No. 18-119

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit erred in holding that Petitioners had proffered insufficient evidence of its ties to California to justify overturning the default judgment against Petitioners.

RULE 29.6 STATEMENT

Nagravision, SA is a wholly owned subsidiary of Kudelski S.A.

Kudelski S.A. is a publicly traded company on the SIX Swiss Exchange. No other publicly held entity owns 10% or more of the stock of Nagravision SA or Kudelski S.A.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

Petitioners Gotech International Technology Limited and Zhuhai Gotech Intelligent Technology Company Limited (collectively, "Gotech") operate an illegal computer network that facilitates the piracy of paid television. Gotech's network illegally captures and rebroadcasts decryption "keys" processed and secured by Respondent Nagravision, SA ("Nagravision"). This allows end users to circumvent Nagravision's security technology and therefore watch copyrighted television shows without paying for them.

Nagravision sued Gotech based on this illegal activity in the Southern District of Texas. Nagravision's complaint alleged, in relevant part, that "[u]pon information and belief, this Court has personal jurisdiction over Defendants under Rule 4(k)(2) of the Federal Rules of Civil Procedure." DE 12 ¶ 10. That Rule provides:

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

Gotech did not answer the complaint and the District Court entered a default judgment.

Gotech then filed a motion to vacate, alleging, in relevant part, that the District Court did not have personal jurisdiction because the requirement in Rule 4(k)(2)(A) that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction" was not satisfied. But Gotech did not present any evidence that it *would* be subject to jurisdiction in any state court. Instead it merely pointed to scattered allegations in Nagravision's filings that ostensibly established a connection to California—while simultaneously denying those very allegations. The District Court denied the motion to vacate.

The Fifth Circuit affirmed. The court concluded that "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')." Pet. App. 6a. Because Nagravision had expressly "plead[ed] Rule 4(k)(2)'s applicability," the "burden then shifted to Gotech" to prove that Rule 4(k)(2)(A)'s requirement that the "defendant is not subject to jurisdiction in any state's courts of general jurisdiction" was *not* satisfied. Pet. App. 6a-7a. The court concluded that Gotech failed to meet this burden: "At most, it alleged that California was a state of such jurisdiction, but it did nothing to *prove*" this fact. Pet. App. 7a.

Gotech's petition for certiorari challenges that decision. The petition should be denied. Nothing in the Fifth Circuit's opinion remotely suggests that this case is a candidate for Supreme Court review.

Gotech contends that this case presents the following question: "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.'" Pet. i. Gotech asserts that the Fifth Circuit answered that question "no," in conflict with two other circuits that answered that question "yes."

Gotech totally misreads the Fifth Circuit's decision. The Fifth Circuit actually answered that question "yes," thus aligning itself with, rather than splitting from, the other circuits. The Fifth Circuit held that *if* the plaintiff makes such an allegation, *then* the burden shifts to the defendant to proffer evidence that jurisdiction is proper in another state—a rule that is consistent with every other circuit's decision. The Fifth Circuit's actual holding was that because Nagravision had indeed made such an allegation in its complaint, Gotech's motion to vacate the default judgment did not proffer sufficient evidence to justify disturbing that judgment. That exceedingly factbound decision does not conflict with the decision of any other circuit and does not warrant Supreme Court review.

Further, it is difficult to imagine a less suitable vehicle than this case to review the question presented. Even setting aside the fact that the Fifth Circuit held the exact opposite of what Gotech claims it held, this case has a plethora of vehicle problems, all of which stem from Gotech's litigation errors below:

- Gotech did not file an answer to the complaint. Therefore, this case arises in the context of a motion to vacate a default judgment. By contrast, every other case in the purported split arose in the context of

defendants who filed timely responsive pleadings. That distinction matters because, as Nagravision has consistently argued, the standard for overturning a default judgment is different from the standard for dismissing a complaint.

- In its motion to vacate the default judgment, Gotech did not adequately support its assertion that personal jurisdiction would have been appropriate in California. The Fifth Circuit's decision was based on the inadequacy of Gotech's filing: the court held that Gotech had merely alleged, but had not proved, that jurisdiction was proper in California. Pet. App. 7a. Thus, although the oft-stated premise of Gotech's petition is that personal jurisdiction *would have* been proper in California, the lower courts did not decide that question because of Gotech's failure to argue this point adequately. Moreover, Gotech's premise is wrong. Personal jurisdiction would *not* have been proper in California. Nagravision could, and indeed did, plead in good faith that the District Court had jurisdiction under Rule 4(k)(2) because Gotech lacked minimum contacts with California or any other state.
- Gotech took the position below that its explicit acquiescence to jurisdiction in California was sufficient to show that jurisdiction in California was proper. However, the lower courts did not resolve

> that issue because Gotech included its statement acquiescing to jurisdiction in a "reply brief" in support of its motion to vacate the default judgment filed eight days after the motion had been denied.

