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SIGNED FOR, 1ST CLASS

Our Ref: EM/JN/MAU/1014/4

Your Ref:

22 July 2019

FOR YOUR URGENT ATTENTION

JUDICIAL REVIEW PRE-APPLICATION LETTER

Dear Sir

Re. Advice from the Ministers of the Crown to Her Majesty the Queen to prorogue the Westminster Parliament in advance of exit day.

1. We are instructed on behalf of a number of Westminster Parliamentarians and others including Joanna Cherry MP and Jo Swinson MP.

2. This is a letter sent to give you notice of a proposed application in Scotland by way of a petition to the Court of Session for Judicial Review concerning the lawfulness and constitutionality of Ministers of the Crown (including the Prime Minister) advising Her Majesty the Queen to prorogue the Westminster Parliament before 31 October 2019, the "**exit day**" on which the United Kingdom of Great Britain and Northern Ireland (the United Kingdom) is currently scheduled to leave the European Union (the EU).

Petitioners

3. Joanna Cherry MP, Jolyon Maugham QC and Jo Swinson MP. It is anticipated that additional petitioners including Ian Murray MP , Geraint Davies MP , Hywel Williams MP, Heidi Allan MP , Angela Smith MP , Lord Hain , Baroness Jones , Baroness Royall , Lord Winston and Lord Wood of Anfield will join in any application for judicial review to follow hereon.

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Proposed Respondents

4. We consider the appropriate respondents to be (1) the Prime Minister and (2) The Advocate General for Scotland. If you disagree, please identify the appropriate respondent(s) to the proposed claim.

The Details of the Petitioners' Legal Advisers

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The Details of the Matter at issue

5. The lawfulness *et separatim* constitutionality of Ministers of the Crown advising Her Majesty the Queen to prorogue the Westminster Parliament.

Order to be sought:

6. The petitioners will seek a declarator to the effect that it is *ultra vires* et separatim unconstitutional for any Minister of the Crown (including the Prime Minister) to purport to advise Her Majesty the Queen, with a view to denying before exit day any further Parliamentary consideration of the withdrawal of the United Kingdom from the EU, to prorogue the Westminster Parliament.

Background

7. In *R (Buckinghamshire County Council) v Secretary of State for Transport: re* ("HS2") [2014] UKSC 3 Lord Neuberger and Lord Mance noted at §207 (emphasis added):

> "The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and in *(in Scotland) the Claim of Right Act 1689*, the Act of Settlement 1701 and *the Act of Union 1707*. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law."

Brexit

8. On 23 June 2016, a referendum was held in the United Kingdom and in Gibraltar. The question posed was "*Should the United Kingdom remain a member of the European Union or leave the European Union?*". The choice for the duly registered voter (in a franchise made up of Commonwealth, Irish and United Kingdom citizens who were lawfully resident in either the United Kingdom or in Gibraltar as at the date of the referendum, as well as United Kingdom citizens who had been resident in the United Kingdom up to 15 year prior to the referendum date) was between "*Remain a member of the European Union*" and "*Leave the European Union*" (section 1(4) of the European Union Referendum Act 2015). Of the electorate that voted, 51.89% (or 17,410,742 votes) voted for the option to "*Leave the European Union*".

9. The United Kingdom Supreme Court held in *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 that the Westminster Parliament alone was constitutionally competent to take the decision to notify the European Union under Article 50(2) of the Treaty on European Union (TEU) of the intention of the United Kingdom to withdraw as a Member State from it.

10. The Westminster Parliament then passed the European Union (Notification of Withdrawal) Act 2017 which was given Royal Assent on 16 March 2017. It provided in its 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".*

11. Pursuant to this statutory authority, the then Prime Minister, Theresa May MP, sent notification of the United Kingdom's intention to withdraw from the EU by letter dated 29 March 2017 to the President of the Council of Ministers of the EU ("the 29 March 2017 letter") confirming as follows:

> "I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union".

12. Negotiations regarding the process of the United Kingdom withdrawing from the EU have been ongoing since that date. In parallel with those negotiations, the United Kingdom Government introduced, before the Westminster Parliament, the European

Union (Withdrawal) Bill in order to "grandparent" into domestic (English, Welsh, Northern Irish and Scots) law after the United Kingdom leaves the EU all the law that is currently in application in the United Kingdom by virtue of being required or imposed by EU law. On 26 June 2018 this Bill received Royal Assent and was enacted as The European Union (Withdrawal) Act 2018.

13. The European Union (Withdrawal) Act 2018 also requires that, prior to any ratification or implementation of any withdrawal deal resulting from the United Kingdom Government's withdrawal negotiations with the EU, the Westminster Parliament will vote on whether to approve the terms of any proposed withdrawal agreement by way of the passing of a resolution of the House of Commons on a motion moved by a Minister of the Crown; and separately the tabling of a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship: Section 13 of the European Union (Withdrawal) Act 2018. Further, Section 9(1) of the European Union (Withdrawal) Act 2018 requires the enactment of a statute by the Westminster Parliament approving the final terms of withdrawal of the United Kingdom from the EU. Separately Part 2 of the Constitutional Reform and Governance Act 2010 obliges the United Kingdom Government to place a copy of any proposed United Kingdom/EU agreement before both Houses of the Westminster Parliament for a period of at least 21 sitting days and the United Kingdom Government may only ratify any such agreement if the House of Commons does not vote against it.

