No. 18-__

IN THE

Supreme Court of the United States

GOTECH INTERNATIONAL TECHNOLOGY LIMITED; ZHUHAI GOTECH INTELLIGENT TECHNOLOGY COMPANY LIMITED,

Petitioners,

v.

NAGRAVISION SA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 4(k)(2) authorizes federal district courts to exercise personal jurisdiction over foreign defendants in suits involving federal claims where exercising jurisdiction is consistent with U.S. law and "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."

The question presented is:

Whether a plaintiff invoking jurisdiction under Rule 4(k)(2) must plead that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction."

PARTIES TO THE PROCEEDING

Petitioners are Gotech International Technology Limited and Zhuhai Gotech Intelligent Technology Company Limited, defendants-appellants in the court below.

Respondent is Nagravision SA, plaintiff-appellee in the court below.

Globalsat International Technology Ltd. was a defendant in the district court, but never appeared and is not a party to any appeal proceeding.

RULE 29.6 DISCLOSURE

Zhuhai Gotech Intelligent Technology Company Limited has no parent corporation and no publicly held company owns 10% or more of Zhuhai Gotech Intelligent Technology Company Limited's stock. Gotech International Technology Limited is a wholly-owned subsidiary of Zhuhai Gotech Intelligent Technology Company Limited.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 882 F.3d 494 and reprinted in the Appendix to the Petition ("App.") at 1a-7a. The decision of the district court entering a default judgment for respondent is unpublished and is reprinted at App. 8a-17a. The decision of the district court summarily denying petitioners' motion to vacate the default judgment is unpublished and is reprinted at App. 18a-19a. The decision of the district court denying reconsideration of the default judgment is unpublished and is reprinted at App. 20a.

JURISDICTION

The court of appeals issued its decision on February 7, 2018. App. 1a. The court denied rehearing on March 12, 2018. App. 21a-22a. On May 29, 2018, Justice Alito extended the time in which to file a petition for certiorari to and including July 10, 2018. *See* No. 17A1305. On July 9, Justice Alito further extended the time for this filing to July 26, 2018. *Id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Federal Rule of Civil Procedure 4(k)(2) provides:

> (2) **Federal Claim Outside State-Court Jurisdiction.** For a claim that arises under federal law, serving a summons or filing a waiver of ser-

vice establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

INTRODUCTION

In ordinary cases—those in which courts of the state in which a federal district court sits could exercise personal jurisdiction—Federal Rule of Civil Procedure 4(k)(1)(A) likewise authorizes a federal district court to exercise personal jurisdiction. But when a foreign defendant lacks sufficient contacts with any single state to satisfy Rule 4(k)(1)(A), a separate rule—Rule 4(k)(2)—applies. Under that provision, a federal court may exercise jurisdiction so long as the defendant is "not subject to jurisdiction in any state's courts of general jurisdiction" but has sufficient contacts with the United States as a whole to authorize a federal court's exercise of personal jurisdiction consistent with due process. Fed. R. Civ. P. 4(k)(2). The question presented here is whether a plaintiff seeking to invoke that rule must plead that Rule 4(k)(2)(A)'s "not subject to jurisdiction in any state's courts" requirement is satisfied—a question over which the courts of appeals are intractably divided.

In this case, respondent Nagravision (a Swiss corporation) sued petitioners (Chinese and Hong Kong corporations) in federal district court in Texas,

alleging personal jurisdiction under Rule 4(k)(2). But respondent did not allege that Rule 4(k)(2)(A) was satisfied—*i.e.*, that petitioners were not subject to personal jurisdiction in any state. And indeed, respondent likely could not have made that allegation, because it knew from its own investigation that its claims arose predominantly from petitioners' California contacts.

Given what petitioners perceived as the insufficiency of this pleading, and absent any apparent basis for personal jurisdiction in Texas federal district court, petitioners exercised their right not to appear to answer the complaint. Yet despite respondent's failure to plead that the elements of Rule 4(k)(2) were satisfied, that court entered a default judgment of more than $100 million against petitioners. Petitioners moved to vacate that judgment as void in light of respondent's failure to plead (much less establish) the district court's jurisdiction. The district court denied petitioners' motion, and the Fifth Circuit affirmed, holding (consistent with case law from the Federal Circuit) that a plaintiff relying on Rule 4(k)(2) has no obligation to allege that no state could exercise jurisdiction over the defendant, and that petitioners had not carried their burden of "prov[ing]" they were subject to jurisdiction in California. App. 6a-7a.

The First and Fourth Circuits, however, have rejected this approach, requiring plaintiffs relying on Rule 4(k)(2) to plead all the elements of that rule, including that the defendant is not subject to the jurisdiction of any particular state. If this suit had been brought in a district court in one of those cir-

cuits, the default judgment would have been vacated, and indeed would have never been entered in the first place.

This square, acknowledged, and outcome-determinative split among the courts of appeals (and replicated among district courts in other circuits) should not be allowed to persist. This Court has emphasized that jurisdictional rules in particular should be clear, a goal undermined by the persistent division of authority. Moreover, the nationwide scope of Rule 4(k)(2) provides for obvious forum-shopping opportunities. After all, if that rule is satisfied, a plaintiff can sue anywhere in the United States. The petition should be granted and the decision below reversed.

STATEMENT OF THE CASE

A. Legal Background

1. "[I]n most cases," a federal district court's authority to assert personal jurisdiction arises under Federal Rule of Civil Procedure 4(k)(1)(A). *Walden v. Fiore*, 571 U.S. 277, 283 (2014). That Rule provides that a federal district court has personal jurisdiction over a defendant so long as the courts of the state in which the district court sits would have personal jurisdiction under that state's long-arm statute. *See, e.g.*, *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 39 (1st Cir. 1999).

In *Omni Capital International v. Rudolph Wolff & Co.*, 484 U.S. 97 (1987), this Court considered whether a foreign corporation could properly be served under Rule 4(k)(1)(A) when it had sufficient contacts with the United States for a federal court to

exercise personal jurisdiction consistent with due process, but did not have sufficient contacts to support the exercise of personal jurisdiction as to any particular state. The Court held that such a case does not fall under Rule 4(k)(1) and refused to recognize a federal common law rule allowing service in these circumstances. *See id.* at 109-11.

This holding resulted in a "gap in the enforcement of federal law," Fed. R. Civ. P. 4, Advisory Committee's Note (1993): "[F]oreign defendants who lacked single-state contacts sufficient to bring them within the reach of a given state's long-arm statute . . . but who had enough contacts with the United States as a whole to make personal jurisdiction over them in a United States court constitutional, could evade responsibility for civil violations of federal laws that did not provide specifically for service of process." *Swiss Am. Bank*, 191 F.3d at 40; *see also Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403, 1414 (Fed. Cir. 2009).

2. In response, the Advisory Committee on the Federal Rules of Civil Procedure proposed new Rule 4(k)(2) "to function as a species of federal long-arm statute." *Swiss Am. Bank*, 191 F.3d at 40. That rule authorizes federal courts to exercise personal jurisdiction in federal-question cases where the defendant "is not subject to jurisdiction in any state's courts of general jurisdiction" and exercising personal jurisdiction would otherwise be "consistent with the United States Constitution and laws." Fed. R. Civ. P. 4(k)(2).