To sum up, Gotech is in its current predicament because it did not file any response to the complaint, then did not file an adequate motion to vacate, then did not acquiesce to jurisdiction in California until yet another untimely filing. Each of Gotech's mistakes results in procedural complexities that render this case a poor vehicle. If the Court wishes to construe Rule 4(k)(2), it should await a case in which the petitioner adequately preserves the record.

STATEMENT

Nagravision designs technology that ensures secure access to subscription-based television services. DE 12, ¶ 12. Pay-television broadcasters that implement Nagravision's technology transmit their signal to subscribers in encrypted form. *Id.* ¶ 13. Subscribers purchase or lease from the broadcaster a receiver paired with a "smart card." *Id.* Nagravision designs software for receivers and smart cards, and also manufactures smart cards. *Id.* ¶ 14. To give subscribers access to the television content they purchase, Nagravision transmits encrypted "control words" or "keys" that can be used to decrypt broadcasts. *Id.* ¶¶ 15-16.

Gotech engages in a form of pay-television piracy known as "Internet key sharing" or "IKS," which involves the unauthorized harvesting and distributing

of Nagravision's control words to so-called "IKS servers." *Id.* ¶ 17. End users can access these servers and obtain control words, so as to decrypt subscription-based television channels without paying for them. *Id.* ¶ 18. Gotech operates a network of IKS servers that are used to distribute Nagravision's control words to unauthorized receivers. *Id.* ¶ 24. These servers include both "authentication servers," which authenticate that the end user is authorized to use Gotech's illegal service, and "control word servers," which illegally store and transmit the control words. *Id.*

Nagravision's investigation revealed that Gotech operated at least 12 servers in the United States. DE 28-1 at 18. Nagravision traced the IP addresses of these 12 servers to four Internet Service providers (ISPs). Eight servers were tied to an ISP in Las Vegas, Nevada; two were tied to an ISP in Atlanta, Georgia; one was tied to an ISP in Providence, Utah; and one was tied to an ISP in Los Angeles, California. DE 28-3 ¶ 12. Of the 12 servers, 6 were located in California, while the others were dispersed in Colorado, Illinois, and the D.C. area. DE 28-4, Exs. 7-9, 11-19; DE 40 at 7-8.

Nagravision sued Gotech in the Southern District of Texas, asserting claims under the Digital Millennium Copyright Act and the Federal Communications Act. The complaint included the following allegation regarding personal jurisdiction:

> Upon information and belief, this Court has personal jurisdiction over Defendants under Rule 4(k)(2) of the Federal Rules of Civil Procedure. Defendants use a network of servers

> located in various cities across in the United States to engage in the unauthorized distribution of Nagravision's control words in violation of the DMCA and FCA. In addition, Defendants import their unauthorized receivers to distributors in the United States, after which the products are sold to end users throughout the United States. Exercising jurisdiction over Defendants is consistent with the Constitution and laws of the United States.

DE 12 ¶ 10.

Gotech did not answer and the District Court entered a default judgment. After the default judgment was entered, Gotech finally appeared and filed a motion to vacate. Gotech's motion argued, among other things, that the District Court lacked personal jurisdiction under Rule 4(k)(2). But Gotech did not actually argue that it was "subject to jurisdiction in any state's court of general jurisdiction," which would foreclose the exercise of jurisdiction under Rule 4(k)(2)(A). Nor did it proffer any evidence that jurisdiction was proper in California or any other state. Instead, Gotech pointed to allegations in Nagravision's complaint and a declaration submitted by Nagravision that supposedly established a connection to California. It stated that if these allegations "were assumed to be true, jurisdiction would lie in California"—but it nonetheless "dispute[d] the truth" of those allegations. DE 34-1 at 15-16.

In its response brief, Nagravision pointed out that Gotech did not "*prove* that personal jurisdiction is proper in California"—to the contrary, by expressly

denying Nagravision's allegations, Gotech was "effectively denying personal jurisdiction in California." DE 40 at 6. Nagravision also argued that Gotech's "contacts with the United States as a whole" sufficed to establish jurisdiction under Rule 4(k)(2), given Gotech's connections to ISPs in Nevada and Utah and to servers in Illinois, Colorado, California, and the District of Columbia area. *Id.* at 7-8.

