London SW1A 0AA
(TWENTY-SEVENTH) WAYNE DAVID MP, House of Commons, London SW1A 0AA
(TWENTY-EIGHTH) EMMA DENT COAD MP, House of Commons, London SW1A 0AA
(TWENTY-NINTH) STEPHEN DOUGHTY MP, House of Commons, London SW1A 0AA
(THIRTIETH) ROSIE DUFFIELD MP, House of Commons, London SW1A 0AA
(THIRTY-FIRST) JONATHAN EDWARDS MP, House of Commons, London SW1A 0AA
(THIRTY-SECOND) PAUL FARRELLY MP, House of Commons, London SW1A 0AA
(THIRTY-THIRD) JAMES FRITH MP, House of Commons, London SW1A 0AA
(THIRTY-FOURTH) RUTH GEORGE MP, House of Commons, London SW1A 0AA

(THIRTY-FIFTH) STEPHEN GETHINS MP, House of Commons, London SW1A 0AA
(THIRTY-SIXTH) PREET KAUR GILL MP, House of Commons, London SW1A 0AA
(THIRTY-SEVENTH) PATRICK GRADY MP, House of Commons, London SW1A 0AA
(THIRTY-EIGHTH) KATE GREEN MP, House of Commons, London SW1A 0AA
(THIRTY-NINTH) LILIAN GREENWOOD MP, House of Commons, London SW1A 0AA
(FORTIETH) JOHN GROGAN MP, House of Commons, London SW1A 0AA
(FORTY-FIRST) HELEN HAYES MP, House of Commons, London SW1A 0AA
(FORTY-SECOND) WERA HOBHOUSE MP, House of Commons, London SW1A 0AA
(FORTY-THIRD) THE RT HON DAME MARGARET HODGE MP, House of Commons, London SW1A 0AA
(FORTY-FOURTH) DR RUPA HUQ MP, House of Commons, London SW1A 0AA
(FORTY-FIFTH) RUTH JONES MP, House of Commons, London SW1A 0AA
(FORTY-SIXTH) GED KILLEN MP, House of Commons, London SW1A 0AA
(FORTY-SEVENTH) PETER KYLE MP, House of Commons, London SW1A 0AA
(FORTY-EIGHTH) BEN LAKE MP, House of Commons, London SW1A 0AA
(FORTY-NINTH) THE RT HON DAVID LAMMY MP, House of Commons, London SW1A 0AA
(FIFTIETH) CLIVE LEWIS MP, House of Commons, London SW1A 0AA
(FIFTY-FIRST) KERRY MCCARTHY MP, House of Commons, London SW1A 0AA
(FIFTY-SECOND) STUART C. MCDONALD MP, House of Commons, London SW1A 0AA
(FIFTY-THIRD) ANNA MCMORRIN MP, House of Commons, London SW1A 0AA
(FIFTY-FOURTH) CAROL MONAGHAN MP, House of Commons, London SW1A 0AA
(FIFTY-FIFTH) MADELEINE MOON MP, House of Commons, London SW1A 0AA
(FIFTY-SIXTH) LAYLA MORAN MP, House of Commons, London SW1A 0AA
(FIFTY-SEVENTH) JESS PHILLIPS MP, House of Commons, London SW1A 0AA
(FIFTY-EIGHTH) LLOYD RUSSELL-MOYLE MP, House of Commons, London SW1A 0AA
(FIFTY-NINTH) THE RT HON LIZ SAVILLE ROBERTS MP, House of Commons, London SW1A 0AA
(SIXTIETH) TOMMY SHEPPARD MP, House of Commons, London SW1A 0AA
(SIXTY-FIRST) ANDY SLAUGHTER MP, House of Commons, London SW1A 0AA
(SIXTY-SECOND) OWEN SMITH MP, House of Commons, London SW1A 0AA
(SIXTY-THIRD) CHRIS STEPHENS MP, House of Commons, London SW1A 0AA
(SIXTY-FOURTH) JO STEVENS MP, House of Commons, London SW1A 0AA
(SIXTY-FIFTH) WES STREETING MP, House of Commons, London SW1A 0AA
(SIXTY-SIXTH) PAUL SWEENEY MP, House of Commons, London SW1A 0AA
(SIXTY-SEVENTH) GARETH THOMAS MP, House of Commons, London SW1A 0AA
(SIXTY-EIGHTH) ALISON THEWLISS MP, House of Commons, London SW1A 0AA
(SIXTY-NINTH) THE RT HON STEPHEN TIMMS MP, House of Commons, London SW1A 0AA
(SEVENTIETH) ANNA TURLEY MP, House of Commons, London SW1A 0AA
(SEVENTY-FIRST) CATHERINE WEST MP, House of Commons, London SW1A 0AA
(SEVENTY-SECOND) MATT WESTERN MP, House of Commons, London SW1A 0AA
(SEVENTY-THIRD) MARTIN WHITFIELD MP, House of Commons, London SW1A 0AA
(SEVENTY-FOURTH) DR PHILIPPA WHITFORD MP, House of Commons, London SW1A 0AA
(SEVENTY-FIFTH) DR PAUL WILLIAMS MP, House of Commons, London SW1A 0AA
(SEVENTY-SIXTH) DANIEL ZEICHNER MP, House of Commons, London SW1A 0AA