Rule 4(k)(2)'s drafters intended it as a "narrow extension of the federal reach." Fed. R. Civ. P. 4, Ad-

visory Committee's Note (1993). The Rule's narrow reach is accomplished by its so-called "negation" clause—Rule 4(k)(2)(A)—which restricts the Rule's "application to those cases in which the putative defendant 'is not subject to the jurisdiction of the courts of general jurisdiction of any state.'" *Swiss Am. Bank*, 191 F.3d at 40. The Rule, in other words, is triggered only in the "exceptional case" in which the defendant has "the requisite relationship with the United States Government but not with the government of any individual State." *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

B. Factual and Procedural Background

1. Respondent Nagravision SA is a Swiss corporation that provides anti-piracy products to foreign satellite television broadcasters. App. 2a-3a. In January 2015, respondent filed suit against unnamed "Doe" defendants in the Southern District of Texas under the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998), and the Federal Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*. Respondent alleged that these defendants were using Internet Service Providers ("ISPs") in the United States to capture and then rebroadcast respondent's security keys, which enabled end users in South American countries to circumvent respondent's security technology and watch copyrighted television programming without paying a subscription fee—a form of piracy known as internet key sharing ("IKS"). DE 1 at ¶¶ 1, 12-25.[1]

[1] All citations to "DE" refer to district court docket entries in the underlying action.

Because respondent did not know the identities of the Doe defendants (it only knew the ISP addresses allegedly used to capture its security keys), the district court authorized respondent to take discovery of the ISPs. DE 11 ¶¶ 1, 4. That discovery revealed that at least one foreign entity—not related to petitioners—was using the ISP's for IKS piracy. DE 10-3 at ¶ 7. Respondent conjectured that this foreign entity was acting as a proxy for petitioners. DE 12 at ¶¶ 24-25. Respondent's investigation revealed that 12 ISPs in the United States, half of them in California, were being used for the alleged IKS piracy operation. *See* DE 40 at 16; DE 28-3 ¶ 12, Exs. 7, 9, 11, 12, 14, 17. Respondent also separately discovered that petitioners had exported 7,274 allegedly unlawful products *exclusively* to California. DE 40 at 17; DE 28-3 ¶ 30, Exs. 25-31. Petitioners conceded having imported those products to California (but not that they were unlawful). DE 34-1 at 12, 22; Dkt. 42 at 11, 20. Discovery revealed no connection between petitioners generally, or their challenged conduct and the State of Texas.

Respondent filed an amended, post-discovery complaint in the Southern District of Texas (the location of its litigating counsel) naming petitioners—Chinese and Hong Kong corporations with no Texas contacts—as defendants and adding a claim that petitioners had unlawfully imported products designed to facilitate digital piracy. DE 12. Despite clear evidence linking petitioners' challenged conduct to the State of California, respondents' allegations did not mention California: they alleged that petitioners "use[d] a network of servers located in various cities

across the United States" and that petitioners "import[ed] their unauthorized receivers to distributors in the United States." DE 12 ¶ 10. Respondent also alleged, on "information and belief," that the court had personal jurisdiction over petitioners under Rule 4(k)(2). *Id.* But respondent did not allege that petitioners were "not subject to jurisdiction in any state's court of general jurisdiction." Fed. R. Civ. P. 4(k)(2)(A).

After petitioners declined to respond to the amended complaint, respondent moved for the entry of a default judgment. *See* DE 28. Respondent made no jurisdictional allegations in its motion. Yet attached to respondent's motion were the results of its discovery, clearly showing petitioners' significant California contacts. *See* DE 28-3 ¶¶ 12(a), (c)-(e), (g), (j), Exs. 7, 9, 11, 12, 14, 17 (IP Information reports demonstrating challenged IP addresses were located in Los Angeles, California); *id.* ¶ 28(a)-(d), Exs. 25-28 (shipments of accused product to Santee, California via Long Beach, California); *id.* ¶ 30(b)-(c), Exs. 29-31 (shipments of accused product to Glendale, California via Long Beach, California). Indeed, respondent's supporting evidence alleged that petitioners had "specific[ally]" requested data servers in Los Angeles to operate its IKS service. DE 40 at 16-17; *see also* DE 40-2 ¶ 7, Ex. 7.

The district court granted the motion for a default judgment. Its order made no jurisdictional findings either (although the district court did find that petitioners were properly served under Rule 4, App. 9a). The court's order permanently enjoins petitioners from engaging in similar conduct, App. 15a-16a,

and it awards respondent $101,851,800—more than $100 million for petitioners' purported piracy, half of which was allegedly conducted through California ISPs, and $1.45 million based solely on petitioners' undisputed imports to California, *id.* at 13a, 16a.

2. Two months later, petitioners moved under Rule 60(b)(4) to vacate the default judgment for, *inter alia*, lack of personal jurisdiction. DE 34, 34-1. Petitioners explained that respondent's complaint was deficient because respondent had failed to allege that petitioners were "not subject to jurisdiction in any state's courts of general jurisdiction," as Rule 4(k)(2)(A) requires. Petitioners also argued that personal jurisdiction under that rule was lacking because the allegations in respondent's complaint, coupled with undisputed materials filed by respondent in support of its motion for a default judgment, established that petitioners were subject to jurisdiction in California at the time respondent's complaint against them was filed. *Id.* While petitioners denied any involvement in piracy, they conceded, consistent with respondent's discovery, that the challenged conduct had occurred *via* California ISPs and that they had exported the accused products exclusively to California. DE 34-1 at 13-16.

Respondent did not deny that it had concealed petitioners' California contacts, nor did it even deny that petitioners were subject to personal jurisdiction in California. In fact, respondent later admitted that "when moving for default judgment, [respondent] did not make any argument to the Court concerning personal jurisdiction," and that "personal jurisdiction was not even addressed." DE 58 at 12 (citing DE 28-

1). But respondent insisted that it had no obligation to plead compliance with Rule 4(k)(2)(A). DE 40 at 13-14. The default judgment could not be vacated, respondent asserted, because petitioners had failed to carry *their* "heav[y]" burden of "prov[ing] they are subject to personal jurisdiction in another state." DE 40 at 15.

On November 22, 2016, the district court denied petitioners' motion to vacate. App. 18a-19a.

3. The Fifth Circuit affirmed. Citing its prior decision in *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646 (5th Cir. 2004), the court of appeals held that although the plaintiff has "the initial burden to plead and prove the requisite contacts with the United States" under Rule 4(k)(2)(B), the *defendant*, not the plaintiff, bears the burden "to establish that there was a state meeting the criteria" of Rule 4(k)(2)(A), *i.e.*, a state with authority to exercise personal jurisdiction over petitioners. App. 6a. The Fifth Circuit, in other words, split the burden under Rule 4(k)(2): While a plaintiff must allege minimum contacts with the United States to satisfy Rule 4(k)(2)(B), it need not allege that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2)(A).