The District Court denied the motion to vacate. Pet. App. 18a-19a. Eight days after the District Court's order, Gotech submitted a filing styled as a "reply brief" in support of its motion to vacate, which had already been denied. This new brief declared, for the first time, that Gotech "consent[s] to personal jurisdiction in California and will not challenge personal jurisdiction if [Nagravision] recommences this action against them in that forum." DE 42 at 3. The District Court declined to reconsider its order in light of this filing. Pet. App. 20a.

The Fifth Circuit affirmed the denial of the motion to vacate. The Fifth Circuit concluded that "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." Pet. App. 6a. It found that because the District Court "impliedly[] found that Nagravision had met its burden," "[t]he burden then shifted to Gotech when it challenged the judgment to do more than just criticize Nagravision's complaint." Pet. App. 7a (parenthesis omitted). Gotech failed to meet this burden: "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." *Id.*

ARGUMENT

Nothing about this case warrants Supreme Court review. There is no circuit split: the Fifth Circuit's decision aligns perfectly with the allegedly conflicting decisions from the First and Fourth Circuits. There are also an array of vehicle problems stemming from Gotech's repeated failure to preserve the record in the district court. Finally, the Fifth Circuit's factbound holding is correct.

I. THERE IS NO CIRCUIT SPLIT.

Gotech claims that the Fifth Circuit's opinion conflicts with *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), and the Fourth Circuit's decisions in *Base Metal Trading, Ltd. v. OJSC 'Novokuznetsky Aluminum Factor,'* 283 F.3d 208 (4th Cir. 2002), and *Grayson v. Anderson*, 816 F.3d 262, 271 (4th Cir. 2016). According to Gotech, those 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." Pet. 12. By contrast, Gotech contends, the Fifth Circuit "rejected petitioners' argument under *Swiss American Bank*" and found that a plaintiff has no such pleading burden. Pet. 14.

Gotech's argument is perplexing. The Fifth Circuit did not "reject petitioners' argument under *Swiss*

American Bank." It did not mention *Swiss American Bank*. And it actually did require a plaintiff to plead personal jurisdiction under Rule 4(k)(2). Thus, the rule adopted by the Fifth Circuit is identical to the rule adopted by the First and Fourth Circuits.

A. The Fifth Circuit's decision does not conflict with *Swiss American Bank*.

The decision below is in perfect harmony with *Swiss American Bank*. In *Swiss American Bank*, the government brought suit against a foreign entity in federal court, alleging jurisdiction under Rule 4(k)(2). The district court dismissed the lawsuit for lack of personal jurisdiction, holding the government had not proven that the defendant was not subject to jurisdiction in any state's courts of general jurisdiction, as required by Rule 4(k)(2)(A). 191 F.3d at 39. The district court reasoned that the government "failed to plead or proffer evidence" establishing "the defendants' lack of jurisdictionally meaningful contacts throughout the fifty states." *Id.* at 42.

The First Circuit reversed. It held that Rule 4(k)(2) does not "require negation of personal jurisdiction over the defendant in any state court," given that such a requirement "requires a plaintiff to prove a negative fifty times over." *Id.* at 40. The court thus adopted a rule that the 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." *Id.* at 41. If the plaintiff does so, "the burden shifts to the defendant to produce evidence which, if credited, would show either that one or more specific states exist in which it

would be subject to suit or that its contacts with the United States are constitutionally insufficient." *Id.* "Should the defendant default on its burden of production, the trier may infer that personal jurisdiction over the defendant is not available in any state court of general jurisdiction." *Id.* at 42.

Gotech characterizes *Swiss American Bank* as requiring a plaintiff to plead that all elements of Rule 4(k)(2), including Rule 4(k)(2)(A), are satisfied. Pet. 12. But it overlooks that the Fifth Circuit adopted the exact same rule. The Fifth Circuit held:

> 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.

Pet. App. 6a. Thus, the Fifth Circuit explicitly required a plaintiff to "plead Rule 4(k)(2)'s applicability." Recall that Rule 4(k)(2) states:

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

Rule 4(k)(2) applies only if Rule 4(k)(2)(A) *and* Rule

4(k)(2)(B) are satisfied. So "pleading Rule 4(k)(2)'s applicability" *means* pleading both Rule 4(k)(2)(A)'s applicability and Rule 4(k)(2)(B)'s applicability. Thus, the Fifth Circuit actually did require plaintiffs to plead Rule 4(k)(2)(A)'s applicability.