PETITIONERS

for

Judicial review on the *vires* of Ministers of the Crown to advise the Queen to prorogue the Union 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 Union Parliament are entrusted, under the constitution, with functions which 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

2. That "Exit Day" is a term of art in UK law with its meaning given by Section 20(1) of the European Union (Withdrawal) Act 2018. Its date is subject to amendment by a Minister of the Crown in right of the United Kingdom Government 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 in right of the United Kingdom Government to advise the Queen to prorogue the Union Parliament for the purpose of denying before Exit Day sufficient time for proper 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 Government: *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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 respondent's averments in answer are denied except insofar as coinciding herewith.

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 power to prorogue the Union 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 in right of the United Kingdom Government - including the ultimate winner of that contest, and now Prime Minster, 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 Union Parliament in advance of Exit Day, with a view to denying sufficient time for proper 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 Union Parliament from carrying out its duties in holding the UK Government to account ahead of Exit Day. With reference to the respondent's averments in answer, explained and averred that there is no breach of Parliamentary privilege in referring to any comments on this issue which were made in Parliament. The references are merely

narrative of past fact: cf *Adams v Guardian Newspapers Ltd.*, 2003 SC 425, OH. *Quoad ultra* denied except insofar as coinciding herewith.

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 respondent's averments in answer are denied except insofar as coinciding herewith.

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 the Union Parliament – whether to approve a Withdrawal Agreement within the terms of Section 13 of the European Union (Withdrawal) Act 2018; whether to pass legislation authorising the United Kingdom's withdrawal from the EU without an agreement with the European Union; or to require the Prime Minister to revoke the Article 50 TEU withdrawal notification – all remain open until at least 31 October 2019. The final decision about the United Kingdom's withdrawal from the European Union and what arrangements, if any, will replace the existing law are matters for the Union Parliament, *not* for the UK Government: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61. And it is not open to the UK Government to wrest that final decision from the Union Parliament. With reference to the respondent's averments in answer, explained and averred that far from being "spent", the provisions of Section 13 of the 2018 Act, which require Parliamentary approval of the outcome of negotiations with the EU, continue to apply to and bind the Government. In particular negotiations remain on-going between the United Kingdom Government and the European Commission over the terms of the possible withdrawal of the United Kingdom from the European Union. Further and in any event, Parliament has at no point enacted the necessary statutory provisions specifically authorising the Government to allow the United Kingdom to cease its membership of the European Union in the absence of any concluded withdrawal agreement ("no-deal Brexit"). *Quoad ultra* denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

11. That the preservation of the rule of law requires the courts to determine, for all concerned, the requirements 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

12. That the law can compel the Crown and its Ministers 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 of the Crown in right of the United Kingdom Government: *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 or she exceeds his or her duty or otherwise abuses Ministerial powers, the law gives redress: *Edwards v Cruickshank* (1840) 3 D 282. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 in right of the United Kingdom Government to advise the Queen to prorogue the Union 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 Union Parliament with a view either to avoid, or leave insufficient time for, proper 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

14. That whether and when it is, or is not, competent for Ministers of the Crown in right of the United Kingdom Government 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: *R (Barclay) v Lord Chancellor (No 2)* [2014] UKSC 54 [2015] AC 276 *per* Baroness Hale at paras 57-8. In accordance with the separation of powers, it is for the courts to find, determine and interpret the law. Far from being a violation of the separation of powers for the courts to do so, it is their core constitutional function. What to do once the answer to the question has been given is a matter for politicians. 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. With reference to the respondent's averments in answer, explained and averred that the royal prerogative is a relic of a past age. The prerogative may be relied upon as a source of power only in situations not covered by statute. Any prerogative power, however well-established, may be curtailed or abrogated by statute: *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*, 1964 SC (HL) 117. Such statutory curtailment or abrogation may be by express words or by necessary implication. It is inherent in its residual nature that a prerogative power will be displaced in a field which becomes occupied by a corresponding power conferred or regulated by statute: *R (Miller) v Secretary of State* [2017] UKSC 5 [2018] AC 61. The Crown's power to prorogue Parliament is now covered by statute, and it is therefore the statute that rules and the prerogative is curtailed: *Attorney General v De Keyser's Royal Hotel Ltd.* [1920] AC 508. *Quoad ultra* denied except insofar as coinciding herewith.