With the latter burden placed squarely on petitioners, the Fifth Circuit held that the default judgment could not be vacated because petitioners had not "*prove[d]* that the district court's implied finding [that no state had personal jurisdiction over petitioners] was wrong." App. 7a (emphasis in original). According to the court of appeals, once respondent pled the requisite contacts with the United States as

a whole, the burden shifted to petitioners "to do more than just criticize [respondent's] complaint. [Petitioners] had to affirmatively establish that the court lacked personal jurisdiction under 4(k)(2) because there was a state where its courts of general jurisdiction could properly exercise personal jurisdiction over it." *Id.* Petitioners, the court of appeals concluded, "did nothing of the kind." *Id.*

On March 12, 2018, the Fifth Circuit denied rehearing. App. 21a-22a. This petition followed.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to resolve whether a plaintiff must plead Rule 4(k)(2)(A)'s negation requirement that defendant is not amenable to jurisdiction in any particular state court. The courts of appeals are intractably divided over that important and recurring question, and this case presents an ideal vehicle through which to resolve it. The court below, moreover, resolved the question incorrectly.

A. The Courts Of Appeals Are Intractably Divided Over Whether The Plaintiff Must Plead Under Rule 4(k)(2)(A) That The Defendant Is Not Subject To Personal Jurisdiction In Any State

Despite its obvious import for the proper exercise of federal judicial power and for foreign relations, this "Court has never addressed" Rule 4(k)(2). *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 293 F. Supp. 3d 232, 234 (D. Me. 2017). "[T]he various circuit courts," meanwhile, "have developed different methods for determining whether . . . Rule 4(k)(2) is met." *Touch-*

com, Inc. v. Bereskin & Parr, 574 F.3d 1403, 1413-15 (Fed. Cir. 2009).

1. Two courts of appeals, as well as numerous district courts, have concluded that a plaintiff invoking personal jurisdiction under Rule 4(k)(2) must plead that all of the rule's requirements, including Rule 4(k)(2)(A)'s requirement that no state have personal jurisdiction over the defendant, are satisfied.

a. The First Circuit held in *United States v. Swiss American Bank, Ltd.* that a plaintiff must "certify that, based on the information that is readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state." 191 F.3d 30, 41 (1st Cir. 1999). Under the First Circuit's framework, if the plaintiff alleges her "prima facie case," the burden of production shifts to the defendant to establish its amenability to suit in a state forum, with the ultimate burden of persuasion resting, as it always does, with the plaintiff. *Id.* at 41-42. This framework, the First Circuit reasoned, fairly accommodates two competing considerations: (i) the principle that "a plaintiff ordinarily must shoulder the burden of proving personal jurisdiction over the defendant," and (ii) the "quandary" of "requir[ing] a plaintiff to prove a negative fifty times over." *Id.* at 40.

b. The Fourth Circuit has "followed the First Circuit's approach." *Touchcom*, 574 F.3d at 1414. Citing *Swiss American Bank*, the Fourth Circuit has held that the plaintiff may not invoke jurisdiction under Rule 4(k)(2) where it has "never attempted to argue that [the defendant] is not subject to personal jurisdiction in any state." *Base Metal Trading, Ltd. v.*

OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208, 215-16 (4th Cir. 2002); *see also Grayson v. Anderson*, 816 F.3d 262, 271 (4th Cir. 2016) (Rule 4(k)(2) inapplicable where "plaintiffs never argued [to the district court], as they were required to do, that *no State* could exercise personal jurisdiction over [defendant]" (emphasis in original)).

c. Several district courts within the Second[2] and Third[3] Circuits likewise require the plaintiff to allege that Rule 4(k)(2)(A) is satisfied.

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[2] *See, e.g.*, *In re M/V MSC FLAMINIA*, 107 F. Supp. 3d 313, 322-23 (S.D.N.Y. 2015) ("Stolt has not certified that BASF SE is not subject to jurisdiction in any other state. . . . Accordingly, Stolt has not alleged all of the elements required for the exercise of personal jurisdiction under Rule 4(k)(2)"); *7 W. 57th St. Realty Co. v. Citigroup, Inc.*, 2015 WL 1514539, at *13 (S.D.N.Y. Mar. 31, 2015) (holding "the second prerequisite for application of Rule 4(k)(2)" was not satisfied where the plaintiff did not certify that defendants were not subject to jurisdiction in any state and dismissing claim against foreign defendants); *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 429 (S.D.N.Y. 2009) ("[A] plaintiff who seeks to invoke Rule 4(k)(2) must certify that, based on the information that is readily available to the plaintiff and his or her counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state." (quotations and alterations omitted)); *Aqua Shield, Inc. v. Inter Pool Cover Team*, 2007 WL 4326793, at *8-10 (E.D.N.Y Dec. 7, 2007) (requiring plaintiff to certify to the best of its knowledge that Rule 4(k)(2)(A) was satisfied).

[3] *Adtile Techs. Inc. v. Perion Network Ltd.*, 192 F. Supp. 3d 515, 524 (D. Del. 2016) (plaintiff must make "an affirmative representation that the defendant is not subject to the general jurisdiction of any state court" (quotations omitted)); *Monsanto Co. v. Syngenta Seeds, Inc.*, 443 F. Supp. 2d 636, 647 (D. Del. 2006) ("To satisfy this requirement, plaintiffs are required to make an affirmative representation that the defendant is not

2. The Fifth and Federal Circuits have rejected the First and Fourth Circuits' rule.

a. The Federal Circuit has expressly rejected the First Circuit's approach as "undesirable." *Touchcom*, 574 F.3d at 1415. The Federal Circuit has thus relieved plaintiffs of any pleading burden under Rule 4(k)(2)(A) and holds that "a court is entitled to use Rule 4(k)(2) to determine whether it possesses personal jurisdiction over the defendant unless the defendant names a state in which the suit can proceed." *Id.* at 1414; *see also Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. de Equip. Medico*, 563 F.3d 1285, 1294 (Fed. Cir. 2009).

b. The same is true in the Fifth Circuit. The panel below held that the plaintiff has "the initial burden to plead and prove the requisite contacts with the United States," App. 6a—*i.e.*, that Rule 4(k)(2)(B) is satisfied. But the court rejected petitioners' argument under *Swiss American Bank* that the plaintiff must also plead that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2)(A). The burden under Rule 4(k)(2)(A), the court of appeals reasoned, "necessarily must fall on the defendant" to establish that jurisdiction is proper in another state forum. App. 6a; *see also Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 650-51 (5th Cir. 2004).

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subject to the general jurisdiction of any state court." (quotations omitted)); *Smith v. S&S Dundalk Eng. Works, Ltd.*, 139 F. Supp. 2d 610, 622 (D.N.J. 2001) (plaintiff must "make an affirmative representation that the defendant is not subject to the general jurisdiction of any state court").