14. By late 2018, the United Kingdom Government had agreed with the European Commission the terms of a proposed withdrawal agreement and with the European council the draft of a political declaration on the United Kingdom's future relationship with the EU after Brexit. As a matter of EU law, the consent of the European Parliament is still required prior to and as condition of the conclusion of any final agreement negotiated between the EU and the UK setting out the arrangements for the UK's withdrawal (taking account of the framework for its future relationship with the EU): Article 50(2) TEU.

15. On 10 December 2018 the Full Court of the Court of Justice of the European Union ("**CJEU**") made the following ruling in Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199 (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):

> "Article 50 TEU must be interpreted as meaning that, where a member state has notified the European Council, in accordance with that article, of its intention to withdraw from the European Union, that article allows that member state - for as long as a withdrawal agreement concluded between that member state and the European Union has not entered into force or, if no such agreement has been concluded, for as long as the two-year period laid down in article 50(3) TEU, possibly extended in accordance with that paragraph, has not expired - to revoke that notification unilaterally, in an unequivocal and unconditional manner, by a notice addressed to the European Council in writing, after the member state concerned has taken the revocation decision in accordance with its constitutional requirements.
>
> The purpose of that revocation is to confirm the EU membership of the member state concerned under terms that are unchanged as regards its status as a member state, and that revocation brings the withdrawal procedure to an end."

16. This proposed withdrawal agreement and draft political declaration have been brought before the Westminster Parliament by the United Kingdom Government on three occasions in the first quarter of 2019. On each occasion, the House of Commons has voted against approving the proposed withdrawal agreement.

17. On 21 March 2019 the United Kingdom and EU agreed to extend the period after which the United Kingdom would leave the EU. A further extension was agreed on 10 April 2019. Exit day is now 31 October 2019.

18. By operation of EU law, unless the period is further extended by agreement between the United Kingdom and the EU, or the United Kingdom revokes the notification of its intention to withdraw from the EU prior to exit day, the United Kingdom will leave the EU on 31 October 2019 regardless of whether the United Kingdom and EU have concluded a withdrawal agreement.

19. On 7 June 2019 it was reported[1] that, in March 2019, Andrea Leadsom MP (who was then Leader of the House of Commons) sought advice on proroguing Parliament to prevent MPs from voting on or passing what is now the European Union (Withdrawal) Act 2019 (or any similar statute intended to assert further Westminster Parliamentary legislative control over the Brexit process). In May and June 2019, a number of backbench MPs raised the possibility that the Prime Minister could ask the Queen to prorogue the Westminster Parliament in October[2]. The effect of this would be that MPs could not take action to control the terms on which the United Kingdom leaves the EU on 31 October 2019.

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[1] https://news.sky.com/story/andrea-leadsom-rules-out-shutting-down-parliament-to-push-through-brexit-11736195

[2] For example, https://twitter.com/EdwardLeighMP/status/1135867258889277440

20. During the Conservative Party leadership election a number of Conservative MPs - former, current and aspirant Ministers of the Crown (including Boris Johnson MP) - publicly stated their openness to proroguing the Westminster Parliament in advance of exit day, with a view to denying before exit day any further Parliamentary consideration of the withdrawal of the United Kingdom from the European Union.[3]

The power to prorogue the Westminster Parliament

21. The power to prorogue the Westminster parliament is a power exercised by Her Majesty, by and with the advice of Her Majesty's Privy Council: section 1 of Prorogation Act 1867. In practice the power to prorogue parliament is, in almost all cases, exercised by the Crown on the advice of the Prime Minister. But

> "it is of primary constitutional importance that ministers should not be confused with the Crown... Neglect of [this] principle would inevitably cripple administrative law and have grave constitutional consequences". [4]

22. There is a bright line, therefore, between the Prime Minister's advice and the exercise of the Crown's power to prorogue Parliament. The Crown is entitled to ignore or reject the Prime Minister's advice on this power. This is made clear beyond peradventure by a number of instances of the Crown's (non-)exercise of the power of prorogation in a number of Commonwealth jurisdictions, including:

    (a) In 1867 the Premier of the State of Victoria advised the Governor to prorogue the Victorian Parliament to break a legislative deadlock. The Governor, as the Crown's representative, would have exercised the Crown's power to prorogue the parliament. The Governor initially refused to exercise the power. The Premier subsequently resigned and the Governor ultimately consented to exercise the power when it became clear that no other party was capable of forming a government.

    (b) In 1907 the Premier of the State of Western Australia advised the Governor to dissolve parliament to break a deadlock over land tax reform. The Governor refused outright.

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[3] https://www.politicshome.com/news/United Kingdom/political-parties/conservative-party/boris-johnson/news/105364/boris-johnsons-team

[4] William Wade *Injunctive Relief against the Crown and Ministers* (1991) 107 *Law Quarterly Review* 4 at pages 4-5 cited with approval in *M v Home Office* at [1994] AC 412–413 per Lord Woolf; and in *Davidson v Scottish Ministers* 2006 SC (HL) 42 per Lord Mance at 68-9, paragraph 101.

(c) In 2008 the (then) Prime Minister of Canada, Stephen Harper, advised the Governor General of Canada to prorogue the Canadian parliament so as to delay a vote of no confidence in Mr Harper's government. Although the Governor General did exercise the power of prorogation, he made clear that he did not consider himself bound by Mr Harper's advice.[5]

23. The power to prorogue a parliament may be used non-abusively and constitutionally, for example between sessions of the parliament or before a parliament is formally dissolved in advance of a general election. It has, on one occasion, been used to break a deadlock between the House of Commons and House of Lords. In 1948 the government sought to prorogue the Westminster Parliament because the House of Lords refused to pass the Parliament Bill. Proroguing Parliament then allowed the government to make use of the provisions of the Parliament Act 1911 - which provided, among other things, that where the House of Commons had approved a bill in three consecutive legislative sessions, the Bill could become law without the consent of the House of Lords. Proroguing the Westminster Parliament in this instance sped this process along by allowing the House of Commons to approve the bill in successive legislative sessions within a relatively short space of time.