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 Union 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 Union Parliament. It does not fetter or otherwise interfere with the options open to the legislature. It does not challenge freedom of speech in the Union Parliament or its parliamentary sovereignty. The court is not being asked to advise the Union Parliament on what it must, or ought, to do. The court is not being asked otherwise to seek to influence the Union Parliament's direction of travel. The court is being asked to determine and declare the law as it applies to Ministers of the Crown in right of the United Kingdom Government, 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. With reference to the respondent's averments in answer, admitted that Parliament can by means of statute limit the prerogative powers of the Executive in relation to prorogation. Admitted that Parliament has done so. Explained and averred that, in particular, in Section 3 of the Northern Ireland (Executive Formation etc.) Act 2019 Parliament has made provision for it to sit in the period up to and after 31 October 2019. *Quoad ultra* denied except insofar as coinciding herewith.

16. That if the legal rights and powers of the relevant constitutional actors cannot be determined *before* the power to prorogue the Union Parliament is purported to be exercised by the Crown on the advice of the Prime Minister, the country will be, metaphorically, sleepwalking into the consequences, with little potential for an effective remedy being available from the courts to ensure reversal of the effects of any unlawful use of this power. If the power of prorogation is exercised, as is being threatened by the respondent, with a view to denying Parliament sufficient time prior to Exit Day for proper consideration of (including, if so advised, enacting primary legislation in respect of) the withdrawal of the United Kingdom from the European Union, there is a danger that legal confusion and constitutional chaos will result. Article 50(3) TEU provides that "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period". But, as a matter of UK constitutional law, the cessation of the United Kingdom's membership of the EU in this manner - simply because no withdrawal agreement has been timeously concluded but without express statutory authorisation by Parliament for a no deal Brexit - would be unlawful. It may be that in such circumstances the Court of Justice of the European Union would hold that - from the perspective of EU law and, in particular, for the purposes of Article 50(1) TEU - the United Kingdom cannot then be said to have decided "to withdraw from the Union in accordance with its own constitutional requirements", but there is as yet no authoritative ruling on this point of EU law. In these circumstances questions as to the application or cessation of the law of the European Union as a source of law in the United Kingdom would become legion and the

country (and the European Union) would be thrown into a profound state of legal uncertainty. This all means that ascertaining from this court the legal and constitutional principles that apply as a matter of UK constitutional law in respect of the proposed or purported use of the power to prorogue the Union Parliament (which is exercised by Ministers of the Crown in right of the United Kingdom Government in the name of the Crown) and the legal consequences of such exercise are a matter of immediate practical and constitutional importance to the petitioners. The respondent's averments in answer are denied except insofar as coinciding herewith.

17. That 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 in right of the United Kingdom Government in relation to the exercise of the power of prorogation of the Union Parliament in the run up to Exit Day. As noted, the exercise of the power of prorogation in this period could have irreversible legal, constitutional and practical implications for the United Kingdom. Any decision from this court made after the Union Parliament has been ordered to be prorogued might come too late fully to resolve and clearly to unravel 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 Union Parliament in advance of Exit Day. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to purport to advise the Queen to prorogue the Union Parliament.

(2) Interdict against Ministers of the Crown from advising the Queen, with the view or intention of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, to prorogue the Union 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.

The respondent's averments in answer are denied except insofar as coinciding herewith.

19. That the petitioners bring this petition for judicial review on the grounds set out in more detail below. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

21. That only the Union 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 Union Parliament enacted the European Union (Notification of Withdrawal) Act 2017. That Act of the Union 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 Union 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. This notification was - and, while the United Kingdom remains a Member State, remains - unilaterally revocable by the United Kingdom in accordance with its constitutional requirements. The effect of any such revocation would be to confirm and continue the United Kingdom's membership of the European Union on its existing terms and conditions: Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199. Accordingly, in passing the European Union (Notification of Withdrawal) Act 2017 the Union Parliament did nothing more than authorise the Government to open negotiations with the European Commission over the terms of the possible withdrawal of the United Kingdom from the European Union. Parliament did not, in passing this Act, either commit the United Kingdom to withdrawal nor did it authorise the UK Government to diminish or take away individuals' EU law derived rights. The respondent's averments in answer are denied except insofar as coinciding herewith.

22. That the UK Government introduced before the Union Parliament the European Union (Withdrawal) Bill in order to "grandparent" into domestic law all European Union law that applied to the United Kingdom and its constituent jurisdictions in the event of 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"). The respondent's averments in answer are denied except insofar as coinciding herewith.

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 Union 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

26. That Article 50(3) TEU allows, as a matter of EU Treaty law, for the European Council, in agreement with the United Kingdom, unanimously to decide to extend the period upon which, as a matter of EU law, the Treaties shall cease to apply to the United Kingdom. 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 date by which the Treaties shall, in accordance with Article 50(3) TEU, cease to apply to the United Kingdom. That date is currently scheduled to be 31 October 2019. The respondent's averments in answer are denied except insofar as coinciding herewith.