The court thus affirmed the entry of a $101 million default judgment notwithstanding respondent's undisputed failure to plead that Rule 4(k)(2)(A) was satisfied.[4]

3. As a result of the decisional conflict just described, a plaintiff's ability to invoke a federal court's jurisdiction under Rule 4(k)(2)—particularly as to a foreign defendant who elects to exercise its right not to answer the complaint—depends entirely on the jurisdiction in which the plaintiff elects to file suit. If the plaintiff files in the First or Fourth Circuits, then she may use Rule 4(k)(2) only if she can plead in good faith that no state court can exercise personal jurisdiction over the defendant. If the plaintiff files in the Fifth or Federal Circuits, in contrast, then she is free (as respondent did here) to invoke a district court's jurisdiction even with knowledge that another state *would* have personal jurisdiction over the defendant. That differential treatment of prospective plaintiffs and defendants, depending solely

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[4] Four other courts of appeals have effectively taken the Federal and Fifth Circuits' position on the question presented. Those four circuits have held that Rule 4(k)(2)(A) places the burden of proof on the defendant, rather than the plaintiff, to negate the applicability of Rule 4(k)(2)(A). *See ISI Int'l, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 548, 552 (7th Cir. 2001); *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1218, n.22 (11th Cir. 2009); *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005). If the plaintiff does not bear the burden of proof respecting Rule 4(k)(2)(A)'s element that the defendant is not subject to personal jurisdiction in any state forum, then it presumably is not required to plead that element.

on where a suit is filed, should not be allowed to persist.

B. The Proper Construction Of Rule 4(k)(2) Is A Recurring Issue Of National Importance, And This Case Presents an Ideal Vehicle for Addressing It

1. The question whether a plaintiff must plead compliance with Rule 4(k)(2)(A) is a recurring issue of national importance. At least four courts of appeals have considered the question, and numerous district courts both within and outside those circuits continue to confront it. *See supra* Section A. Indeed, the importance of the question presented is self-evident: "In a world of exponential growth in international transactions, the practical importance of [that question] looms large." *Swiss Am. Bank*, 191 F.3d at 40. That is all the more true given the proliferation of federal law—Rule 4(k)(2) affects foreign defendants' amenability to suit in the United States on virtually every type of federal claim.

Furthermore, this Court has emphasized that "[g]reat care" must be exercised when fashioning rules that subject foreign defendants to jurisdiction in the United States. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) (quotations omitted); *cf. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406-07 (2018). Nations in which foreign defendants operate often "do not share" our conceptions of jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 141 (2014). "Considerations of international rapport" and fair notice thus require our jurisdictional rules to ensure "the fair play and substantial justice [that] due process demands." *Id.* at 142 (quo-

tations omitted). As bad as it is for a U.S. company to be sued in a state in which it has no relations, it is even worse for a foreign corporation with contacts in one U.S. state to be sued in another in which it never had any relations.

2. For two reasons, there is an especially pronounced need for national uniformity as to the question presented.

First, this Court has repeatedly stressed the importance of "predictability" and clarity in jurisdictional rules. *Bauman*, 571 U.S. at 137 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94-95 (2010)). This "allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

Jurisdictional clarity is especially important for foreign defendants, like petitioners here, considering whether to exercise their right not to appear in a forum that they believe lacks jurisdiction over them. "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 65 cmt. b (a defendant has a "right to ignore the proceeding at his own risk but to suffer *no detriment* if his assessment proves correct" (emphasis added)). That principle is frustrated so long as

the lower courts remain divided regarding the requirements of Rule 4(k)(2)(A).

Second, the disarray in the lower courts creates massive opportunities for forum shopping. Because Rule 4(k)(2) is a nationwide long-arm statute, a plaintiff availing itself of that rule can sue in *any* federal district court. In the First and Fourth Circuit, the plaintiff must plead compliance with Rule 4(k)(2)(A), foreclosing suits (like this one) where the plaintiff has good reason to believe that the defendant is subject to personal jurisdiction elsewhere. But in the Fifth and Federal Circuits, that same suit would be allowed to go forward and, in many cases involving foreign defendants, proceed to default judgment, because the plaintiff has no obligation to plead that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2)(A). This Court's review is necessary to eradicate this disjoint.

2. This petition provides an ideal vehicle through which to resolve the conflict over the question presented. There is no dispute that respondent failed to plead that Rule 4(k)(2)(A) was satisfied. This case thus squarely presents the purely legal question whether the plaintiff bears the initial burden under Rule 4(k)(2)(A) to plead that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." If the Court grants certiorari and sides with the First or Fourth Circuits, then the default judgment would have to be vacated. *See, e.g.*, *Ohio Cent. R. Co. v. Cent. Tr. Co.*, 133 U.S. 83, 91 (1890) (defendant attacking a default judgment "is not precluded from contesting the sufficiency of the bill, or

from insisting that the averments contained in it do not justify the decree"); *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (same).

Indeed, this petition presents a particularly opportune case for this Court's intervention because respondent's pleading failure could not be easily corrected through amendment. After all, respondent's own submissions show, and respondent has never disputed, that petitioners had numerous contacts with California. Respondent, therefore, likely could not plead that petitioners are not subject to personal jurisdiction in California, and they have not contended otherwise.

C. The Decision Below Is Wrong

The conflict of authority over a recurring and important legal question of federal jurisdiction suffices to warrant this Court's review. Review is additionally appropriate because the decision below is incorrect.

1. a. It is axiomatic that the plaintiff, as the party invoking the court's power, bears the burden of establishing personal jurisdiction. *See, e.g.*, App. 5a (citing *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994)); *see also* Charles A. Wright, et al., 4 *Federal Practice & Procedure* § 1067.6. And because the plaintiff bears the burden on this issue, the plaintiff must "support[]" it "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992).

At the pleading stage, this generally means the plaintiff must allege a plausible basis for the exercise of personal jurisdiction. *Forras v. Rauf*, 812 F.3d 1102, 1105-06 (D.C. Cir. 2016) (affirming dismissal for failure "to allege any plausible basis for exercising personal jurisdiction over" the defendant); *Malone v. Windsor Casino Ltd.*, 14 F. App'x 634, 636 (6th Cir. 2001) (noting that "the basis for 'hailing' a foreign defendant into court must be clearly articulated when establishing personal jurisdiction" and affirming "district court's dismissal . . . based upon plaintiff's failure to allege a valid basis for personal jurisdiction"); *McIlwee v. ADM Indus., Inc.*, 17 F.3d 222, 223 (7th Cir. 1994) ("The threshold step in the inquiry is to determine whether plaintiff has alleged that defendants committed one of the acts enumerated in the state's long-arm statute.").

The decision below cannot be reconciled with this straightforward principle. A plaintiff must allege "each element" of personal jurisdiction, *Lujan*, 504 U.S. at 561, not just some of them. Under Rule 4(k)(2), this means that the plaintiff must allege that "exercising jurisdiction is consistent with the United States Constitution and laws" *and* that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." The Fifth Circuit's rule impermissibly relieves the plaintiff of the latter burden.

b. Requiring the plaintiff to plead the applicability of Rule 4(k)(2)(A) will also "[dis]courage" procedural gamesmanship. *7 W. 57th St. Realty*, 2015 WL

1514539, at *13. Under the Fifth Circuit's approach, plaintiffs "suing foreign corporations under federal law" are well advised "to omit any allegations tying defendants to a specific state, in hopes of engaging the broader minimum contacts analysis of Rule 4(k)(2), which only requires contacts with the United States as a whole." *Id.* That is, after all, what happened here. Respondent knew from court-authorized discovery that its claims arose predominantly from petitioners' California contacts. Yet respondent pleaded only that petitioners' conduct took place "in the United States." DE 12 ¶ 10.