24. But the power to advise Her Majesty to prorogue the Westminster Parliament is not an absolute one. There are enforceable legal limits on the extent to, and the purposes for, which it may be lawfully and constitutionally exercised. In particular, if the Prime Minister were to purport to advise Her Majesty to prorogue the Westminster Parliament with a view to denying before exit day any further Westminster Parliamentary consideration of the withdrawal of the United Kingdom from the European Union, this would be an unlawful abuse of power. It would be *ultra vires* for any Minister of the Crown or Privy Council Member to proffer such advice to the Crown for this unconstitutional purpose.

25. It is beyond dispute that the United Kingdom's withdrawal from the EU will fundamentally alter the constitution of the United Kingdom and separately will impact substantially on the rights and lives of individuals living within the UK and on UK nationals living elsewhere in the European Union. As the CJEU noted in Case C-621/18 *Wightman and others v Secretary of State for Exiting the European Union* EU:C:2018:999 [2019] QB 199 at para 64:

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[5] See Ann Twomey, *The Veiled Sceptre: Reserved Powers and Heads of State in Westminster Systems*, (London; CUP, 2018), Ch. 8

> "Any withdrawal of a member state from the European Union is liable to have a considerable impact on the rights of all Union citizens, including, *inter alia*, their right to free movement, as regards both nationals of the member state concerned and nationals of other member states."

26. And in *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111 Lord President Carloway noted at para 36:

> "The present case, which involves a constitutional question of considerable importance which may have an impact, not just on a group of four children of a testator, but on a great number of individuals, companies and institutions in the United Kingdom."

27. The question of whether, and in what terms, a withdrawal agreement may be concluded between the United Kingdom and the EU are clearly matters of fundamental legal and constitutional importance. In the period leading up to exit day, particularly when no agreement has yet been presented to the House of Commons or approved of by the Westminster Parliament, it is of fundamental importance within a democratic constitution for the Westminster legislature to sit and hold the UK Government to account. It would subvert the very principles of democratic accountability and representative government for the Westminster Parliament to be prevented from sitting during that period by abuse of the Ministerial power to advise its prorogation by the Crown.

Proposed Grounds of Challenge

Ground 1: Advice to prorogue Parliament before exit day is unlawful because it would undermine the principles of Government's political accountability to Parliament and legal accountability to the courts. Both principles are fundamental to the United Kingdom's constitutional tradition.

28. The Westminster Parliament represents the people and nations of the United Kingdom as its sovereign legislature to which the United Kingdom Government is on all matters *politically* answerable and accountable. Separately the United Kingdom Government is *legally* answerable and accountable to the courts.

29. In advising Her Majesty to prorogue the Westminster Parliament, a Minister of the Crown and/or a Privy Councillor (including the Prime Minister) as such has none of the Crown's prerogatives and immunities. His or her unlawful actions may be invalidated, or he may be compelled to perform his duties, by remedies which may not lie directly against the Crown. And court judgments may be enforced against him personally in ways which may not be constitutionally permissible in the case of the Crown. As Lord Templeman noted in *M v Home Office* [1994] 1 AC 377 at 395:

> "The judges cannot enforce the law against the Crown as monarch because the Crown as monarch can do no wrong but *judges enforce the law against the Crown as executive and against the individuals who from time to time represent the Crown.* A litigant complaining of a breach of the law by the executive can sue the Crown as executive bringing his action against the minister who is responsible for the department of state involved, in the present case the Secretary of State for Home Affairs. To enforce the law the courts have power to grant remedies including injunctions against a minister in his official capacity. If the minister has personally broken the law, the litigant can sue the minister, in this case Mr. Kenneth Baker, in his personal capacity. *For the purpose of enforcing the law against all persons and institutions, including ministers in their official capacity and in their personal capacity, the courts are armed with coercive powers exercisable in proceedings for contempt of court.*"

30. The mature Scottish constitutional principle insisting on the subordination of Government to the law can be traced back to the work of George Buchanan (1506–1582), the noted European humanist scholar, historian of Scotland, tutor to the young James VI. In his dialogue written in 1567 and published in 1579 *De iure regni apud Scotos* (which might be translated as *On Constitutional Government in Scotland*), Buchanan insisted on the existence of an immemorial Scottish tradition to the effect that the power received by the kings of Scotland had, from the outset, been limited and restricted by the laws and customs of the people. The existence of such boundaries or limitation on power meant that the king could be *required as a matter of law* to act only in an *intra vires* manner. The law and customs of the Scots in relation to Kings was therefore said, by Buchanan, to be one of a limited constitutional monarchy involving subordination of the Crown to the law, the Crown's answerability before the courts, and ultimate sovereignty residing in the people. Thus, in response to the question ""You do not think, then, that the king ought to possess complete power over all matters ?", [6] he wrote:

> "Not at all. For I recall that he is not only a king, but a human being as well, erring in many things through ignorance, often transgressing of his own will, often almost against his will, since *he is a creature readily changing with every breath of popularity or hatred.* This natural vice is only intensified as a magistrate, so much that here especially I find the famous aphorism of comedy to be true that 'everyone becomes worse if he is allowed to do as he pleases'. That is why *men of the greatest wisdom have proposed that the law should be yoked to the king to show him the way when he does not know it or lead him back to it when he wanders from it.*
> [...]
> *I want the people who have granted the king authority over themselves to be allowed to dictate to him the extent of his authority, and I require him to exercise as a king only such right as the people have granted him over them*
> [...]
> *When our kings of Scots are publicly inaugurated, they give a solemn promise to the entire people that they will observe the laws, customs and ancient practices of our*

[6] Roger Mason and Martin Smith *A Dialogue on the law of kingship among the Scots – a critical edition and translation of George Buchanan's De iure regni apud Scotos dialogus* (Ashgate: Aldershot, 2004) at pages 33, 55, 133, 143

ancestors, and that they will adhere to the law which they have received from them.[7] ... God set down this condition under which David and his descendants should reign: He promises that they will reign so long as they obey the laws ordained by him. These facts make it probable that *the power received by our kings from our ancestors was not unbounded but was limited and restricted within fixed boundaries.*
[...]
It makes no difference to me whether the king himself appears in court or his procurator. [8] *In either event, the king will be at risk in litigation: any profit or loss arising from the result of the trial will fall to him, not to his procurator. In short the king himself is the defender, that is the person whose case is in dispute.* [9] There is no justification either for the complaint and protest of those who argue that it is neither proper nor just that a verdict on a king should be delivered by a man of lower rank.... For *no one who comes before a judge comes before an inferior, especially since God himself pays so much honour to the judicial order that He calls them not only judges but gods and, so far as this is possible, imparts to them His own dignity.*

The verdicts of judges are valid when pronounced in accordance with law, otherwise they are rescinded. ... *The judge has his authority from the law, not the law from the judge ... and the lowly rank of the person pronouncing the verdict does not diminish the dignity of the law, but the dignity of the laws is always the same, whether it is a king, or a judge or a herald who pronounces the verdict.* .... It seems therefore *that when a king is condemned by a judge, he is condemned by the law.* [10]

31. Such claims ran directly counter to the Stuart monarchs' absolutist claims - once they had left Scotland and acceded to the English throne in the course of the 17th century

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[7] The accession oath which was sworn by Elizabeth II before the Accession Privy Council on the day immediately after her accession, and which is renewed by her each year (whether in writing or in person) before the General Assembly of the Church of Scotland is in the following terms:

> "I, Elizabeth the Second by the Grace of God of Great Britain, Ireland and the British dominions beyond the seas, Queen, Defender of the Faith, do faithfully promise and swear that I shall inviolably maintain and preserve the Settlement of the True Protestant Religion as *established by the laws of Scotland in prosecution of the Claim of Right* and particularly an Act entitled an Act for the Securing the Protestant Religion and Presbyterian Church Government and *by the Acts passed in both Kingdoms for the Union of the two Kingdoms*, together with the Government, Worship, Discipline, Rights and Privileges of the Church of Scotland. So help me God." (emphasis added)

[8] Lord M'Laren dealt with the point in *Somerville v Lord Advocate* (1893) 20 R 1050, 1075:

> 'I do not think that it ever was doubted in Scotland that the Crown might be called as a defender in a proper action, either through the officers of state collectively, or through the King's advocate or other officer representing the Crown in the matter of the action; and the reported decision by Balfour which negatives the jurisdiction of the inferior judges also asserts inferentially that His Highness, or his advocate as representing the King, may be convened in the Court of Session in actions and pleas at the instance of any private person.'

[9] See generally JR Philip *The Crown as Litigant in Scotland* (1928) 40 *Juridical Review* 238

[10] See H R Buchanan "Some aspects of the royal prerogative" (1923) 25 *JR* 49 at 53:

> "It is doubtful whether prior to the Union of 1707 the common law of Scotland accorded any prerogative or privilege to the Crown, at any rate within the field of private law. And the terms of the Act of Union should have sufficed to prevent innovation on the common law of Scotland in this respect, apart, of course, from specific statutory enactment."

- to be monarch by "Divine Right". It was this theory of holding his office by divine right which led James VI and I to assert that:

"The King is above the law, as both the author and giver of strength thereto." [11]

32. But such Divine Rights claims were expressly rejected and never formed part of the Scottish constitutional tradition. Thus in the 1644 CE work of the Scottish Presbyterian Divine Samuel Rutherford (c.1600 CE–1661 CE) *Lex Rex*, Rutherford answers his Question XLIII on *"whether the King of Scotland be an absolute prince, having prerogatives above Parliament and laws: the negative is asserted by the laws of Scotland, the King's oath of coronation, the Confession of Faith etc."* as follows:

"The kings of Scotland have not any prerogative distinct from supremacy above the laws. If the people must be governed by no laws but by the king's own laws, that is, the laws and statutes of the realm, acted in parliament under pain of disobedience, then must the king govern by no other laws, and so by no prerogative above law

33. This tradition of popular sovereignty within the Scottish constitution reached its apotheosis with the decision by the Scottish Parliament in 1689 to find that James VII : "Did By the advyce of wicked and evill Counsellers Invade the fundamentall Constitution of this Kingdome And altered it from a legall limited monarchy to ane Arbitrary Despotick power ... to the violation of the lawes and liberties of the Kingdome" and consequently to declare that he had *forfeited* the Crown on the basis of his over-reaching the limits placed by law on his executive power and its exercise.[12] The use of the word 'forfeited' was of particular significance because it was consistent with the terms of the Declaration of Arbroath of 1320 CE[13] as well as with the constitutional writings of George Buchanan and Samuel Rutherford.

