No. 23-131

In the
Supreme Court of the United States

FALKBUILT LTD., ET AL.,
Petitioners,
v.

DIRTT ENVIRONMENTAL SOLUTIONS, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICI CURIAE BRIEF FOR PROFESSORS JOOST BLOM, K.C. AND DR. AUBIN CALVERT IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are Joost Blom, K.C. and Dr. Aubin Calvert, Professor Emeritus and Adjunct Professor, respectively, of conflict of laws at the Peter A. Allard School of Law at the University of British Columbia. Professor Blom has Bachelor of Arts and Master of Laws degree from the University of British Columbia, a Bachelor of Civil Law from the University of Oxford, and a Master of Laws from Harvard Law School. He has been a member of the Bar of British Columbia since 1978, was appointed Queen's Counsel (now King's Counsel) in 1985, and was the Dean of the Peter A. Allard School of Law at the University of British Columbia from 1997 to 2003.

Professor Blom authored the annual survey of conflict of laws cases for the Canadian Yearbook of International Law from 1982 to 2021, and has published more than twenty other scholarly articles in the field. His work is regularly cited by the Supreme Court of Canada, and he was the Principal Researcher for the Uniform Law Conference of Canada's project to update the *Uniform Court Jurisdiction and Proceedings Transfer Act* (the final report for which was adopted by the Conference in 2021).

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of *amici curiae's* intent to file this brief.

Professor Calvert is a former Supreme Court of Canada law clerk, and is a practicing lawyer specializing in constitutional law, public law and conflict of laws. She has a Ph.D. in Political Science from the University of British Columbia, and a *Juris Doctor* degree from the Peter A. Allard School of Law, where she was awarded ten scholarships, awards and bursaries. Professor Calvert is a member of the Law Societies of British Columbia and Ontario, and is a member of the Board of the British Columbia Law Institute.

Amici curiae are interested in this case because the ruling of the Court below is highly problematic for cross-border litigation between the U.S. and Canada. This is of special concern to the Canadian legal system because of the sheer volume of cross-border disputes that involve both jurisdictions.

SUMMARY OF ARGUMENT

The petition for *certiorari* raises an important question about the application of the doctrine of *forum non conveniens* in U.S. Federal Courts, which is foundational to the ability of parties and foreign courts to coordinate their adjudication of cross-border disputes.

The American and Canadian *forum non conveniens* doctrines both have their root in nineteenth century Scottish doctrine. Both developed in response to the susceptibility of long-arm jurisdiction to forum shopping, and both aim to ensure that courts may liberate themselves from disputes that—in the interests of the parties, justice,

and the court—are more appropriately adjudicated elsewhere.

The American and Canadian doctrines both ask, as a threshold question, whether the proposed alternative forum is "available." The Tenth Circuit, in the decision below, has held that "available" means available for *all* defendants, such that a *forum non conveniens* dismissal is not possible as against any subset of defendants. Pet. App. 15a (in no circumstances is "*forum non conveniens* … available as a tool to split or bifurcate cases."). This is not the rule in Canada, where courts possess the discretion and flexibility to decline jurisdiction depending on the particular circumstances of each case.

This case requires the Court's attention because the "all-or-none" rule now imposed by the Tenth Circuit is inimical to well-ordered cross-border litigation. The practical effect of the decision below will be an increase in duplicative, inefficient parallel proceedings in the U.S. and Canada, an increase in motions for anti-suit injunctions, and the increased likelihood that U.S. judgments will not be enforced in Canada. These outcomes are not in the interests of litigants, justice, or the comity that exists between the Canadian and U.S. legal systems.

ARGUMENT

I. The *Forum Non Conveniens* Doctrines of the United States and Canada Are Descended from the Same Common Law

The United States Supreme Court and the Supreme Court of Canada each drew on cases litigated in Scotland when originally adopting the doctrine of *forum non conveniens*. See, e.g., *American Dredging Co.* v. *Miller*, 510 U.S. 443, 449 (1994) ("most authorities agree that forum non conveniens had its earliest expression … in Scottish estate cases."); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 248 n.13 (1981) ("The doctrine of forum non conveniens has a long history. It originated in Scotland, … and became part of the common law of many States."); *Amchem Products Inc.* v. *British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 915 (Can.) ("the principle of *forum non conveniens* … was a Scottish principle"); see also *id.* at 916. The U.S. and the Canadian doctrines are thus founded on the same basic principles.