27. That Article 50 TEU does, however, not permit a Member State to be ejected from the European Union in the absence of a decision from it to leave duly made in accordance with that State's own constitutional requirements: cf Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199. Such a result would be

inconsistent with the aims and values of the European Union, in particular with the values of liberty and democracy which form part of the very foundations of the European Union legal order: Joined Cases C-402/05 P and C-415/05 P *Kadi v Council of the European Union* [2009] AC 1225 at paras 303-4. Thus where the United Kingdom - although having notified its intention to withdraw from the European Union in accordance with its constitutional requirements - has *not* reached in accordance with its own democratic processes (by Parliament passing relevant primary legislation) a final decision (on the terms on which) to withdraw, it cannot compatibly with EU law to be deemed to have left the European Union. This would be so even if an extension to date by which the Treaties shall, in accordance with Article 50(3) TEU, otherwise cease to apply to the United Kingdom, has not been timeously agreed on. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 recommending that the Queen to prorogue the Union Parliament in October 2019 with a view to ensuring that the UK leave the European Union on 31 October 2019 by default. However it is not possible as a matter of UK constitutional law for the UK to leave European Union by default, as this would not be in accordance with the United Kingdom's constitutional requirements which require the enactment by Parliament of primary legislation giving domestic legal effect to the terms of any withdrawal agreement concluded between the United Kingdom and the European Union, or authorising the United Kingdom's withdrawal from the European Union in the absence of any such agreement. Only Parliament has the constitutional authority to authorise, and give legal effect to, the necessary changes in domestic law and existing legal rights that would follow from the United Kingdom leaving the European Union. Accordingly suspending Parliament in this way would *not* cause the United Kingdom to leave the European Union by default but would, instead prevent members of the Union Parliament from, among other things: legislating to give the necessary authority to the Government to allow the United Kingdom to leave the EU by operation of EU law on 31 October 2019 in the absence of a deal; mandating the UK Government to seek an extension to Exit Day , as Parliament did in passing 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

29. That this idea of the UK Government proroguing the Union Parliament with a view to ensuring that the United Kingdom leave the EU on 31 October 2019 (even if by default, because no withdrawal agreement had been concluded) 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 Union Parliament from considering further the withdrawal of the United Kingdom from the European Union. The respondent's averments in answer are denied except insofar as coinciding herewith.

30. That the Union 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 Union 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 Union 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 hope of ensuring not only that the Union Parliament would be advised on the issue of devolved government in Northern Ireland, but that it 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 the Union Parliament of its voice on this most significant of political issues with irreversible consequences and that advice by Ministers of the Crown in right of the United Kingdom Government to the Queen to prorogue the Union Parliament in such circumstances would subvert the principle that the Government is accountable to Parliament. The long title to the Northern Ireland (Executive Formation) Bill as introduced by the Government to the House of Commons on 4 July 2019 was "To extend the period for forming an Executive under section 1(1) of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 and to impose a duty on the Secretary of State to report on progress towards the formation of an Executive in Northern Ireland." The long title sets out in general terms the purposes of the Bill, and should cover everything in the Bill. Amendments to a Bill are required to pass a test of relevance by reference to the long title of the Bill. It is not possible for amendments unrelated to a Bill's core purpose to be moved. The long title can be amended only if the Bill has been so altered as to necessitate such an amendment to ensure conformity between the long title and the substance of the Bill. The long title of the 2019 Act as enacted is "An Act to extend the period for forming an Executive under section 1(1) of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018 and to impose a duty on the Secretary of State to report on progress towards the formation of an Executive in Northern Ireland and other matters; to impose duties to make regulations changing the law of Northern Ireland on certain matters, subject to the formation of an Executive; and for connected purposes." The phrase "and for connected purposes" makes it possible to omit an express reference in the long title to minor matters related to the main substance of the bill. Notwithstanding its broader formulation

from the Bill as introduced, the long title to the Act as passed still restricts the extent to which sittings of Parliament mandated by section 3 may be used. The 2019 Act concerns the re-establishment of an executive in Northern Ireland and does not directly relate to Parliament's consideration of the United Kingdom's withdrawal from the European Union prior to Exit Day. As such there would be no section 3 mandated sittings of Parliament if and when an executive were re-established in Northern Ireland. The fact that section 3 allows for the possibility for the Union Parliament to continue to sit in periods in the second quarter of 2019 for the purpose of receiving reports on the formation of a Northern Ireland Executive, may impede but does not of itself wholly prevent the Government still from abusing the power of prorogation by using it with the intention and aim of denying, before Exit Day, sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union Further, and in any event, nothing in the provisions of the 2019 Act indicate that it was the intention of Parliament that Section 3 of the 2019 be construed as a comprehensive or complete code on when and how Parliament might wish to continue to sit in the run up to Exit Day. Simply because Parliament has expressly provided in enacting the provisions of Section 3 of the 2019 Act that it *must* sit in certain situations, it cannot be concluded that it was therefore Parliament's intention that it can lawfully be prevented from sitting in all other situations. Separately, the parliamentary session may also be prorogued in connection with the process of dissolving Parliament. The exercise of the power to prorogue Parliament with a view to its dissolution before its fixed five-year term and to summon a new Parliament after a General Election is governed by the Fixed-term Parliaments Act 2011. The polling day for any early General Election is to be the day appointed by the Queen on the recommendation of the Prime Minister. The exercise of this statutory power is subject to the constraints provided by law. In particular, the power must not be used for a purpose other than that for which it was intended or otherwise to subvert the constitution. The respondent's averments in answer are denied except insofar as coinciding herewith.