[11] King James VI and I, *Political Writings* (ed by J P Somerville, 1994) pp 63ff "The Trew Law of Free Monarchies or The Reciprock and mutuall duetie betwixt a free King and his naturall Subjects" at page 75

[12] The legitimacy of these actions and claims of the 1689 Scottish Parliament were was expressly confirmed by subsequent Scottish statutes, notably in the Scottish Act of 16 September 1703 which provides:

"Our sovereign lady, with advice and consent of the estates of parliament, ratifies, approves and perpetually confirms the first act of King William and Queen Mary's parliament, dated 5 June 1689, entitled act declaring the meeting of the estates to be a parliament, and of new enacts and declares that the three estates then met together the said 5 June 1689, consisting of noblemen, barons and burghs, were a lawful and free parliament, and it is declared that it shall be high treason for any person to disown, quarrel or impugn the dignity and authority of the said parliament. And further, the queen's majesty, with consent foresaid, statutes and declares that it shall be high treason in any of the subjects of this kingdom to quarrel, impugn or endeavour by writing, malicious and advised speaking, or other open act or deed, to alter or innovate the Claim of Right or any article thereof."

[13] The Declaration of Arbroath 1320 makes two important constitutional claims about kingship and popular sovereignty in Scotland. First, it notes, that *"it was the due consent and assent of us all have made Robert*

34. Consistently with this tradition, the English law doctrine that the Crown cannot be impleaded before the courts has never formed part of Scots law. The 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 sovereign or his officers. [14] In Scots law, the Crown in Scotland *could* do wrong. And if and insofar as it did wrong it may be called to account before the courts in Scotland, even in relation to actions outside Scotland.[15] And, in further contrast to the position in English law,[16] it was always considered possible in Scots law to obtain interdict directly against the Crown [17] at least prior to the passing of the Crown Proceedings Act 1947 which sought make it easier and not more difficult for individuals to bring proceedings and obtain relief against the Government, [18] and to harmonise the position of Scotland and England on this point. [19] The Treaty and Acts of Union in 1707 allowed for, but did not themselves *effect*, any harmonisation of the systems of public law as between Scotland and England. [20] Nor has there ever been any

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Bruce our Prince and King". Secondly, it asserts that the continued kingship of Robert Bruce was conditional on his maintaining the integrity and independence of the Scottish nation, for

> *"[I]f he should give up what he has begun, and agree to make us or our kingdom subject to the King of England or the English, we should exert ourselves at once to drive him out as our enemy and a subverter of his own rights and ours and make some other man, who was well able to defend us, our King".*

[14] *A v B* (1534) Mor. 7321; *Somerville v Lord Advocate* (1893) 20 R 1050 per Lord M'Laren at 1075.

[15] See *Burmah Oil v. Lord Advocate*, 1964 SC (HL) 117 and *Tehrani v. Secretary of State for the Home Department* [2006] WLR 699, HL, per Lord Rodger of Earlsferry at 725-6

[16] cf. *Entick v Carrington* (1765) 19 STR 1030; *R v Lords of the Treasury* (1872) LR 7 QB 387 per Lord Blackburn at 398, *R v Nathan* (1884) 12 QBD 461 at 472.

[17] Fraser, *Constitutional Law* (2nd edn) at p 165; *BMA v Greater Glasgow Health Board* 1989 SC (HL) 17 per Lord Jauncey of Tullichettle at 94; *McDonald v Secretary of State for Scotland* per the Lord Justice Clerk (Ross) at p 238,

[18] *British Medical Association v. Greater Glasgow Health Board*, 1989 SC (HL) 65 Lord Jauncey at page 95:

> "[T]he general purpose of the Crown Proceedings Act 1947 was to make it easier rather than more difficult for a subject to sue the Crown. To hold that the Act had clothed with immunity from prohibitory proceedings a body which prior to its passing would have enjoyed no such immunity would be to run wholly counter to its spirit. Furthermore, neither principle nor logic would appear to require that a body such as a health board should be granted such a privilege."

[19] See *Davidson v. Scottish Ministers*, 2006 SC (HL) 41 per Lord Rodger at 57:

> "There is at least some authority to suggest that in Scotland interdict against the Crown was competent before the 1947 Act. But Burn-Murdoch, *Interdict in the Law of Scotland* (p 66), is anything but enthusiastic:
>
> > 'Although sheriffs, and public officials, such as even a Secretary of State, are sometimes made respondents to interdicts of procedure, this is rarely appropriate or necessary.'
>
> He rather gives the impression that it was not regarded as good form to seek interdict in such cases."

[20] Article 18 of the Treaty of Union is in the following terms:

presumption that the powers and prerogatives of the Crown as recognised in English law[21] were automatically received, or are otherwise are to be recognised and applied, in a post-Union Scotland. [22]

35. Further, the constitutional role and status of the Westminster Parliament are now rooted in democratic principles [23] and defined by the constitutional traditions of each of the

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"(1) That the laws concerning regulation of trade, customs and such excises to which Scotland is by virtue of this Treaty to be liable be the same in Scotland, from and after the union, as in England; and

(2) That all other laws in use within the Kingdom of Scotland do after the Union and notwithstanding thereof remain in the same force as before (except such as are contrary to or inconsistent with this Treaty) but alterable by the Parliament of Great Britain, with this difference betwixt the laws concerning public right, policy and civil government and those which concern private right:

(i) That the laws concerning public right, policy and civil government may be made the same throughout the whole United Kingdom; but
(ii) That no alteration may be made in laws which concern private right except for evident utility of the subjects within Scotland" (numbering added).

