ANNEX 2 to FORM 1
6. Grounds of Appeal

The Inner House erred in law in rejecting the proposition that the question posed by the petitioners was academic or hypothetical.

[1]. The Inner House erred in law in concluding that the petition raises a dispute as to the proper construction of EU law; and that the issue it raises is not purely hypothetical.

[2]. The Inner House erred in law in failing to have proper regard to the absence of any live proposal to revoke the Article 50 TEU notice and thus no domestic necessity to answer the question posed. The Inner House failed to have regard to the contingent nature of the issue the petitioners seek to have answered.

[3]. The Inner House erred in law in determining that restraint in defining the scope of judicial review is inconsistent with the function of a court in the public law field. Neither the proper application of the rule of law, nor the existence of standing, require the court to determine any issue of law put to it.

[4]. The Inner House erred in law in failing to limit the scope of judicial review in line with the dictum of Lord Justice Clerk (Thomson) in *Macnaughton v Macnaughton's Trs* 1953 SC 387 (at 382) having regard to the nature of the supervisory jurisdiction as a means of supervision of the actings of a public body (*AXA General Insurance Company Ltd v Lord Advocate* 2012 SC (UKSC) 122, Lord Reed at para. 159) regulating the process by which decisions taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument do not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires (*West v . Secretary of State for Scotland* 1992 SC 385, Lord President (Hope) at p. 413).

[5]. In so doing the Inner House erred in law in failing to properly recognise and apply its prior recognition of *Macnaughton* and the need for a live controversy

in the public law sphere, per *Law Hospital NHS Trust v Lord Advocate* 1996 SC 301, Lord President (Hope) 309 (a Full Bench decision).

[6]. The Inner House erred in law in failing to have proper regard to the provisions of the European Union (Withdrawal) Act 2018, section 13, in which parliament prescribed the national procedure for the United Kingdom's withdrawal from the EU following upon parliament's enactment of the European Union (Notification of Withdrawal) Act 2017 authorising the Prime Minister to notify under article 50 (2): and in particular that it does not provide for revocation of the article 50(2) notice.

[7]. The Inner House erred in law in determining that the Government's firm and consistent policy and the confidence it maintains in the House of Commons was of no bearing on the question the petitioners seek to have resolved.

[8]. The Inner House erred in law in failing to have proper regard to the absence of any clear factual basis upon which any advisory declaration or reference would proceed. The Inner House erred in law in failing to have regard, in relation to the appropriateness of making a reference to the CJEU, to the fact that the circumstances in which any hypothetical attempt to revoke the article 50(2) notice might take place are necessarily unknown. The Lord Ordinary correctly observed that article 50 involves the powers of the European Council as much as the rights of the United Kingdom and that on a reference raising the interpretation of article 50 at this stage the CJEU would be called upon to provide a ruling when the circumstances of any hypothetical revocation and/or its acceptance by the European Council and member states are uncertain. The jurisprudence of the CJEU demonstrates that it will not provide a ruling in a case in which the facts have not been established and it is not in a position usefully to answer the question referred.

[9]. Further the Inner House erred in law in concluding that the CJEU is, in the light of the authority in *Minister for Justice and Equality v RO* case C-327/18 PPU, 7 August 2018, likely to entertain the reference. The Inner House erred in not properly recognising that the factual circumstances upon which that decision was reached were clearly not hypothetical and that the Advocate General considered that it was appropriate to proceed on the assumption that in legal

terms things will stay as they currently are. There is currently no live issue of revocation of the article 50(2) notice.

[10]. The Inner House erred in law in not concluding that the application amounted to an impermissible circumvention of the proper route for the resolution of any question of interpretation about Article 50. The TFEU provides means whereby Member States and EU Institutions may raise before the CJEU issues about the rights and obligations of Member States under the Treaties; and, exceptionally, for the giving of advisory opinions, but not in respect of Article 50. The petitioners' application seeks to circumvent those prescribed arrangements and amount to a misuse of the preliminary reference procedure.

The Inner House erred in law in rejecting the proposition that answering the question posed by the petitioners constituted a breach of parliamentary privilege.

[11]. The Inner House erred in law in failing to recognise and give effect to the wider principle of constitutional constraint inherent in parliamentary privilege, namely that it not merely provides a means of protecting free speech in Parliament, but goes beyond issues of interference with or criticism of the legislature. It involves a wider principle of constitutional restraint which the courts have described as 'a mutuality of respect between two constitutional sovereignties' and as reflecting the separation of powers between the legislature on the one hand and the judiciary on the other. *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) Stanley Burton J at [46]; *Adams v Guardian Newspapers Ltd* 2003 SC 425, Lord Reed at paras. 13-15.

[12]. The Inner House erred in law in concluding that because it is the function of the court to adjudicate on questions of law, the present application does not infringe the doctrine of parliamentary privilege. When the scope of that doctrine is properly understood, as embracing the separation of powers, there is indeed an infringement. This application seeks to place the court in a position where its decision may influence debate or voting within parliament. That is clear from the fact that the Inner House held that the petition is competent at the instance of a Member of Parliament precisely owing to her

interest in parliamentary vote(s) which are to be held in terms of section 13 of the European Union (Withdrawal) Act 2018. The Inner House erred in failing to recognise that very constitutional interest within parliament as the reason why the issue raised is not justiciable.

[13]. The Inner House erred in law in concluding that authoritative legal advice ought to be provided to parliament in the form of a ruling from the CJEU. It is for parliament to decide what material and advice it requires. *Pickin v British Railways Board* [1974] AC 765, Lord Morris at p. 790.

[14]. The Inner House erred in law by engaging in what the Lord Ordinary correctly described as "a clear and dangerous encroachment on the sovereignty of Parliament."