31. That on the grounds set out below in more detail, for Ministers of the Crown in right of the United Kingdom Government to purport to use the power to prorogue Parliament prior to Exit Day with the intention of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union is both unlawful and unconstitutional. The respondent's averments in answer are denied except insofar as coinciding herewith.

The power to prorogue the Union 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). The respondent's averments in answer are denied except insofar as coinciding herewith.

33. That prorogation marks the end of one parliamentary session and the State Opening of Parliament that begins the next session. The parliamentary session may also be prorogued as part of the process of dissolving Parliament under and in terms of the Fixed-term Parliaments Act 2011. The power to prorogue the Union 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 in right of the United Kingdom Government on this matter of proroguing the Union 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. With reference to the respondent's averments anent the separation of powers, reference is made to the petitioners' averments at statement 14 above. The respondent's averments in answer are denied except insofar as coinciding herewith.

34. That the authority of Ministers of the Crown in right of the United Kingdom Government to advise the Queen to prorogue the Union 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 in right of the United Kingdom Government, were to purport to advise the Queen to prorogue the Union Parliament with a view to denying, prior to Exit Day, sufficient time for proper 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* <u>*allowed to sit*</u> and the freedom of speech and debate secured to the members"

With reference to the respondent's averments in answer, the Acts of 1694, 1707 and 2011 are referred to for their terms beyond which no admission is made. The Meeting of Parliament Act 1694 (which is an enactment of the pre-Union English Parliament) provides only that the English Parliament must sit at least every three years. Neither the 1694 Act nor the 1707 Act authorise Ministers of the Crown in right of the United Kingdom Government to advise the Crown to prorogue the Union Parliament with the intention and aim of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union. Section 6 of the 2011 Act says nothing about the legality or otherwise of the executive seeking deliberately to advise the Crown to exercise the power to prorogue the Union Parliament in order to prevent further and proper scrutiny of the actions of that executive. By contrast the provisions of the Claim of Right Act of 1689 – to which full respect and substance must be given as an always speaking constitutional instrument – "that for redress of all greivances and for the amending strenthneing and preserveing of the lawes Parliaments ought to be ... *allowed to sit*" – clearly do limit the Crown's power of prorogation and outlaw its abusive use (which, for the avoidance of doubt would include the Prime Minister recommending prorogation with the intention and aim of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union). *Quoad ultra,* the respondent's averments in answer are denied except insofar as coinciding herewith.

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 in right of the United Kingdom Government and the legal and 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. If individuals' EU-law derived rights were to be removed or altered or diminished by Crown action or inaction, this may only be done lawfully and constitutionally if the Crown is expressly authorised or empowered by Parliament to do so: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61. The fact that the United Kingdom notified its intention to withdraw from the European Union has no immediate or necessary effect on the EU law derived rights currently enjoyed by individuals while the United Kingdom remains a member of the European Union. Individuals' current EU law derived rights will only be removed altered or diminished if the United Kingdom leaves the European Union; and the degree to which they are removed altered or diminished is dependent on the manner and the term (if any) upon which the United Kingdom might leave the European Union. It is only when it is clear that the United Kingdom is leaving the European Union and the terms on which it is doing so, that the final effect on the rights of individuals can be known. It is therefore only at that time that the Union Parliament may pass the necessary primary