[21] Lord Mansfield put it in *King v Cowle* 97 ER 587:

"1st. That *this Court has no jurisdiction over the town and borough of Berwick, or any local matters arising there; because it is not to be deemed part of the realm of England, and the King's writ does not run there*: consequently, this Court has no authority to remove a record from thence, by writ of *certiorari*, for any purpose... Writs, not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the King,) such as writs of mandamus, prohibition, habeas corpus, certiorari, are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England; the only question is, as to the propriety. To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. *We cannot send a habeas corpus to Scotland*, or to the electorate [of Hanover]: but to Ireland, the Isle of Man, the plantations, and, as since the loss of the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais; which was a conquest, and yielded to the Crown of England by the treaty of Bretigny". (emphasis added).

[22] See for example *Admiralty v Blair's Trustees* 1916 SC 247 per Lord President:

"My own views in this case may be expressed briefly in the form of propositions: (First) That *by the common law of Scotland the Crown possesses no prerogative right such as is laid claim to in this appeal*, and, consequently, is not entitled to a preferential ranking in this sequestration. That proposition, I think, was not disputed. (Secondly) That *the prerogative right claimed by the Crown was not imported into the law of Scotland* by the statute of Anne. I can find no words in that statute adequate to that end. *It is, to my mind, inconceivable that a doctrine of the law of England should thus be engrafted on the law of Scotland. We do not know what the law of England on this head is.* It is not averred; and it is not proved. (Thirdly) The statute of Anne did import into the law of Scotland the English process as a means of recovery of Crown debts in Scotland, and particularly the facilities and preference conferred on the Crown by the statute of Henry VIII." (emphasis added)

constituent nations of the United Kingdom, notably the Scottish and English constitutional traditions which merged together with the creation of the Union Parliament with the Treaty and Acts of Union of 1707. As Lord Hope has noted:

> "Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the *English* principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.
> [...]
> [E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: Thoughts on the Scottish Union, pp 252-253, quoted by Lord President Cooper in *MacCormick's* case 1953 SC 396, 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality.
> ...
> It must never be forgotten that this rule [of recognition] ... depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty... is built upon the assumption that Parliament represents the people whom it exists to serve."[24]

36. The Scottish Claim of Right Act 1689 complains that James VII had acted in violation of the basic constitutional principles including, crucially, the fundamental principle of the separation of powers as understood in terms of: due respect owed by the executive for the workings and constitution of the legislature [25] and of the judiciary. [26] In failing to

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[23] In 2014, giving the judgement of the majority in *Moohan v Lord Advocate* [2014] UKSC 67, [2015] 1 A.C. 901, Lord Hodge said:

> "I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by the curtailment of the franchise or similar device, the common law, *informed by the principles of democracy and the rule of law* and international norms, would be able to declare such legislation unlawful."

[24] ***Jackson v. Attorney General* [2006] 1 AC 262 per Lord Hope at page 303-4 para 104, 106**

[25] The Claim of Right Act 1689 notes:

> "By Subverting the right of the Royal Burghs The third Estate of Parliament imposeing upon them not only magistrats But also the wholl toune Councill and Clerks contrary to their liberties and express chartours without the pretence either of sentence surrender or consent so that the Commissioners to Parliaments being chosen by the magistrats and Councill The King might in effect alswell nominat that entire Estate of Parliament ...."

[26] The Claim of Right Act 1689 also notes:

> "By Sending letters to the chiefe Courts of Justice not only ordaining the Judges to stop and desist *sine die* to determine causes But also ordering and Commanding them how to proceed in cases depending befor them Contrair to the express lawes and by chainging the nature of the Judges gifts *ad vitam aut culpam* and giveing them Commissions *ad beneplacitum* to

respect the limits upon his powers and to give due deference to the workings of the other branches of Government, the erstwhile king was said to have exercised the royal powers with which he was entrusted in an arbitrary, despotic manner "to the violation of the laws and liberties of the Kingdom inverting all the Ends of Government". Avowedly just "as their ancestors in the like cases have usually done for the vindicating and asserting their ancient rights and liberties", the 1689 document then goes on to declare as unlawful a number of specific acts or practices of the Crown. Importantly, however, the Claim of Right does *not* seek to list or enumerate (and thereby to define and limit) precisely what its authors considered to constitute "their undoubted right and liberties" which they sought to defend. By referring only to the King's *actual abuses* of rights, the document then leaves open the possibility of there existing further unenumerated rights which have not been mentioned simply because they have not (yet) been the subject of abuse by the executive powers. [27]

37. But one clear abuse of the limited powers of allowed by law to the Crown is listed as being its interference in the ability of Parliament to sit to carry out its proper constitutional role. The Claim of Right notes as follows (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"

38. So the Claim of Right 1689 makes it explicit – as the parallel provision in the English Bill of Rights 1688 does not [28] - not only that Parliament are to be frequently called but once called are not to be impeded by the Crown from continuing to sit to carry out their business of redressing of all grievances and for the amending strengthening and preserving of the laws.