The decision below thus illuminates the extreme consequences of the Fifth Circuit's rule: A plaintiff can bring suit under Rule 4(k)(2) and obtain a default judgment despite having knowledge indicating that the court lacks personal jurisdiction over the defendant. No legitimate purpose is served by that result.

c. The Fifth Circuit's rule, in fact, undermines the core purpose of Rule 4(k)(2). In keeping with this Court's admonition that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *Asahi*, 480 U.S. at 115 (quotations omitted), Rule 4(k)(2) is supposed to be a "narrow extension of the federal reach," Fed. R. Civ. P. 4, Advisory Committee's Note (1993). This Court has thus indicated that only the "exceptional case" would come within the aegis of the rule. *J. McIntyre Mach. Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011).

But in the Fifth (and Federal) Circuit, Rule 4(k)(2) has replaced Rule 4(k)(1) as the jurisdictional

basis of *first* resort in federal question cases because it is (in those courts' view) "clearer and more straightforward." *Adams*, 364 F.3d at 652. In these circuits, neither the plaintiff nor the court must consider a foreign defendant's jurisdiction in *any* state, because a court is "entitled" to use Rule 4(k)(2) as a jurisdictional hook so long as there are minimum United States contacts and the defendant does not consent to jurisdiction elsewhere. *See id.* at 651; *see also* Jeffrey R. Armstrong, *Guaranteed Jurisdiction: The Emerging Role of Fed. R. Civ. P. 4(k)(2) in the Acquisition of Personal Jurisdiction of Foreign Nationals in Internet Intellectual Property Disputes*, 5 Minn. Intell. Prop. Rev. 63, 80 (2003) (Courts "have effectively taken the concept of Rule 4(k)(2) and vastly expanded it. No longer is Rule 4(k)(2) only to be applied in a situation where a jurisdiction cannot be established in any given state. Instead, it has become a fallback position for a plaintiff to be able to keep a defendant in a federal court of the plaintiff's choosing so long as there are minimum contacts aggregated on a national basis."). Such *un*exceptional jurisdiction over foreign defendants is not "gap-filling," *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 429, 434-35 (S.D.N.Y. 2009); it is a vast and unwarranted expansion of the jurisdiction of every federal district court.

2. The Fifth Circuit and other courts have rejected the First and Fourth Circuits' pleading rule on the ground that placing the burden on the plaintiff to plead Rule 4(k)(2)(A)'s satisfaction would thwart litigative efficiency. *See, e.g.*, *Touchcom,* 574 F.3d at 1414-15. Such a pleading requirement, these courts

reason, would unfairly require the plaintiff to allege and then prove the absence of personal jurisdiction everywhere, requiring the plaintiff and the court to engage in a "[c]onstitutional analysis for each of the 50 states" to determine whether the defendant is subject to jurisdiction in any of them. *Id.* at 1415 (quotation omitted). This reasoning is flawed.

a. As an initial matter, courts are not authorized to depart from settled principles—principles that Congress *expects* courts to apply—simply because of a perceived "high cost of compliance." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013) (quotations omitted). The plaintiff "ordinarily must shoulder the burden of proving personal jurisdiction over the defendant." *Swiss Am. Bank*, 191 F.3d at 40. And there is no indication whatsoever that Congress meant for a different standard to apply under Rule 4(k)(2)(A). To the contrary, all agree that Rule 4(k)(2) was meant only to be a minor jurisdictional fix. *See, e.g.*, Fed. R. Civ. P. 4, Advisory Committee's Notes (1993); *supra* at 5-6.

b. In any event, these efficiency concerns are entirely misplaced. Given that Rule 4(k)(2) does not apply if the defendant has minimum contacts with a single state, plaintiffs invoking Rule 4(k)(2) do not realistically need to conduct fifty different constitutional analyses to allege in good faith that the rule applies. They need only assess the contacts with the one or two states with which the defendant has had the most contact. And if the plaintiff believes from that assessment that the defendant may be subject to personal jurisdiction in one of those states, then this modest pleading rule would have the salutary

benefit of preventing frivolous filings. It also prevents subjecting the foreign defendant to a "Catch-22" in which it must either appear in a forum lacking even a plausible basis for personal jurisdiction or suffer a default.

c. Then there is the Federal Circuit's concern that requiring plaintiffs to plead satisfaction of Rule 4(k)(2)(A) would foreclose alternative pleading under Rule 8(d)(2). *See Touchcom*, 574 F.3d at 1415. That is, the Federal Circuit has asserted that requiring a plaintiff to plead all the elements of Rule 4(k)(2) would prevent the plaintiff from also arguing in the alternative "that the defendant is subject to jurisdiction in the state in which the court resides." *Id*.

The Federal Circuit is incorrect. There is no logical reason why a plaintiff cannot plead that the defendant is subject to personal jurisdiction in the forum state or, alternatively, in no *other* state. Indeed, the government did exactly that in *Swiss American Bank*. 191 F.3d at 38 ("The government claims, in the alternative, that the district court possessed *in personam* jurisdiction under Rule 4(k)(2)."). *Swiss American Bank*'s rule thus does nothing to prevent alternative pleading. But it does prevent plaintiffs from fabricating jurisdiction under Rule 4(k)(2) by intentionally concealing a basis for jurisdiction in another court. For that reason and others, it should be the law of the land.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20817

NAGRAVISION SA,

Plaintiff - Appellee

v.

GOTECH INTERNATIONAL TECHNOLOGY LIMITED; ZHUHAI GOTECH INTELLIGENT TECHNOLOGY COMPANY LIMITED,

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Texas

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Before REAVLEY, SOUTHWICK, and HAYNES, Circuit Judges.

REAVLEY, Circuit Judge:

Nagravision SA ("Nagravision") filed suit against Zhuhai Gotech Intelligent Technology Co. Ltd. and Gotech International Technology Ltd. (collectively, "Gotech") in the Southern District of Texas, alleging violations of the Digital Millennium

Copyright Act ("DMCA") and the Federal Communications Act ("FCA").[1] Nagravision is a Swedish company, Gotech Chinese. Gotech knowingly chose to ignore the lawsuit and even the ensuing $100 million-plus default judgment. It did nothing at all until Nagravision took its judgment to a Hong Kong court, initiated enforcement proceedings, and succeeded in freezing Gotech's assets. Then Gotech decided to litigate in the Southern District of Texas after all, filing a motion under Rule 60(b) for relief from the default judgment. The district court denied that motion, and Gotech appeals. We affirm.

Gotech moved under Rule 60(b)(1) and Rule 60(b)(4), but only its arguments pertaining to the latter rule merit discussion.[2] Under Rule 60(b)(4), a judgment must be set aside if it is void. *Recreational Props., Inc. v. Sw. Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986). Gotech asserts that the judgment is void for a plethora of reasons. We examine each one.