Moreover, in context, the Fifth Circuit's reference to "plead[ing] Rule 4(k)(2)'s applicability" could only have been a reference to pleading the applicability of Rule 4(k)(2)(A). The Fifth Circuit imposed a burden *both* to "plead and prove the requisite contacts with the United States" *and* to "plead Rule 4(k)(2)'s applicability." Pet. App. 6a. The Fifth Circuit's requirement to "plead and prove the requisite contacts with the United States," *id.*, is a reference to Rule 4(k)(2)(B), which requires a showing that "exercising jurisdiction is consistent with the United States Constitution and laws." Thus, the Fifth Circuit's additional requirement to plead—though not prove—the "applicability of Rule 4(k)(2)" can only *possibly* be a reference to Rule 4(k)(2)(A).

Nagravision satisfied the Fifth Circuit's requirement. It pleaded: "Upon information and belief, this Court has personal jurisdiction over Defendants under Rule 4(k)(2) of the Federal Rules of Civil Procedure." DE 12 ¶ 10. Gotech states that Nagravision "did not allege that Rule 4(k)(2)(A) was satisfied," Pet. 3, but this makes no sense. Alleging that "this Court has personal jurisdiction over Defendants under Rule 4(k)(2)" *means* that Rule 4(k)(2)(A) is satisfied.

To be sure, in the lower courts, Nagravision did argue that it was not required to plead *anything* in the

complaint regarding personal jurisdiction. *E.g.*, DE 40 at 5-6. But it did, indeed, include such an allegation in its complaint, and the Fifth Circuit held that such an allegation in the record was necessary—and that Nagravision satisfied that requirement. *That* is the holding under review, and it does not conflict with *Swiss American Bank*.

The Fifth Circuit ruled against Gotech because, even in seeking to vacate the default judgment, Gotech did not adequately support its contention that jurisdiction was proper in a particular state. The court held that because Nagravision had *pleaded* the applicability of Rule 4(k)(2), Nagravision had "no burden to negate jurisdiction in every state," and "[t]he burden then shifted to Gotech when it challenged the judgment to do more than just criticize Nagravision's complaint." Pet. App. 6a-7a. Gotech failed to meet this burden: "At most, it alleged that California was a state of such jurisdiction, but it did nothing to *prove*" that allegation. *Id.* at 7a.

The analysis would have been identical in the First Circuit. As noted above, *Swiss American Bank also* held that the plaintiff has no burden to negate jurisdiction in every state. Once a plaintiff pleads the applicability of all provisions of Rule 4(k)(2), "the burden shifts to the defendant to produce evidence which, if credited, would show either that one or more specific states exist in which it would be subject to suit or that its contacts with the United States are constitutionally insufficient." 191 F.3d at 41. "Should the defendant default on its burden of production, the trier may infer that personal jurisdiction over the

defendant is not available in any state court of general jurisdiction." *Id.* at 42. That is precisely what happened in this case: Gotech defaulted on its burden of production, even in its motion to vacate the default judgment, and the trial court therefore found that Rule 4(k)(2) applied. Because the Fifth Circuit's analysis was identical to the analysis in *Swiss American Bank*, it does not conflict with *Swiss American Bank*.

B. The Fifth Circuit's decision does not conflict with the Fourth Circuit's decisions in *Base Metal* and *Grayson*.

The decision below also does not conflict with *Base Metal* or *Grayson*. Those decisions, like *Swiss American Bank*, demonstrate that a plaintiff must at least *argue* that Rule 4(k)(2) is satisfied. The Fifth Circuit adopted the same rule and held that Nagravision satisfied that rule.

Base Metal, like *Swiss American Bank*, was a case in which the plaintiff appealed from a district court order dismissing a case for lack of personal jurisdiction. In *Base Metal*, the plaintiff did not plead that jurisdiction was proper under Rule 4(k)(2). To the contrary, it pleaded the exact opposite: that personal jurisdiction *was* proper in Maryland, and that it was therefore *not* the case that no state would have jurisdiction, as required by Rule 4(k)(2)(A). 283 F.3d at 215. Furthermore, in other pending cases, the plaintiff simultaneously contended that personal jurisdiction was proper in other states. *Id.* at 212. The district court dismissed the case for lack of personal jurisdiction, finding that exercising jurisdiction under

Rule 4(k)(2) would "usurp the opportunity for sister federal courts to exercise jurisdiction which they may decide they have." *Id.* (internal quotation marks omitted). The Fourth Circuit affirmed, emphasizing that the plaintiff "continues to assert that personal jurisdiction … is proper in Maryland as well as in other states," and "to determine that another state lacks jurisdiction would require us to decide a question currently pending before at least one of our sister circuits." *Id.* at 215.