legislation to authorise the now known removal, alteration or diminution of individuals' rights that will result from the United Kingdom leaving the European Union. It follows that, as a matter of constitutional law, the United Kingdom Government may not permit a "no deal Brexit" unless and until explicit statutory authorisation from the Union Parliament is provided in the form of primary legislation to this effect. If the United Kingdom Government's policy with regards to the withdrawal of the United Kingdom from the European Union encompasses the possibility of a "no deal Brexit", the power of prorogation cannot be used to further that aspect of its policy. Indeed, and in any event, prorogation would defeat any legal ability to effect a "no deal Brexit" because the primary legislation that would be necessary in order to authorise such a policy legally and constitutionally could not be passed by the Union Parliament prior to exit day. In such circumstances, this court would then be required to fill the constitutional gap caused by Parliament's inability to sit due to its prorogation. In accordance with its constitutional function and duty to preserve the rule of law this court would then require to provide effective remedies necessary to preserve and protect individuals' EU law derived rights from their inevitable substantial diminution and degradation resulting from the Government's unilateral action or inaction in refusing or failing to conclude a withdrawal agreement or revoking the Article 50 TEU withdrawal notification, at least until Parliament was again able to sit and consider matters anew. In such circumstances, this court would be obliged to pronounce a mandatory order ordaining the United Kingdom Government duly to revoke, prior to exit day, its Article 50 TEU withdrawal notification. All this can and should be avoided, however, if Parliament is able to sit and fulfil its necessary constitutional role in this matter which will be done if the remedies currently expressly sought in Statement 18(1), (and, if necessary, in Statement 18(2)) above are pronounced. It is, in any event, constitutionally more appropriate, in a constitutional representative democracy such as the United Kingdom, for any such decision - on whether and how the United Kingdom remains a Member State of the European Union in the absence of Parliamentary authorisation in primary legislation allowing for a no deal Brexit - to be made by Parliament passing general legislation. With reference to the respondent's averments in answer, neither the Succession to the Crown Act 1707 nor the Fixed-term Parliaments Act 2011 preserve any *prerogative* power of the Crown anent the prorogation of Parliament. Rather these statutes, among others, confirm that it is the law as passed by Parliament which confers, regulates and confines the Crown's powers such that the Crown cannot lawfully prorogue Parliament contrary to the intention of Parliament. Accordingly, the exercise of the power of prorogation is governed *not* by (unenforceable) political convention but ultimately by law, as found, declared and enforced by the courts. Further, in terms of the likelihood of any abusive use by the Government of the power of prorogation, *The Observer* newspaper for Sunday 25 August 2019 carried a front page story to the effect that the Government is taking active steps towards shutting down Parliament for 5 weeks from 9 September 2019 as part of its concerted plan to stop MPs forcing a further extension to Brexit. The newspaper refers to its story being based on leaked Government

correspondence – in particular an E-mailed memo from a senior government adviser to an adviser in No. 10 in which advice is given on how the Prime Minister could "circumvent" the provisions of what is now Section 3 of the Northern Ireland (Executive Formation etc.) Act 2019 which requires Ministers to report regularly to Parliament on progress in relation to the restoration of the Stormont Assembly. The newspaper reports suggests that the Government has been advised that the provisions of the Northern Ireland (Executive Formation etc.) Act 2019 "do not necessarily prevent the prime minister activating the prorogation plan". In light of this story, it is believed and averred that the UK Government is seeking to use the power of prorogation so as to deny sufficient time for proper Parliamentary scrutiny of its actions or inactions in relation to the possible withdrawal of the United Kingdom from the European Union in the run up to Exit Day. The respondent is called upon, conform to his duty of candour, to confirm or deny the truth of this story. The respondent is further called upon to produce the said document or documents referred to in this newspaper article, including the legal advice sought and received. His failure to answer either of these calls will be founded upon. *Quoad ultra* the respondent's averments in answer are denied except insofar as coinciding herewith.

36. That in all the circumstances, it is of fundamental legal and constitutional importance that the Union Parliament be able to sit in the period leading up to Exit Day and so: ensure the political accountability of the Government; be able to exercise its legislative powers as may be necessary to determine the terms and timing of any withdrawal of the United Kingdom from the European Union; and take any other decision, if so advised, as regards the United Kingdom's relationship with the European Union. The principles of democratic accountability would be denied if the Union Parliament were, as a result of an abuse of ministerial power, to be suspended and so prevented from sitting during that period. With reference to the respondent's averments admitted that it is a matter for Parliament to decide what business it wishes to consider during its sittings, under explanation that it follows by corollary that it is not for the Government to purport to use the power of prorogation to stop Parliament from sitting to consider business which the Government would wish otherwise it not to. *Quoad ultra* denied except insofar as coinciding herewith.

First Ground of Challenge

37. That the Union 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 Union Parliament. Separately, the UK Government is legally accountable and answerable to the courts. With reference to the respondent's averments in

answer, admitted that Parliament has, through the enactment of NIEFA, provided for sittings to take place in the period up to and beyond 31 October 2019, under explanation that any such sittings would be for the purpose and period provided for in the 2019 Act which is a statute concerned primarily with the formation of an executive in Northern Ireland and is not an Act specifically governing Parliamentary oversight of the exit of the United Kingdom from the European Union. The NIEFA provisions do not, however and in any event, exhaust the situations or possibilities for when Parliament might itself wish or be constitutionally required to sit. The principle of *expressio unius est exclusio alterius* does not apply to the interpretation of this legislation in the manner submitted by the respondent. *Quoad ultra* denied except insofar as coinciding herewith.

38. That advising the Queen to prorogue the Union Parliament prior to Exit Day with a view to denying the Union Parliament sufficient time properly to consider issues around 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 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*. The respondent's averments in answer are denied except insofar as coinciding herewith.