(1) Standing. Gotech contends that Nagravision lacked standing to bring its claims, rendering the judgment void. Gotech is incorrect. Nagravision is a provider of security technology, including technology supporting subscription-based television providers, and this lawsuit is based on Gotech's sophisticated-but-illegal soft- and hardware that both steals Nagravision technology and defeats

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[1] A third defendant, Globalsat International Technology Ltd. is not a party to the appeal.

[2] Gotech's willful default precludes relief under Rule 60(b)(1). *See, e.g., In re Chinese Manufactured Drywall Prod. Liab. Litig.*, 742 F.3d 576, 594-95 (5th Cir. 2014).

Nagravision security, allowing for piracy of pay-television programming. Under these circumstances, we have no doubt that Nagravision suffered an injury traceable to Gotech's misdeeds that can be (and indeed has been) redressed through the court. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1386 (2014); *Sayles v. Advanced Recovery Sys., Inc.*, 865 F.3d 246, 250 (5th Cir. 2017). To the extent Gotech argues about statutory standing rather than Article III standing, its arguments do not advance the ball, for a lack of statutory standing would not render the judgment void. *See Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 409 (5th Cir. 2008) ("This question of whether or not a particular cause of action authorizes an injured plaintiff to sue is a merits question, affecting statutory standing, not a jurisdictional question, affecting constitutional standing."). And, contrary to Gotech's arguments, because Nagravision asserted its own rights and injuries, there are no issues of prudential standing.[3] *See Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015).

(2) Federal Question Jurisdiction. Nagravision based its lawsuit on violations of federal law, and subject matter jurisdiction is clearly present. *See, e.g.*, *Gilbert v. Donahoe*, 751 F.3d 303, 311 (5th Cir. 2014). Nonetheless, Gotech urges that subject matter jurisdiction is absent because the DMCA and FCA do "not apply to claimed violations of foreign intellectual property rights." This argu-

[3] We leave undecided the unbriefed question of whether the absence of prudential standing would render the judgment void.

ment about the statute's application "confuses failure to state a claim with lack of subject matter jurisdiction." *Id.*; *see also United States v. Rojas*, 812 F.3d 382, 390 (5th Cir. 2016) ("[T]he question 'whether a statute applies extraterritorially is a question on the merits rather than a question of a tribunal's power to hear the case.'" (quoting *Villanueva v. U.S. Dep't of Labor*, 743 F.3d 103, 107 (5th Cir. 2014))). The only question fit for our consideration is whether the judgment was void for lack of subject matter jurisdiction, and the answer to that question is no.

(3) Personal Jurisdiction, Lack of Proper Service. Defendants raise one argument pertaining to only one of them. Specifically, Gotech asserts that the court lacked personal jurisdiction over Zhuhai Gotech Intelligent Technology Co. Ltd for want of proper service. Rule 4 permits service on foreign defendants "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents" *and* "by other means not prohibited by international agreement, as the court orders." FED. R. CIV. P. 4(f)(1), (3). Service here was court-ordered email service under Rule 4(f)(3), and Gotech has not shown that such service is prohibited by international agreement. Service was therefore proper. Overlooking Rule 4(f)(3) entirely, Gotech argues that the service did not comply with the Hague Convention and Rule 4(f)(1). This argument misses the mark because service was not effected pursuant to the Hague Convention, and that agreement does not displace Rule 4(f)(3). *See United States v. Real Prop.*

Known As 200 Acres of Land Near FM 2686 Rio Grande City, Tex., 773 F.3d 654, 659 (5th Cir. 2014).

(4) Personal Jurisdiction, Rule 4(k)(2). Nagravision asserted personal jurisdiction solely under Rule 4(k)(2), which "provides for service of process and personal jurisdiction in any district court for cases arising under federal law where the defendant has contacts with the United States as a whole sufficient to satisfy due process concerns and the defendant is not subject to jurisdiction in any particular state." *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 650 (5th Cir. 2004). There is no dispute that Gotech's contacts with the United States, taken as a whole, are sufficient to satisfy due process concerns. The issue is whether the district court erred by finding Gotech "not subject to jurisdiction in any state's courts of general jurisdiction." FED. R. CIV. P. 4(k)(2)(A).

As an initial matter, the burden of proof to establish personal jurisdiction over the defendants rests upon the plaintiff. *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). In a case involving a default judgment allegedly rendered in the absence of personal jurisdiction, we stated that, "[o]f course, the 'burden of undermining'" a default judgment "'rests heavily upon the assailant.'" *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974) (quoting *Williams v. State of N.C.*, 325 U.S. 226, 233–34, 65 S.Ct. 1092, 1097 (1945)). More recently, however, we stated that "the question who bears the burden of proof in a Rule 60(b)(4) challenge to personal jurisdiction is one that has not been answered for this circuit." *Jackson v. FIE Corp.*, 302 F.3d 515, 520 (5th Cir. 2002). Under the rule of orderliness, the older case would govern,

United States v. Broussard, 669 F.3d 537, 554 (5th Cir. 2012), but we need not address all potential permutations of this rule to address the circumstance here. The disagreements among the circuits as to which side bears the burden of proof under Rule 60(b)(4) center on the fact that the plaintiff generally has the burden of proof as to personal jurisdiction. *See Oldfield v. Pueblo de Bahia Lora, S.A.*, 448 F.3d 1210, 1217 (11th Cir. 2009) (addressing Rule 4(k)(2)(B) and finding no personal jurisdiction due to the lack of necessary contacts); *cf. Bally Exp. Corp. v. Blaicar, Ltd.*, 804 F.2d 398, 401 (7th Cir. 1986) (noting the general rule that the plaintiff has the burden of proving jurisdiction but determining that the burden should be on the defendant to prove lack of jurisdiction in a Rule 60(b)(4) context).

In this case, we have a very specific question of who bears the burden of proof when a Rule 60(b)(4) challenge is made solely on the argument that the requirement of Rule 4(k)(2)(A)—that defendant is not subject to jurisdiction in any state's courts of general jurisdiction—is not met. Given our holding in *Adams* that plaintiffs do not have a general burden to negate jurisdiction in every state, the burden to establish that there was a state meeting the criteria necessarily must fall on the defendant. 364 F.3d at 651 ("Rather, so long as a defendant does not concede to jurisdiction in another state, a court may use 4(k)(2) to confer jurisdiction.")

Thus, Nagravision had the initial burden to plead and prove the requisite contacts with the United States and plead Rule 4(k)(2)'s applicability (though no need for "magic words"), but it had no burden to negate jurisdiction in every state. Be-

tween Nagravision's allegations, the evidence attached to its motion for default judgment, and our holding in *Adams*, there is no doubt that the district court correctly (if only impliedly) found that Nagravision had met its burden giving the district court the personal jurisdiction over Gotech necessary to render the default judgment. *See Sys. Pipe & Supply, Inc. v. M/V VIKTOR KURNATOVSKIY*, 242 F.3d 322, 324 (5th Cir. 2001) (holding that, because "a judgment entered without personal jurisdiction is void," district courts have the duty to independently confirm their "power to enter a valid default judgment"); *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 500 (5th Cir. 2015) (explaining that, in considering whether to enter a default judgment, evidence can be used to further support allegations in the complaint).