39. By virtue of this fundamental right preserved within the Scottish constitutional tradition any advice tendered by the Prime Minister to Her Majesty to prorogue the Westminster Parliament, with a view to denying before exit day any further Westminster Parliamentary consideration of the withdrawal of the United Kingdom from the

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> dispose them to compliance with arbitrary Courses and turneing them out of their offices when they did not comply"

[27] Compare with the Ninth Amendment to the United States 1789 Constitution:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[28] The Bill of Rights Act 1688 declares:

> "And that for Redresse of all Grievances and for the amending strengthening and preserveing of the Lawes Parlyaments ought to be held frequently".

European Union, is both unconstitutional and unlawful. Parliament exercises authority on behalf of the people. The United Kingdom Government branch is subject to the Westminster Parliament. It is well established that it is, therefore, unlawful for the executive branch to take an action that would frustrate an Act of Parliament: *Craig v Advocate General for Scotland* [2018] CSOH 117, 2019 SC 230. It is equally unlawful for the executive to prevent the Westminster Parliament from acting on an issue of national and/or constitutional importance. The harm in both sets of circumstances is the same: the executive has usurped authority that properly belongs to the people and is properly exercised by parliament.

40. To purport to advise Her Majesty to prorogue parliament in advance of exit day, with a view to denying before exit day any further Westminster Parliamentary consideration of the withdrawal of the United Kingdom from the EU, would prevent Parliament from carrying out its proper constitutional function in relation to the terms of exit. The terms of exit are a question of national and constitutional importance. It matters not how Parliament may choose to act in relation to those questions. What is important is that Parliament not be prevented from acting. An executive that prevents Parliament from acting in relation to a matter of national or constitutional importance acts itself without regard for the fundamental basis of authority in the constitution. It is excluding the electorate from control over the government. This cannot be lawful or constitutional.

Ground 2: Proroguing parliament in advance of exit day would frustrate the will of parliament as expressed in sections 13 and 20 of the European Union (Withdrawal) Act 2018

41. As we have noted, Sections 9 and 13 of the European Union (Withdrawal) Act 2018 provides, among other things, that before any agreement on the terms of the United Kingdom's exit from the EU can be ratified:

(1) The agreement must be laid before both Houses of Parliament;

(2) The agreement must be approved by a resolution of the House of Commons and debated by the House of Lords;

(3) A further Act of Parliament, which provides for the implementation of the agreement, must be passed.

42. Under section 20 a Minister of the Crown may, by regulations, amend the date of exit day. A regulation amending the date of exit day is subject to the negative approval procedure: Sch. 7, §14.

43. These statutory provisions presuppose and expressly require parliamentary scrutiny of the terms, and date, of the United Kingdom's exit from the EU. Advice by a Minister of the Crown to prorogue Parliament in advance of exit day would frustrate this intention:

- As to section 13: If Parliament is prorogued in advance of exit day then the terms of section 13 cannot be fulfilled. Parliament cannot consider the terms of any agreement with the EU. Parliament's intention, as expressed in section 13, is therefore frustrated.

- As to section 20: A Minister may make regulations while Parliament is prorogued. These must then be laid before Parliament when it returns for the new session. In the instant case, if exit day is moved to another date within the period of prorogation, then Parliament will be entirely denied the opportunity to scrutinise the regulation. By the time it is laid before Parliament, it will be a fait accompli. Parliament's intention, that it should have the opportunity to scrutinise the regulation, will thus have been frustrated.

44. An action of the executive that frustrates the will of Parliament, whether directly or indirectly, is unlawful: *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 at paras **98-9**]. To prorogue Parliament in advance of exit day would clearly frustrate the will of Parliament as expressed in sections 13 and 20 of the EU (Withdrawal) Act 2018. It would, therefore, be unlawful.

Justiciability

A real question of law

45. It is clear that the issue raised by the petitioners concerns a live constitutional issue on which there is a real practical necessity to have the court's determination as a matter of urgency. In *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSIH 62, 2019 SC 111 the Lord President stated **(at para 27)** that where "the answer will have the effect of clarifying the options open" to decision-makers, the issue is not hypothetical. The same principle applies in the present case: those entrusted with making decisions as to public policy options on issues of national importance should have legal-certainty as to the options properly and constitutionally

available to them as a matter of law. The petitioners in the instant matter will ask the court to provide certainty as to the legality of the option of proroguing Parliament in advance of exit day.

46. It is essential that this matter be dealt with in advance of any advice by a Minister of the Crown. There may not be time to review any actual exercise of the power to prorogue Parliament itself. Past prorogations indicate that the exercise of the power (if it is exercised) will follow quickly on the heels of the Minister's advice to do so. Once this power has been exercised, and Parliament is suspended from sitting in the run-up to exit day, a retrospective review of the Minister's advice would be rendered pointless as coming too late. It is, therefore, essential that the court gives declarator as to the legality of advice to prorogue Parliament in advance of exit day in advance of any such advice.

Supervisory jurisdiction of the Court of Session in constitutional matters

47. As the First Division noted in *Wightman v Advocate General for Scotland (No 1)* [2018] CSIH 18, 2018 SC 322:

> "the law is always developing and, in certain areas, it can do so quickly and dramatically. The scope of judicial review of Government policy may be one such area, at least where no issue of questioning what is said in Parliament arises."

48. The resolution of the constitutional matter raised by the petitioners falls centrally within the supervisory jurisdiction of the Court of Session. As Lord Drummond Young noted in *Wightman and others v Secretary of State for Exiting the European Union (No. 2)* [2018] CSIH 62, 2019 SC 111:

> [67] The fundamental purpose of the supervisory jurisdiction is in my opinion 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 fundamental to the rule of law; public authorities of every sort, from national government downwards, must observe the law. The scope of the supervisory jurisdiction must in my opinion be determined by that fundamental purpose. Consequently I would have no hesitation in rejecting any arguments based on procedural niceties, or the detailed scope of previous descriptions of the supervisory jurisdiction, if they appear to stand in the way of the proper enforcement of the rule of law.