Canadian courts emphasize that "[t]he application of *forum non conveniens* is an exercise of discretion[.]" *Haaretz.com* v. *Goldhar*, [2018] 2 S.C.R. 3, 37 (Can.), citing *Éditions Écosociété Inc.* v. *Banro Corp.*, [2012] 1 S.C.R. 636, 655 (Can.); see also, e.g., *Vale Canada Limited* v. *Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862 (Can.) (reviewing exercise of discretion in denying *forum non conveniens* dismissal); *Giustra* v. *Twitter, Inc.*, 2021 BCCA 466 (Can.) (same).

The Canadian doctrine imposes a burden on "a defendant …to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff." *Club Resorts Ltd.* v. *Van Breda*, [2012] 1 S.C.R. 572, 623 (Can.). A defendant "must show that the alternative forum is clearly more appropriate" (*id.* at 625), and "that, … it would be fairer and more efficient to" litigate in the alternative forum (*id.* at 626). *See also id.* at 626 ("A court hearing an application for a stay of proceedings [on the ground of *forum non conveniens*] must find that [an alternative] forum exists that is in a better position to dispose fairly and efficiently of the litigation.").[2]

The United States Supreme Court and the Supreme Court of Canada have both opined that the central question in the application of the doctrine is not just the interests or "convenience" of the parties, but the *appropriateness* of the alternative forum taking all circumstances into account. See, e.g., *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 504 (1947) ("Courts …occasionally decline, in the interest of justice, to exercise jurisdiction, where … the litigation can more appropriately be conducted in a foreign tribunal." (quoting *Canada Malting Co., Ltd.*, v. *Paterson Steamships, Ltd.*, 285 U.S. 413, 422-23 (1932)). Similarly, the Supreme Court of Canada identified in *Van Breda* that the doctrine has:

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[2] In Canada, a successful *forum non conveniens* motion generally results in a stay, not a dismissal, as is common in the United States.

> an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

Van Breda, [2012] 1 S.C.R. at 626 (Can.); *see also Antares Shipping* v. *The Ship Capricorn et al.*, [1977] 2 S.C.R. 422, 451 (Can.) ("When I consider the forum conveniens, I bear in mind that … the term means not the 'convenient' Court, but the 'appropriate' Court or the court 'more suitable for the ends of justice.'" (internal quotation omitted); *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1987] 1 A.C. (HL) 460, 474 (U.K.) (explaining that the meaning of *conveniens* is apt to be misunderstood: "[t]he question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction").

As the Supreme Court of Canada explained in *Van Breda*:

> The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. … It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute.

Van Breda, [2012] 1 S.C.R. at 623-24 (Can.).

II. The Canadian Approach to *Forum Non Conveniens*

The Supreme Court of Canada has insisted that the *forum non conveniens* doctrine is flexible, emphasizing that:

> a party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations, and concerns … the doctrine focusses on the context of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.

Id. at 624. Application of the Canadian doctrine requires a discretionary analysis that is guided by well-recognized factors, including: (i) the location of the parties and witnesses; (ii) the law to be applied; (iii) the avoidance of multiplicity of proceedings and conflicting decisions; (iv) enforcement of the eventual judgment; (v) the fair and efficient working of the Canadian legal system; and (vi) the relative strength of the connections between the parties and the facts involved in the dispute. See, *id.* at 624, 626-27; *Breeden* v. *Black*, [2012] 1 S.C.R. 666, para. 23 (Can.). These factors have been codified in several Canadian provinces (see, e.g., *Court Jurisdiction and*

Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11)[3] but, in Canada, the statutory and common law versions of the doctrine are generally treated as equivalent. *Teck Cominco Metals Lt.* v. *Lloyd's Underwriters*, [2009] 1 S.C.R. 321, para. 22 (Can.); *Breeden*, [2012] 1 S.C.R. 666, paras. 29-36 (Can.) (using the statutory rubric to frame a common law *forum non conveniens* analysis).