Nothing about this holding conflicts with the decision below. The Fourth Circuit held that if a plaintiff *pleads* that jurisdiction is proper in a particular state—and hence *not* proper under Rule 4(k)(2)—it cannot simultaneously argue that jurisdiction is proper under Rule 4(k)(2). That is consistent with the Fifth Circuit's decision, which requires a plaintiff to plead Rule 4(k)(2)'s applicability.

Similarly, *Grayson* is consistent with the decision below. In *Grayson*, the Fourth Circuit affirmed the dismissal of a complaint on personal jurisdiction grounds, emphasizing that the plaintiff had not even argued—indeed, had not even *mentioned*—that no state could exercise personal jurisdiction over the defendant. 816 F.3d at 271. Again, in this case, the Fifth Circuit held that a plaintiff must plead Rule 4(k)(2)'s applicability, and Nagravision satisfied that requirement.

C. The Federal Circuit's decision in *Touchcom* confirms that Gotech's claim of a circuit split is wrong.

Gotech's claim of a circuit split hinges primarily on *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403 (Fed. Cir. 2009). Gotech points to language in *Touchcom* characterizing the First Circuit's approach as "'undesirable.'" Pet. 14. Gotech claims that the Fifth Circuit and the Federal Circuit have adopted the same approach to Rule 4(k)(2), and characterizes this case as a vehicle to resolve a conflict between *Touchcom* and *Swiss American Bank*. Pet. 14.

Touchcom, however, dealt with a completely different situation. In *Touchcom*, the plaintiff alleged that the Eastern District of Virginia had jurisdiction under Fed. R. Civ. P. 4(k)(1), which permits a federal court to exercise personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." 574 F.3d at 1410 (quoting Fed. R. Civ. P. 4(k)(1)(A)). The district court held that it lacked personal jurisdiction because the defendant lacked minimum contacts with Virginia. *Id.* at 1409. In the district court, the plaintiff did not argue that the court had jurisdiction under Rule 4(k)(2); it made this argument for the first time on appeal. *Id.* at 1410.

The Federal Circuit held it could consider the Rule 4(k)(2) argument for the first time on appeal. *Id.* at 1410-11. The court concluded that the district court could exercise jurisdiction under Rule 4(k)(2), notwithstanding the fact that the plaintiff had not certified or pleaded that the district court would have

jurisdiction under Rule 4(k)(2), and indeed had affirmatively argued that Virginia's state courts would have jurisdiction over the defendant. It reasoned that "[r]equiring a plaintiff to certify that a defendant is not subject to jurisdiction in any state forecloses an argument by the plaintiff that the defendant is subject to jurisdiction in the state in which the court resides." *Id.* at 1415. "An approach that forecloses alternative arguments appears to conflict with the Federal Rules of Civil Procedure." *Id.*

That holding is irrelevant to this case. Here, Nagravision did plead that the court had jurisdiction under Rule 4(k)(2). It did not plead that Texas state courts would have jurisdiction. Indeed, the *absence* of such a pleading was the very basis for Gotech's argument in the district court that the default judgment should be vacated for lack of personal jurisdiction. Gotech's argument opened as follows: "Plaintiff's Complaint failed to allege facts sufficient to establish personal jurisdiction over Defendants, which its motion for default judgment failed to cure. Plaintiff did not contend that Defendants were subject to jurisdiction under the Texas long arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, or allege that Defendants had contacts with Texas." DE 34-1 at 13.

Thus, the Federal Circuit's view that a plaintiff may simultaneously plead that jurisdiction is proper in a particular state and also rely on Rule 4(k)(2) is irrelevant to this case. In no sense did the Fifth Circuit align itself with the Federal Circuit.

D. No other circuit's decision is relevant.

Gotech also drops a footnote identifying cases from the Seventh, Ninth, Eleventh, and D.C. Circuits that have "effectively taken the Federal and Fifth Circuits' position on the question presented." Pet. 15 n.4. Those circuits actually say this:

> Constitutional analysis for each of the 50 states is eminently avoidable by allocating burdens sensibly. A defendant who wants to preclude use of Rule 4(k)(2) has only to name some other state in which the suit could proceed. Naming a more appropriate state would amount to a consent to personal jurisdiction there (personal jurisdiction, unlike federal subject-matter jurisdiction, is waivable). If, however, the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible, then the federal court is entitled to use Rule 4(k)(2).

ISI Int'l, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir. 2001); *accord Holland Am. Line v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 461 (9th Cir. 2007); *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005); *Oldfield v. Pueblo de Bahia Lora, S.A.*, 558 F.3d 1210, 1218 & n.22 (11th Cir. 2009).