39. That a Minister of the Crown in right of the United Kingdom Government does not, in advising the Queen to prorogue the Union 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 (*Teh Cheng Poh v. Public Prosecutor* [1980] AC 458 per Lord Diplock at 473) or otherwise be required to 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 or privileges 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. In any event the courts' role has been, historically, to limit the Crown's powers and, in modern society, to guard the rule of law under a system of democratic government. If there is any difference between historic/pre-Union Scots law's and English law's respective understandings on this matter, the Scottish tradition which is more limiting of the Crown's arbitrary powers

and more ensuring of democratic accountability for the use of those powers is to be preferred. The respondent's averments in answer are denied except insofar as coinciding herewith.

40. That the constitutional role and status of the Union 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 Union 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 powers of suspending or dissolving Parliament and allow for effective legal remedies from the court against its abuse: *Edwards v Cruickshank* (1840) 3 D 282. The respondent's averments in answer are denied except insofar as coinciding herewith.

42. That the proper exercise by the Union Parliament of its constitutional role may not be usurped by the executive branch. The Union 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 in right of the United Kingdom Government to prorogue the Union 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The prorogation of the Union Parliament in advance of Exit Day would frustrate the will of the Union Parliament as expressed by sections 13 and 20 of the European Union (Withdrawal) Act 2018 and separately would deprive the Union Parliament of the opportunity, if so advised, of timeously enacting relevant primary legislation, for example: whether to authorise a no deal Brexit; or to require the UK Government to seek an extension of the Article 50 notice period; or revoke the Article 50 TEU notice. With reference to the respondent's averments in answer, explained and averred that the termination of the United Kingdom membership of the European Union, from the perspective and by operation of EU Treaty law, because of the present Government's inability or unwillingness to conclude any form of withdrawal agreement, would involve both a profound change to the United Kingdom's constitutional arrangements and an immediate fundamental (and in many cases detrimental) shift in access to and enjoyment of those rights based on EU law which are currently available in the United Kingdom, both to UK citizens and to nationals of the other Member States (EU citizen free movers) settled here. Such a fundamental change in the constitution, and in the rights of individuals, cannot be lawfully be done as a matter of UK constitutional law simply by Government action or inaction, in the absence of express domestic sanction in an appropriate statutory form: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61. But there is no such statutory authorisation for this shift. Parliament has at no time to date authorised the Government to allow the United Kingdom to leave the European Union in the absence of a withdrawal agreement (duly approved by Parliament in accordance with the terms of the 2018 Act). All that Section 1(1) of the European Union (Notification of Withdrawal) Act 2017 did was to provide 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." It did not, whether expressly or by necessary implication, authorise the Government to conclude this process of withdrawal with a "no-deal Brexit." Similarly, the European Union (Withdrawal) Act 2018 is predicated on there being a withdrawal agreement negotiated between the United Kingdom Government and the EU institutions, and for this withdrawal agreement to be presented to, and approved, by Parliament. Nothing in the provisions of the 2018 Act, whether expressly or by necessary implication, authorise the Government to conclude this process of withdrawal with a "no-deal Brexit". And finally the European Union (Withdrawal) Act 2019 obliges the Prime Minister to seek an extension of the period specified in Article 50(3) of the Treaty on European Union to a period ending on the date to be specified by the House of Commons. Accordingly, in the absence of express Parliamentary discussion and specific Parliamentary approval for such a course, it is unlawful for the Government (relying on the automatic effect of EU law and its own failure) to allow the United Kingdom to leave the European Union by default, without a deal. Ministers accordingly require the authority of Parliament in the form of new primary legislation expressly allowing for it, before they can lawfully take the course of allowing for such a "no deal Brexit". The Government is therefore obliged to ensure that

Parliament is sitting for such no deal authorising legislation to be considered by Parliament and, is so advised, passed by Parliament before Exit Day. *Quoad ultra* denied except insofar as coinciding herewith.

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. With reference to the respondent's averments in answer, admitted that ministers cannot properly or lawfully advise prorogation of Parliament such that the purposes of section 13 would be frustrated. Explained and averred that the respondent's assertion that "ministers cannot be expected to advise prorogation such that the purposes of section 13 would be frustrated" is inconsistent with the respondent's claim in Answer 8 to the effect that Section 13 is now "spent". The respondent appears to be confused as to what the law requires of the Government in this regard. There is therefore a clear need for this court to rule on the matter. *Quoad ultra* denied except insofar as coinciding herewith.

45. That section 20 of the 2018 Act permits a Minister of the Crown in right of the United Kingdom Government 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. The definition of agreement at section 20 encompasses any agreement between the United Kingdom and the European Union relating to the withdrawal of the United Kingdom from the European Union. An agreement by the United Kingdom and the European Union to stop having further discussions in relation to a withdrawal agreement is nonetheless an agreement for the purposes of the 2018 Act. The respondent's averments in answer are denied except insofar as coinciding herewith.

46. That accordingly, sections 13 and 20 expressly require the scrutiny by the Union 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 in right of the United Kingdom Government to the Queen to prorogue the Union Parliament, with the intention and aim of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

47. That it is possible for a Minister of the Crown in right of the United Kingdom Government to make regulations during a period of prorogation. Any such regulations would be laid before the Union 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 Union 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 Union Parliament would accordingly be frustrated. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 Union 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 Union 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 Union 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 Union Parliament received Royal Assent on 24 July 2019 as the Northern Ireland (Executive Formation etc.) Act 2019. The respondent's averments in answer are denied except insofar as coinciding herewith.