As in the U.S., the discretionary analysis is only engaged if, as a threshold matter, there is a proposed alternative forum that is capable of exercising jurisdiction in respect of the dispute. The holding of the Tenth Circuit in the decision below pertains to this threshold step:

> When a plaintiff brings suit against multiple defendants … and the proposed alternative forum could only exercise jurisdiction over some of those defendants ⋯ the [proposed alternative forum] is not an available alternative forum.

Pet. App. 13a-14a. In other words, applying the Tenth Circuit's all-or-none rule, in a multi-defendant scenario, a proposed alternative forum is not "available" unless it is available for *all* defendants.

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[3] Versions of this legislation, which was developed by the Uniform Law Conference of Canada, have been enacted in Saskatchewan, Nova Scotia, Prince Edward Island, and Yukon.

There is no comparable restriction on the application of *forum non conveniens* in Canada, and such a strict limitation is contrary to the flexible nature of the doctrine. Were the question to arise in Canada, it is open to a Canadian court to exercise its discretion, in an appropriate case, to stay proceedings against a subset of defendants, if the disadvantages of splitting the proceedings are outweighed by gains in fairness, efficiency, and in the administration of justice that would result from the stay. See, e.g., *Teck Cominco*, [2009] 1 S.C.R. at 337 (Can.) (holding, in the context of parallel proceedings, that the desire to avoid multiplicity should not be permitted to overshadow the objectives of the *forum non conveniens* analysis); *Van Breda*, [2012] 1 S.C.R. at 634 (Can.) (treating the avoidance of case-splitting as a factor to be weighed, as opposed to a threshold question).

The position taken in Canada appears to be in harmony with that taken by this Court in, for example, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981):

> this Court's earlier *forum non conveniens* decisions … have repeatedly emphasized the need to retain flexibility. In [*Gulf Oil*, 330 U.S. 501], the Court refused to identify specific circumstances "which will justify or require either grant or denial of remedy." 330 U.S., at 508 … in *Williams* v. *Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946), we stated

> that we would not lay down a rigid rule to govern discretion, and that "[each] case turns on its facts." If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.

Id. at 249-250. See also *Gulf Oil*, 330 U.S. at 508:

> Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of [dismissal based on *forum non conveniens*]. The doctrine leaves much to the discretion of the court.

Id.

III. The Decision Below Is Highly Consequential

There is no agreed system for a U.S. court and a Canadian court to coordinate their respective roles in litigation that has a connection with both countries. Instead, coordination on a certain level, is achieved by each court unilaterally deciding whether it has jurisdiction, and whether it is appropriate to relinquish that jurisdiction so that the dispute can be heard in another forum.

The decision below to remove from courts within the Tenth Circuit the discretion to relinquish jurisdiction over some, but not all defendants is highly consequential because it negatively impacts the ability of those courts and Canadian courts to

engage in mutually responsive management of the jurisdictional complexities of cross-border multi-party litigation. This dissonance between the two jurisdictions in the application of the *forum non conveniens* doctrine will increase duplicative parallel litigation, judicial inefficiency, and undesirable tactical behavior of litigants.

A. The Tenth Circuit's All-or-None Rule Will Result in Inefficient Duplicative Proceedings and a Problematic Race to Judgment

An increase in parallel proceedings in the U.S. and Canada is precisely the kind of result the doctrine seeks to avoid. An inflexible application of the doctrine will result in duplication and inefficiency at all stages of the litigation process. See, e.g., J. G. Castel, Canadian Conflict of Laws 244 (1997) ("The doctrine of *forum non conveniens* is relevant to every case in which a problem of conflict of jurisdictions is present."). *Amici* respectfully urge the Court to grant the petition to address and resolve this significant problem.

Plaintiffs will initiate proceedings in what they consider to be the most favorable court. Where the involvement of a single defendant in U.S. proceedings who is not amenable to suit in Canada precludes a *forum non conveniens* dismissal under the all-or-none rule, a Canadian court in parallel litigation will be placed in the difficult position of having to choose between condoning a multiplicity of proceedings and relinquishing jurisdiction over a case it considers to be more appropriately litigated in Canada. See, e.g.,

Teck Cominco, [2009] 1 S.C.R. at 326 (Can.) (parties filed suit in the Washington State Superior Court and in the Supreme Court of British Columbia on the same day, and each took steps to obtain jurisdictional rulings in their preferred court). The shared U.S. and Canadian goal of eliminating multiplicity will thus fall entirely on the shoulders of Canadian courts, because Tenth Circuit courts have divested themselves of discretion.