These decisions say nothing about whether a plaintiff does or does not have to plead the applicability of Rule 4(k)(2). They hold, like every circuit, that the plaintiff need not conduct a state-by-state analysis of personal jurisdiction. And they take the view that if a

defendant *consents* to personal jurisdiction in a particular state, personal jurisdiction is proper there.

Those decisions are irrelevant to this case because, as explained below, Gotech did not consent to jurisdiction in California until a reply brief in support of its motion to vacate that was filed eight days after the motion to vacate was denied. They certainly do not establish any kind of circuit split in which the Fifth Circuit took sides.

II. THIS CASE IS A POOR VEHICLE.

Gotech contends that this case presents the following question: "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.'" Pet. i. As just explained, this case is not an appropriate vehicle for deciding that question because the Fifth Circuit actually did hold that plaintiffs must plead the applicability of Rule 4(k)(2), and Nagravision satisfied that requirement. But even if the Fifth Circuit had issued the holding that Gotech claims it did, this would be an inappropriate vehicle for reviewing that holding. There are several procedural complexities in this case, each attributable to Gotech's litigation errors.

A. This case arises as a challenge to a default judgment.

This case arises in a different procedural posture than all of the cases in the asserted circuit split: it arises in the context of a motion to vacate a default judgment, rather than a timely-filed challenge to personal jurisdiction. Nagravision has argued

throughout this case that the burden to overturn a *judgment* should exceed the burden to dismiss a *complaint*, based on the principle that the burden of undermining a default judgment—even rendered for lack of personal jurisdiction—"rests heavily on the assailant." Pet. App. 5a (quoting *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 154 (5th Cir. 1974), in turn quoting *Williams v. North Carolina*, 325 U.S. 226, 233-34 (1945)).

The Fifth Circuit's opinion is ambiguous on whether its decision turned on the fact that Gotech challenged personal jurisdiction after, rather than before, the district court entered its judgment. The Fifth Circuit identified conflicting circuit authority on "who bears the burden of proof in a Rule 60(b)(4) challenge to personal jurisdiction," and also pointed to "disagreements among the circuits as to which side bears the burden of proof under Rule 60(b)(4)." Pet. App. 5a-6a. It held that it "need not address all potential permutations of this rule to address the circumstance here." Pet. App. 6a.

Later in its opinion, however, the Fifth Circuit's analysis referred directly to the fact that the district court had entered a default judgment. It found that "Nagravision had the initial burden to plead and prove the requisite contacts with the United States and plead Rule 4(k)(2)'s applicability," and "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." Pet. App. 6a-7a. At that point, the "burden then shifted to Gotech," and

"[a]t most, [Gotech] 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." Pet. App. 7a. This analysis refers directly to the fact that the district court made an "implied finding," which can only occur in the context of a default judgment.

Either way, the procedural posture of this case is a serious vehicle problem. If the Fifth Circuit's analysis *did* turn on the fact that this was a challenge to a default judgment, this would be another reason there is no circuit split—no other case in the supposed split arose in the context of a default judgment.

Even if the Fifth Circuit's analysis *did not* turn on the fact that this was a challenge to a default judgment, that would still be a serious vehicle problem. The Fifth Circuit certainly did not hold that the default judgment posture was *irrelevant*; rather, it pointed to intra-circuit and inter-circuit splits on how to address such challenges and concluded that it "need not address all potential permutations of this rule to address the circumstance here." Pet. App. 6a. Nagravision is entitled to, and would, defend the judgment below on the ground that Gotech did not satisfy its burden to overcome a default judgment. There would be no way for the Court to avoid that issue: the Court could not possibly hold that the Fifth Circuit erred in upholding a default judgment without considering the standard for upholding a default judgment. If the Court deems the question presented certworthy, it should await a case arising from a timely motion to dismiss for lack of jurisdiction, which would not present this vehicle

problem.

The default judgment posture of the case leads to yet another wrinkle. Gotech asks the Court to hold that Nagravision was required to *plead in its complaint* that Rule 4(k)(2)(A) was satisfied. This is because Gotech seeks to overturn a default judgment, and therefore seeks to establish that the complaint was defective. Yet, neither the First nor the Fourth Circuits created any type of formal pleading requirement. While the First Circuit has stated that a plaintiff should "certify" compliance with Rule 4(k)(2)(A), it has not required that certification to appear in the *complaint*, as opposed to a post-complaint brief or affidavit. In the lower courts, Nagravision preserved the argument that Rule 8 does not require a plaintiff to plead personal jurisdiction in the complaint. DE 40 at 5 (citing *Stirling Homex Corp. v. Homasote Co.*, 437 F.2d 87, 88 (2d Cir. 1971)). This argument was not addressed by the lower courts, but Nagravision would be entitled to advance it as an alternative basis for affirmance, adding an additional procedural complexity to this case.