The burden then shifted to Gotech when it challenged the judgment to do more than just criticize Nagravision's complaint. Gotech had to affirmatively establish that the court lacked personal jurisdiction under 4(k)(2) because there was a state where its courts of general jurisdiction could properly exercise jurisdiction over it. *See Adams*, 364 F.3d at 650. Gotech did nothing of the kind. At most, it alleged that California was a state of such jurisdiction, but it did nothing to *prove* that the district court's implied finding was wrong making the judgment void. Accordingly, the district court did not err in denying the Rule 60(b) motion.

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The judgment is AFFIRMED.
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APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NAGRAVISION SA, Plaintiff, vs. ZHUHAI GOTECH INTELLIGENT TECHNOLOGY CO. LTD.; GOTECH INTERNATIONAL TECHNOLOGY LTD.; GLOBALSAT INTERNATIONAL TECHNOLOGY LTD.; and DOES 1-12 Defendants.	§ § § § § § § § § § § § § § § § §	CIVIL ACTION NO. 4:15-CV-0403

FINAL JUDGMENT AND PERMANENT INJUNCTION

1. Plaintiff Nagravision SA ("Nagravision") filed this case against Defendants Zhuhai Gotech Intelligent Technology Co. Ltd. ("Zhuhai Gotech"), Gotech International Technology Ltd. ("Gotech"), and Globalsat International Technology Ltd. ("Globalsat" and together with Zhuhai Gotech and Gotech, "Defendants") for providing products and services that are designed for and used for circumventing the Nagravision security technology and receiving the encrypted satellite broadcasts of copyrighted television programming provided by customers of

Nagravision without paying the required subscription fees.

2. Defendants have been properly served with Nagravision's summons and amended complaint (Dkts. 18-19, 24), but failed to file an answer, responsive pleading, or otherwise defend the action in the time allowed. The Court has therefore entered default against Defendants. (Dkts. 22, 27.) Nagravision submitted evidence that Defendants are not infants, incompetent, or on active duty with the military or otherwise exempted under the Servicemembers' Civil Relief Act.

3. As a result of Defendants' failure to answer, or otherwise appear in this action, the Court accepts as true the following well-pleaded allegations in Nagravision's amended complaint:

a. Nagravision provides security technology to several prominent broadcasters in the pay-television industry, which ensures secure access to their subscription-based television services. Nagravision's customers serve markets globally, including DISH Network in the United States and Telefonica and Claro TV Brazil in Latin America. (Am. Compl. ¶¶ 12, 22.)

b. Pay-television broadcasters that use the security technology of Nagraivion transmit their signal to subscribers in an encrypted format. To receive the signal, subscribers are required to purchase or lease from the broadcaster a receiver paired with a smart card, along with a programming subscription package. Viewing rights vary based on the services purchased from the pay-television broadcaster. *(Id.* ¶ 13.)

c. Nagravision designs and licenses software incorporated into the receivers and smart cards, and also manufactures smart cards. The smart card is used to (i) manage, store, and communicate to the receiver the subscriber's right to decrypt specific channels based on his subscription plan, and (ii) decrypt the encrypted control words or "keys" required to unlock and view the channels for which the subscriber has purchased access. *(Id.* ¶ 14.)

d. Nagravision's control words are transmitted to subscribers in the encrypted audio and video streams of the pay-television broadcaster. Control words are channel specific and change automatically about every few seconds. The control words are double protected by being delivered in encrypted packets called "entitlement control messages" ("ECMs"). The keys used to decrypt ECMs, called "transmission keys", are stored in the subscriber's smart card. *(Id.* ¶ 15.)

e. When a subscriber wants to view a specific channel, the receiver obtains the ECM containing the encrypted control word and forwards it to the smart card. The smart card uses its current transmission key to decrypt the ECM. The smart card then looks in its rights database to confirm the subscriber purchased a subscription to view the programming the control word will decrypt. If the rights match, the smart card forwards the unencrypted control word to the receiver, where the control word decrypts the broadcast. *(Id.* ¶ 16.)

f. "Internet key sharing" ("IKS") is a form of pay-television piracy involving unauthorized harvesting and redistribution of Nagravision's control

words. Nagravision's control words are obtained by purchasing a subscription with the pay-television broadcaster, and using a genuine smart card activated on that subscription to decrypt ECMs containing the control words. Once decrypted, control words are sent from the smart card to a computer server, called an "IKS server", where they are saved in the server's memory or cache. *(Id.* ¶ 17.)

g. Nagravision control words are distributed from the IKS server to end users. End users access the IKS server with an unauthorized receiver connected to the Internet. When the end user tunes to a channel, the unauthorized receiver requests the control word for that channel from the IKS server. The IKS server sends the control word over the Internet to the unauthorized receiver, allowing the end user to decrypt the channel without purchasing a subscription from the pay-television broadcaster. *(Id.* ¶ 18.)

h. Defendants manufacture and distribute unauthorized receivers under brand names including Globalsat, AZAmerica, NAZABox, Captiveworks, and Limesat, among them the Globalsat GS-111 and GS-300, AZAmerica S1005, NAZABox NZ S-1010, Captiveworks CW-600S, CW-650S, CW-700S, CW-800S, 900 HD, and LimesatUltra. *(Id.* ¶ 21.)

i. Defendants' Globalsat, AZAmerica, and NAZABox receivers are capable of circumventing Nagravision's security system and intercepting the subscription-based television programming provided by Nagravision's customers in Latin America,

Telefonica and Claro TV Brazil. Defendants' Limesat and Captiveworks receivers can be used to circumvent Nagravision's security system and intercept the subscription-based television programming of DISH Network, which is Nagravision's customer in the United States. Defendants imported and sold Limesat and Captiveworks receivers to distributors located in the United States. *(Id.* ¶¶ 22, 28.)

j. Defendants' unauthorized receivers contain multiple hardware and software components that are unnecessary for receiving unencrypted satellite broadcasts, but are essential for decrypting broadcasts protected by the Nagravision security system. The components include proprietary Nagravision code taken from the ROM and EEPROM of a pay-television provider's smart card, decryption keys and a decryption algorithm used in Nagravision's security system, and other design elements relating to pay-television piracy. *(Id.* ¶¶ 23, 29-30.)

k. Defendants operate an IKS service from servers located in the United States that are used to distribute Nagravision's control words to end users of their Globalsat, AZAmerica, and NAZABox receivers. The servers involved are: (i) "authentication servers", which confirm the end user is permitted to access the IKS service and provide information to connect to additional servers that deliver Nagravision's control words; and (ii) "control word servers", which function as a cache by storing Nagravision's control words and also a front end by transmitting the control words from the cache to end users requesting control words through their unauthorized receiver. Defendants developed the control word sharing technology and assembled the

IKS servers used to support their IKS service. *(Id.* ¶¶ 24-26, 32, 38.)

l. Defendants' control word sharing technology, services, and unauthorized receivers are primarily designed and produced to circumvent Nagravision's security technology, have no commercially significant purpose or use other than circumventing Nagravision's security technology, and are primarily of assistance in the unauthorized decryption of satellite television broadcasts protected by Nagravision's security technology. Defendants assisted others to receive Nagravision's control words and satellite television broadcasts protected by Nagravision's security technology, without authorization and for their own benefit, by having provided IKS services and unauthorized receivers. *(Id.* ¶¶ 33, 39, 43.)