49. And again in *Taylor v. Scottish Ministers* [2019] CSIH 2, 2019 SLT 288, Lord Drummond Young reiterated (at paras 15, 19):

> *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 emphasises the importance of the rule of law in public law decisions. It is one of a number of recent

cases (including the recent decision in *Wightman v Secretary of State for Exiting the European Union*) that place stress on the proposition that government must in a civilised society be conducted in accordance with the law, and a major function of public law remedies is to achieve that result. Procedural niceties should not stand in the way of due observance of the rule of law, and enforcing the rule of law is a vital function of the courts.

...

I should observe that it has become commonplace for public bodies, whether the Scottish Government or local authorities, to raise preliminary objections at an early stage to appeals to the Court of Session by private individuals on the basis of standing or other factors. I do not doubt that in some cases such a course is entirely justified. Nevertheless, it is important that excessive use of preliminary objections should not be used to prevent the court from hearing substantive argument in cases that may have an important bearing on questions of public law, questions relating both to what the law is and to how it should be applied in a particular case. I would reiterate the renewed emphasis on the importance of the rule of law in public law decisions, and the fundamental principle that all forms of government, by any public body, must be conducted in accordance with the law. For that reason I would caution against the excessive use of preliminary objections to cut down appellate litigation."

50. The remedy of declarator in Scots law facilitates the exercise of the court's supervisory constitutional jurisdiction. As Lord Dunedin put it, the "one great merit of the Scottish action of declarator is its elasticity": *North British Railway v Birrell's Trustees* 1918 SC (HL) 33. The wide scope of declarator matches the wide jurisdiction of the courts to adjudicate on "any kind of right relating to liberty, dominion, or obligation: Clyde and Edwards *Judicial Review* para 24-07.

51. In the instant matter it is necessary to determine the question of whether the Prime Minister has the power to advise the Queen as Head of State to take an action that would, effectively, exclude the Westminster Parliament from its further participation on a question of fundamental national and constitutional importance. It is right that the court determine whether this is an option that is lawfully open to the Prime Minister.

Standing

52. In its decision in *AXA v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 the UK Supreme Court held that the previously private law derived requirement to show individual 'title and interest' in order to make an application to the Court of Session's supervisory jurisdiction was, from a constitutional/rule of law perspective, no longer appropriate. The Supreme Court therefore announced in *AXA* a new liberal approach to standing for judicial review, an approach which it confirmed the following year in its 2012 decision in *Walton v Scottish Ministers* [2012] UKSC 44, 2013 SC (UKSC) 67 as also being applicable to statutory appeals and judicial reviews in planning cases. This was followed by rule changes in consequence of the Courts Reform (Scotland) Act 2014. In

Christian Institute v Lord Advocate [2015] CSOH 7, 2015 SLT 72 Lord Pentland, in the Outer House, held that, in their challenge to the 'named persons' legislation of the Scottish Parliament, the Christian Institute and other organisations did not have 'sufficient interest' in the proceedings. They were not 'in any realistic sense directly affected'. They had not, for instance, contributed to the legislative scrutiny of the Act under review. Nor did they demonstrate sufficient levels of expertise and knowledge to claim to act in a representative capacity. This decision was overturned on appeal by the First Division in *Christian Institute v Lord Advocate* [2015] CSIH 64, 2016 SC 47 which accepted that the UK Supreme Court had "made it abundantly clear that a very broad approach should be taken to the issue of standing": per Lord President (Carloway) at para 40. In *Wightman v Secretary of State for Exiting the European Union (No 2)* [2018] CSIH 62, 2019 SC 111 Lord President (Carloway) observed (at paras 24–5) that 'the merits, in terms of court time and parties' expense, of a restrictive approach which limits access to the courts may be clear, but they are inconsistent with the modern view on the functions of a court in the public law field' and, accepting the essential function of the courts as being 'the preservation of the rule of law, which extends beyond the protection of individuals' legal rights', confirmed that 'the modern tendency appears to be to open the doors wider to such proceedings'.

53. Against that background the anticipated petitioners - as members of either the House of Commons or the House of Lords and/or as active UK citizen members of civil society with a strong record of campaigning and engagement in pursuing litigation in the public interest to defend, define or clarify the law in particular areas around the United Kingdom's decision to leave the European Union - all have standing to pursue this petition.

Details of action the respondents are expected to take

54. The Prime Minister give a formal undertaking not to advise the Queen to prorogue parliament in advance of exit day.

Details of legal advisors

55. Balfour and Manson LLP of 56-66 Frederick Street, Edinburgh, EH2 1LS FAO Elaine Motion, Chairman and Partner, Litigation. Aidan O'Neill QC of Matrix Chambers and Ampersand Advocates, David Welsh of Axiom Advocates, Professor Kenneth Armstrong of the University of Cambridge, Sam Fowles of Cornerstone Barristers.

Address for reply and service of documents

56. Balfour and Manson, as above.

Time for response

57. We require a response, in line with your duty of candour in judicial review proceedings (c.f. *McGeoch v. Scottish Legal Aid Board* [2013] CSOH 6, 2013 SLT 183 at para 63), **by 4pm on Monday 29 July 2019** that is seven (7) days from the date of this letter.

Yours faithfully

Elaine Motion
Chairman and Partner
Balfour+Manson LLP