49. That the clear intention and purpose of the Union Parliament in passing what is now Section 3 of the Northern Ireland (Executive Formation etc.) Act 2019 was to ensure that the Union Parliament continues to sit throughout September 2019 to December 2019 to ensure, among other things, the Union 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 Union Parliament on this issue: *Pepper v. Hart* [1993] AC 593. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 Union 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 in, among other provisions: Sections 13 and 20 of the European Union (Withdrawal) Act 2018; and separately Section 3 of the Northern Ireland (Executive Formation etc.) Act 2019; and separately Sections 2 and 3 of the Fixed-term Parliaments Act 2011. In particular were the Prime Minister to purport to exercise the power in section 2(7) of the 2011 Act, by recommending to the Queen that she appoint a polling day so as to ensure that Parliament was prorogued or otherwise not able to sit in the immediate run-up to and on Exit day in order to denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union, would constitute an abuse and misuse of the power conferred on the Prime Minister by the 2011 Act. It would therefore be *ultra vires,* unlawful and void. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 Union Parliament the petitioners are reasonably apprehensive that the UK Government intends to advise the Queen - whether as part of a process either ending a session of Parliament in preparation for the State Opening of Parliament, or dissolving Parliament and summoning a new Parliament following a General Election - to prorogue the Union Parliament in advance of Exit Day so as to deny the Union Parliament an adequate 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 even without a deal. He appears to have misunderstood or has decided to misrepresent the law in this regard given that the Government does not in fact have the necessary statutory authorisation from Parliament for a no deal Brexit. Nonetheless, the current Prime Minister therefore refuses to rule out his advising the Queen to prorogue the

Union Parliament with the intention and aim of denying before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union. When asked to rule out the possibility of his recommending that the Queen use the power of prorogation for these ends, the current Prime Minister said on 27 June 2019 that it would be "absolute folly" to do so. *The Observer* newspaper report of 25 August 2019 stated that the Prime Minister was actively trying to carry out a plan to stop MPs from forcing another extension to Brexit by proroguing Parliament in September and October 2019. Further at a press conference held at the G7 Conference in Biarritz on 26 August 2019 the current Prime Minister, Boris Johnson MP, was asked repeatedly to rule out suspending Parliament in advance of Exit Day, but he refused to do so. But given that this application is now before this court and the United Kingdom Government is party to it (and the current Prime Minister has had it personally served on him as an interested party) any such action on the part of the executive would be a direct and deliberate attempt to undercut this court's role in determining the issues raised by this petition. Ministers of the Crown, and the Prime Minister in particular are however subject to this court's contempt jurisdiction: *M v. Home Office* [1994] 1 AC 377 and *Beggs v. Scottish Ministers* [2007] UKHL 3, 2007 SLT 235. 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

53. That additionally, as the effect of the tendering of such advice to the Queen would potentially 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

54. That, were the interdict granted and the petitioners ultimately were not vindicated by this court as regards the remedies sought, the worst possible outcome for the UK Government would be a delay in its ability to tender the advice or make the recommendation to the Queen on proroguing Parliament. Conversely, if the interdict were not granted and the petitioners were ultimately vindicated by this court, the petitioners would not be able to seek any meaningful practical remedy from this court that would fully rectify the abuse of power involved in the Government using the power of prorogation so as to deny before Exit Day sufficient time for proper parliamentary consideration of the withdrawal of the United Kingdom from the European Union. There is therefore 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 to give an undertaking that no advice shall be given to the Queen to prorogue the Union Parliament in the abusive manner set out in this petition. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 parliamentarian petitioners and the matter therefore cannot be hypothetical: *Wightman and others v Secretary of State for Exiting the European Union*, 2019 SC 111. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

58. That it is essential that this matter be dealt with expeditiously and in advance of any advice from a Minister of the Crown in right of the United Kingdom Government to the Queen. There will be very limited opportunity for recourse to the court and at best very limited scope for their review of the lawfulness 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 in right of the United Kingdom Government. Once the power has been exercised in advance of Exit Day and the Union Parliament has been suspended, a retrospective review of the lawfulness of the advice would arguably be rendered academic as coming too late. It is accordingly essential that the decision of this court and the remedies sought by the petitioners

from this court be given in advance of any such Ministerial advice being given to the Queen. The respondent's averments in answer are denied except insofar as coinciding herewith.

Permission to Proceed

59. That the petitioners satisfy the 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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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. The respondent's averments in answer are denied except insofar as coinciding herewith.

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 Union Parliament with the intention of denying before Exit Day sufficient time for proper 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 Union Parliament with the intention of denying before Exit Day sufficient time for proper 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

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

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-D00A35551D4E/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