m. Defendants intended for their control word sharing technology, services, and receivers to be used in the unauthorized decryption of satellite television broadcasts protected by Nagravision's security technology, or at least knew or should have known that the foregoing are primarily used for this purpose. *(Id.* ¶¶ 35, 40, 44.)

n. Defendants' acts violate the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201(a)(2), and the Federal Communications Act ("FCA"), 47 U.S.C. §§ 605(e)(4) and 605(a), as alleged in Counts I, II and III of Nagravision's amended complaint. (*Id.* ¶¶ 31-45.)

o. Nagravision elected to recover statutory damages in the amount of $200 for each of Defendants' violations of the DMCA. The damages sought

by Nagravision are at the very bottom of the range authorized by 17 U.S.C. § 1203(c)(3)(A), substantially less than the $10,000 per violation statutory minimum allowed by the FCA, in line with statutory damages awarded in similar cases, and reasonable given Defendants' misconduct. Nagravision submitted evidence that Defendants provided their IKS services to at least 501,985 end users, and distributed at least 7,274 Limesat and Captiveworks receivers, for a combined total of 509,259 violations of the DMCA.

II. FINAL JUDGMENT AND PERMANENT INJUNCTION

Upon default of Defendants, and having reviewed the record, evidence, and applicable law in this matter, the Court hereby ORDERS as follows:

1. Defendants, and any of their officers, agents, servants, employees, or other persons acting in active concert or participation with any of the foregoing that receives actual notice of the order, is permanently enjoined from:

a. Manufacturing, importing, assembling, selling, distributing, offering to the public, providing, or trafficking in: (a) any product, technology, or service used in acquiring or distributing Nagravision's control words; (b) Limesat receivers; (c) Captiveworks receivers; or (d) any other service, technology, product, equipment, device, component, or part thereof that:

i. is primarily designed or produced for circumventing Nagravision's security system or any other technological measure deployed by

Nagravision that controls access to, copying, or distribution of copyrighted works;

ii. has only a limited commercially significant purpose or use other than to circumvent Nagravision's security system or any other technological measure deployed by Nagravision that controls access to, copying, or distribution of copyrighted works;

iii. is marketed for use in circumventing Nagravision's security system or any other technological measure deployed by Nagravision that controls access to, copying, or distribution of copyrighted works; or

iv. is primarily of assistance in the unauthorized decryption of direct-to-home satellite services protected by the Nagravision security technology.

b. Receiving or assisting others in receiving Nagravision's control words or satellite transmissions of television programming protected by Nagravision's security technology without authorization.

2. Third parties providing any form of web, server, domain registration, file hosting, or content delivery network services used by Defendants in connection with any of the activities enjoined in paragraph 1, and who receive actual notice of this Order, are enjoined from providing such services to Defendants in connection with any of the activities enjoined under paragraph 1.

3. Judgment is entered in favor of Nagravision on Counts I through III of the amended complaint,

which allege violations of the DMCA, 17 U.S.C. § 120l(a)(2), and FCA, 47 U.S.C. §§ 605(e)(4) and 605(a).

4. In accordance with 17 U.S.C. § 1203(c)(3)(A), statutory damages of $101,851,800 are awarded to Nagravision. The statutory damages are calculated based on Defendants' 509,259 violations of section 120l(a)(2) of the DMCA at $200 per violation.

5. In accordance with 17 U.S.C. § 1203(b)(2), Defendants, and any of their officers, agents, servants, employees, or other persons acting in active concert or participation with any of the foregoing that receives actual notice of the order, must tum over for impoundment all items listed in paragraph 1(a), and any source code or other components of the receivers that incorporate any portion of Nagravision's security technology. The items must be delivered to Nagravision's counsel of record no later than five court days following service of this order.

6. In accordance with 17 U.S.C. § 1203(b)(6), all items that Nagravision receives pursuant to paragraph 5 may be destroyed. Destruction may commence after the time for filing an appeal from this order has passed, provided that no such appeal has been filed.

7. The registries and registrars holding or listing the domain names gotechcn.com and goosat.com, upon receiving actual notice of this Order, shall (i) temporarily disable the domain names through a registry hold or otherwise, and make them inactive and non-transferable; and (ii) transfer these domain

names to Nagravision, including changing the registrar of record to the registrar selected by Nagravision.

8. The Court retains jurisdiction over this action for a period of two years for purposes of enforcing this final judgment and permanent injunction.

SIGNED on this 18th day of August, 2016

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States Distict Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NAGRAVISION SA, Plaintiff, vs. ZHUHAI GOTECH INTELLIGENT TECHNOLOGY CO. LTD.; GOTECH INTERNATIONAL TECHNOLOGY LTD.; GLOBALSAT INTERNATIONAL TECHNOLOGY LTD.; and DOES 1-12 Defendants.	§ § § § § § § § § § § § § § § § §	CIVIL ACTION NO. 4:15-CV-0403

ORDER DENYING MOTION OF DEFENDANTS ZHUHAI GOTECH INTELLIGENT TECHNOLOGY LTD. AND GOTECH INTERNATIONAL TECHNOLOGY LTD. TO VACATE DEFAULT JUDGMENT AND DISMISS THE COMPLAINT

Presently pending before this Court in the above-captioned case is a motion by the defendants Zhuhai Gotech Intelligent Technology Ltd. ("Zhuhai Gotech") and Gotech Intelligent Technology Ltd. ("Gotech HK," and together with Zhuhai Gotech, "defendants") for an order pursuant to (*a*) Fed. R. Civ. P. ("FRCP") 60(b), vacating the Final Judgment

and Permanent Injunction entered by this Court on August 18, 2016 (the "Default Judgment") (Dkt. 29), and (*b*) FRCP 12(b)(1)&(2), dismissing the Amended Complaint (Dkt. 12) (the "Motion to Vacate").

Having considered the submissions on both sides, the Court finds that the Default Judgment is sustained. The defendants have failed to establish entitlement to relief under FRCP 60(b)(1); (b)(4) and 4(k)(2). *See Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974); and *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2004).

It is so Ordered.

SIGNED on this 22nd day of November, 2016

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States Distict Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NAGRAVISION SA, Plaintiff, vs. DOES 1-12, et al. Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 4:15-CV-403

ORDER DENYING RECONSIDERATION OF DEFAULT JUDGMENT

The defendants request reconsideration of the Court's entry of Default Judgment in this case. The Court has reviewed the defendants Reply Memorandum (Dkt. No. 42), and determines that the motion should be Denied.

It is so **ORDERED**.

SIGNED on this 6th day of December, 2016

s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States Distict Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20817

NAGRAVISION SA,

Plaintiff - Appellee

v.

GOTECH INTERNATIONAL TECHNOLOGY LIMITED; ZHUHAI GOTECH INTELLIGENT TECHNOLOGY COMPANY LIMITED,

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 2/7/18, 5 Cir. _____, _____ F.3d _____)

Before REAVLEY, SOUTHWICK, and HAYNES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc,

(FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley

UNITED STATES CIRCUIT JUDGE