B. Whether California would have had personal jurisdiction was not decided because of Gotech's substandard filings—and is heavily disputed.

The oft-stated premise of the petition is that California would have had personal jurisdiction over Gotech. Gotech insists it had "numerous contacts with California" and that Nagravision therefore "could not plead," were it required to do so, that California lacked

personal jurisdiction. Pet. 19. Therefore, Gotech claims, it was prejudiced by the absence of its proposed pleading rule. *Id.*

The Fifth Circuit could not meaningfully consider this question because Gotech did not adequately preserve the record. Gotech's motion to vacate the default judgment included all of two sentences on its connection to California, supported by evidence exclusively taken from Nagravision's own filings. DE 34-1 at 15. Gotech then stated that it *denied* the very allegations establishing a connection to California—thus *denying*, rather than proving, personal jurisdiction. *Id.* It is thus unsurprising that the Fifth Circuit held that this deficient filing could not overcome the default judgment: Gotech merely "alleged," but did not "*prove* that the district court's implied finding was wrong." Pet. App. 7a.

But even if Gotech litigated this issue more energetically, its argument would still lack merit. Nagravision could—and indeed did—plead that the District Court had jurisdiction under Rule 4(k)(2). As Nagravision explained to the District Court in its opposition to Gotech's motion to vacate, Gotech scattered its activities across a multitude of locations, thus establishing minimum contacts with the United States as a whole. DE 40 at 7-8.

Further, those contacts do not establish minimum contacts with California or any other State. Gotech includes a series of assertions in its Statement of Facts purporting to establish its connection to California, but those assertions are in large part contrary to the factual record. For instance, Gotech asserts:

"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." Pet. 7. The document it cites for this proposition says nothing of the kind: It explains that Nagravision identified *four* ISPs, in Nevada, Utah, Colorado, and California. DE 28-3 ¶ 12. The document identifies 12 servers involved in the illegal activity, but only one out of the 12 was tied to the California ISP. *Id.*[1]

Gotech also asserts that Nagravision "discovered that [Gotech] had exported 7,274 allegedly unlawful products *exclusively* to California." Pet. 7. Gotech's own filings in the district court, however, disclaimed that these shipments were sufficient to establish personal jurisdiction. Gotech's declarant acknowledged that a "relatively few number of such receivers were shipped to California in 2012," but explained that they were "shipped FOB China"; that Gotech has no "reliable information regarding the distribution channels for their products"; that Gotech has never "marketed products to U.S. end users"; and that Gotech "did not believe the U.S. court would believe it had jurisdiction." DE 34-7, ¶¶ 16-17, 21, 36. As Nagravision explained to the Fifth Circuit, case law confirms that an FOB shipment which winds up in a

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[1] Gotech seems to have confused "ISP" (Internet Service Provider) with "IP address" (Internet Protocol address). The exhibits cited by Gotech do establish that 6 of the 12 computer servers had IP addresses in California, but the fact that non-California ISPs operate servers with California IP addresses does not show that *Gotech* targeted California to a sufficient extent to warrant the exercise of personal jurisdiction.

particular State is insufficient to establish personal jurisdiction in that State.[2] It is ironic that, having previously argued that these shipments were *insufficient* to establish personal jurisdiction, Gotech now argues that they are *sufficient*.

Gotech also claims that the district court awarded a judgment of "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." Pet. 9. Its sole citations for this assertion are Pet. App. 13a and 16a, neither of which say anything about the share of the damages award attributable to California. Gotech's assertion is also incorrect: Nagravision's damages calculation was based on sampling from server data assigned to an ISP in Nevada, based on servers in Colorado and Illinois. DE 28-3 ¶ 16; DE 28-4, Exs. 8, 13, 15. Nagravision is aware of no basis in the record for Gotech's statements.

Gotech's effort to rely on Nagravision's own statements below fares no better. Gotech's petition includes the following passage:

Respondent did not deny that it had concealed

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[2] *See* Nagravision Fifth Circuit brief at 29-30; *Aurora Corp. of Am. v. Michlin Prorpserity Co.*, No. CV 13-03516 RSWL (JCx), 2015 WL 5768340, at *6 (C.D. Cal. Sept. 29, 2015) (finding that defendant's shipment of a product F.O.B. China was insufficient to establish personal jurisdiction in California); *S. Copper, Inc. v. Specialloy, Inc.*, 245 F.3d 791, 2000 WL 1910176, at *4 (5th Cir. 2000) (unpublished table decision) (finding that shipments F.O.B. Chicago were insufficient to establish personal jurisdiction in Texas).