Litigants will also be incentivized to race-to-judgment in their preferred forum, risking gamesmanship, and inconsistent and potentially irreconcilable, decisions. Those same parties will then seek to have their preferred decision recognized and enforced in the other jurisdiction, generating additional litigation and further burdening courts.

B. Canadian Courts May Refuse Enforcement of U.S. Judgments Where Canada Was Clearly the More Appropriate Forum

U.S. judgments impacted by the all-or-none rule are also vulnerable at the recognition and enforcement stage in a further blow to judicial comity between the U.S and Canada. *Amici* respectfully urge that the Court grant the petition to address this significant problem.

The Uniform Law Conference of Canada has taken a clear position in the model Uniform Enforcement of Foreign Judgments Act that "A foreign judgment cannot be enforced" if "at the time" enforcement is sought, a Canadian "proceeding based on the same facts and having the same purpose," was

commenced first and remains "pending before" the court in which enforcement is sought, or "has resulted in a judgment or order rendered by a [Canadian] court." Uniform Enforcement of Foreign Judgments Act, § 4(h). Canadian common law may also allow a Canadian court to refuse recognition of a U.S. judgment that was issued following an unsuccessful *forum non conveniens* motion in the U.S., where the party seeking to prevent enforcement successfully argues that a Canadian court was clearly the more appropriate forum. See, e.g., V. Black and J. Swan, *Concurrent Judicial Jurisdiction: A Race to the Court House or to Judgment: Lloyd's Underwriters v. Cominco Ltd.*, 46 Can. Bus. L.J. 292, 308-09 (2008).

C. Canadian Courts Will Issue More Anti-Suit Injunctions, Undermining International Comity

A rise in duplicative proceedings will also spur litigants to seek anti-suit injunctions from Canadian courts with greater frequency, and, almost certainly, with greater success. See, *Amchem*, [1993] 1 S.C.R. at 912 (Can.) (Canadian "courts have developed two forms of remedy to control the choice of forum by the parties. The first … is a stay of proceedings. … The second is the anti-suit injunction, a more aggressive remedy."); *id.* at 913 ("In the case of the stay the domestic court determines for itself whether in the circumstances it should take jurisdiction whereas, in the case of the injunction, it in effect determines the matter for the foreign court."); *id.* at 914 ("In a world where … courts of countries … appl[y] consistent

principles … anti-suit injunctions would not be necessary.").

In Canada, anti-suit injunctions are an exceptional remedy because Canadian courts are reluctant to interfere, even indirectly, in the exercise of jurisdiction by a foreign court. See, e.g., *id.* at 925-26. The same is true, if not more so, in the United States. See, e.g., George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 589 (1990) (in the United States, the "international anti-suit injunction" is one of the most controversial forms of provisional relief).

However, Canadian courts—if satisfied that Canada is the clearly more appropriate forum—will restrain a litigant from pursuing foreign proceedings where: (i) the foreign court assumes jurisdiction on a basis that is inconsistent with Canadian rules of private international law; and (ii) an injustice results to a litigant or would-be litigant in the Canadian court: "[t]he foreign court, not having, itself, observed the rules of comity, cannot expect its decision to be respected on the basis of comity." *Amchem*, [1993] 1 S.C.R. at 934 (Can.); see also *id.* ("If, … a foreign court assumes jurisdiction on a basis that is inconsistent with our rules of private international law and an injustice results to a litigant or 'would-be' litigant in our courts, then the assumption of jurisdiction is inequitable and the party invoking the foreign jurisdiction can be restrained."); *Vale Canada*, 2022 ONCA, para. 26 (Can.) ("Comity rests

on the assumption of reciprocity and can be refused where reciprocity is not forthcoming.").

The non-discretionary all-or-none rule imposed by the Tenth Circuit in the decision below is inconsistent with the Canadian doctrine of *forum non conveniens*. The threshold question for an anti-suit injunction in Canada is thus satisfied whenever a court dismisses a *forum non conveniens* motion based on that rule. This will further fray international comity.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for *certiorari*. This would afford the Court the opportunity to clarify the American doctrine of *forum non conveniens* and the discretion retained by U.S. courts to decline jurisdiction in appropriate cases.

Respectfully submitted,

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