> 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).

Pet. 9-10. Yet the cited source says the opposite of what Gotech claims it says. "DE 58" is Nagravision's reply brief in support of its motion for contempt, based on Gotech's violation of court orders. In this filing, Nagravision *did* deny that it "concealed" any contacts with California, and *did* deny that Gotech was subject to personal jurisdiction in California. In the paragraph immediately preceding Gotech's quotation, Nagravision stated:

> As a last point, Defendants contend that the Court should abstain from ruling on their contempt because Nagravision allegedly obtained the Judgement "by misleading conduct" that purportedly consisted of "deliberately conceal[ing] Defendants' California contacts." (Resp. at 1 n.3, 18.) A simple reading of Nagravision's motion for default judgment and supporting materials belies this argument.

DE 58 at 11-12. After walking through the connections to California that it disclosed to the court, Nagravision stated: "the materials that Defendants point to in claiming contacts with California were before the Court." *Id.* at 12. Indeed, the sentence quoted by

Gotech was in support of the argument that Nagravision could *not* have concealed any information because the issue of personal jurisdiction was not litigated. *Id.* More generally, Gotech's suggestion that Nagravision concealed information from the district court—and even did not deny this misconduct—simply does not make sense. Given that Gotech's entire theory of personal jurisdiction in California is derived from information in Nagravision's own filings, Nagravision could not have concealed that information.

Then, on the very next page of DE 58, Nagravision explained:

> Defendants' arguments concerning personal jurisdiction in California were considered and rejected—not because Nagravision failed to disclose any California contacts, but because Defendants' arguments lack merit. … [T]he only California contacts acknowledged by Defendants, which consist of one of the Defendants providing a small number of NA Receivers that allegedly were not piracy-enabled and whose ultimate destination was unknown, do not establish personal jurisdiction in California.

Id. at 13. Thus, contrary to Gotech's assertion, Nagravision does, indeed, deny that personal jurisdiction is proper in California. Gotech's statement that Nagravision "likely could not plead that petitioners are not subject to personal jurisdiction in California, and [has] not contended otherwise," Pet. 19, is just wrong.

Taking a step back, these factual disputes illustrate that the core premise of the petition—that Nagravision could not have pleaded personal jurisdiction in California—is both disputable and disputed. It was not addressed by the lower courts by virtue of Gotech's failure to provide sufficient evidence of its connections to California, and the Court should not consider these factbound issues in the first instance.

C. Gotech did not consent to jurisdiction in California until an untimely filing.

Finally, Gotech might not have been in its current predicament were it not for a *different* litigation error. Over a week *after* the District Court denied Gotech's motion to vacate its default judgment, Gotech submitted a so-called "reply brief" in support of its motion. This reply brief declared—for the first time—that Gotech would consent to jurisdiction in California after all, thus defeating the application of Rule 4(k)(2). DE 42 at 3. The district court declined to reconsider its denial order based on this *volte-face*. If a timely-filed acquiescence to jurisdiction in California would have been sufficient to defeat the application of Rule 4(k)(2) (a question the lower courts did not decide), then this petition for certiorari would have been avoidable by the simple measure of a timely filing in the District Court.

III. THE DECISION BELOW IS CORRECT.

The Fifth Circuit's decision is correct. Because Nagravision *pleaded* that the District Court had jurisdiction under Rule 4(k)(2), the Fifth Circuit properly held that the burden of proof shifted to

Gotech. All circuits agree that a plaintiff should not bear the burden to negate personal jurisdiction in all 50 states. As *Swiss American Bank* explained, Rule 4(k)(2) does not "require negation of personal jurisdiction over the defendant in any state court," given that such a requirement "requires a plaintiff to prove a negative fifty times over." 191 F.3d at 40. The Fifth Circuit properly applied that rule, particularly in view of the fact that Gotech sought to overturn a default judgment.

Further, the Fifth Circuit did not err in finding that Gotech's motion to vacate did not adequately establish that personal jurisdiction was proper in California. Pet. App. 7a. As explained above, that filing relied exclusively on Nagravision's allegations while denying those very allegations, thus proving nothing. Thus, the Fifth Circuit correctly concluded that Gotech may have "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." Pet. App. 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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