

No. 25-188

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IN THE  
*Supreme Court of the United States*

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JFXD TRX ACQ LLC, D/B/A TRX,  
*Petitioner,*

v.

LOO TZE MING, ET AL.,  
*Respondents.*

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

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REPLY BRIEF FOR PETITIONER

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**CORPORATE DISCLOSURE STATEMENT**

The disclosure statement in the petition (at iii) remains accurate.

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**REPLY BRIEF FOR PETITIONER**

The Anticybersquatting Consumer Protection Act (ACPA) imposes liability for certain bad-faith conduct related to domain names that are confusingly similar to protected marks, but only if the mark was “distinctive at the time of registration of the domain name.” 15 U.S.C. § 1125(d)(1)(A)(ii)(I); *see* Pub. L. No. 106-113, § 1000(a)(9) [app. I, tit. III], 113 Stat. 1536 [1501A-545] (1999). Here, <trx.com> was first registered (by someone else) before petitioner TRX’s marks became distinctive. TRX alleged that respondent Loo Tse Ming later purchased and registered <trx.com> in bad faith. But under circuit precedent, that claim failed as a matter of law: the Ninth Circuit holds that only the *initial* registration of a domain name counts as a registration for purposes of the ACPA. *See GoPets Ltd. v. Hise*, 657 F.3d 1024, 1030-32 (9th Cir. 2011); Pet. App. 3a. Ming’s conduct therefore could not support an ACPA claim; he was alleged to have registered <trx.com> in 2022, whereas the domain name was first registered in 1999. *See* Pet. 9-11; Pet. App. 6a.

The Third, Fourth, and Eleventh Circuits reject the Ninth Circuit’s view and hold that the ACPA does not distinguish between an initial registration and a subsequent registration, a concept each circuit has referred to as a “re-registration.” According to that majority view, “registration” means “registration,” not “*initial* registration.” And under that view, TRX would have stated a viable ACPA claim. This Court should grant certiorari to resolve this conflict.

These circuits have explicitly acknowledged their intractable split. In an effort to muddy the waters,

respondents suggest two reasons for this Court to nevertheless ignore that conflict: perhaps, if presented with unrelated fact patterns not implicated by this case, the courts in the majority might have disagreed amongst themselves as to whether a re-registration had occurred; and perhaps, if those courts had been faced with entirely different legal questions, they may never have disagreed with the Ninth Circuit. These arguments are not compelling. The courts of appeals acknowledge their conflict because their *actual* holdings simply cannot be reconciled with one another.

Respondents devote most of their energy to the merits, adopting a new theory of the ACPA that diverges from the *GoPets* standard. Respondents now claim that the dividing line for ACPA liability is whether a domain name was *unclaimed* at the time of registration. But respondents' effort to ground that theory in the ACPA's text or policy fares no better than the Ninth Circuit's justification of its own incorrect interpretation.

Respondents also argue that this case is a poor vehicle, primarily based on statements from the district court expressing confusion about TRX's filings. But the district court ultimately construed the complaint to allege that respondent Ming had purchased <trx.com> on the secondary market, and it hence held that *GoPets* was dispositive. The Ninth Circuit affirmed on that basis. This case therefore squarely tees up the question presented.

This Court should grant review.

# I. THE CIRCUITS ARE SPLIT ON AN IMPORTANT AND RECURRING QUESTION OF TRADEMARK LAW.

The question presented in this case is whether the ACPA’s references to registration of a domain name are limited to the initial registration, or whether a domain name can be registered multiple times for ACPA purposes—*i.e.*, whether a so-called “re-registration” can be a registration, too. Pet. i. The circuits are split on that question. The Ninth Circuit alone holds that “‘registration’ . . . refer[s] only to the initial registration.” *GoPets*, 657 F.3d at 1031. Three other circuits—and every district court to examine the issue—disagree. Pet. 17-23.

Indeed, each circuit to join the fray has explicitly acknowledged its place in the split. The Ninth Circuit in *GoPets* explicitly disagreed with the Third Circuit’s earlier analysis in *Schmidheiny v. Weber*, 319 F.3d 581, 582-83 (3d Cir. 2003). *GoPets*, 657 F.3d at 1031; *see Schmidheiny*, 319 F.3d at 582-83 (“[T]he language of the statute does not limit the word ‘registration’ to the narrow concept of ‘creation registration.’”). The Eleventh Circuit noted the “divergent answers” provided by these two courts and “agree[d] with the Third Circuit.” *Jysk Bed’N Linen v. Dutta-Roy*, 810 F.3d 767, 777 (11th Cir. 2015). The Fourth Circuit later canvassed the “split,” *Prudential Ins. Co. of Am. v. Shenzhen Stone Network Info. Ltd.*, 58 F.4th 785, 794 (4th Cir. 2023); *see id.* at 794-96, and “join[ed] the Third and Eleventh Circuits,” *id.* at 797.

As TRX has explained (Pet. 26-28), cybersquatting continues to be a major problem affecting digital commerce. And particularly given the outsize importance of

the Fourth and Ninth Circuits in ACPA litigation, the question presented is especially ripe for this Court’s review now that these courts have diverged. *See* Pet. 27-28. Respondents dispute none of this.

Instead, respondents offer (Br. in Opp. 23-28) two implausible arguments as to why this Court should ignore the split. Respondents first observe (*id.* at 23-25) that the Third, Fourth, and Eleventh Circuits’ respective cases involved nonidentical facts, and thus it is theoretically possible that one of these courts might have determined that the activity at issue in the others’ cases did not constitute “registration” at all. It is unclear, however, why this matters. The question presented here is not what quantum of activity constitutes registration; it is whether activity that *does* constitute registration is nonetheless ignored by the ACPA because it is not the *initial* registration. All three courts held that the activities at issue *were* “registrations,” and hence departed from the Ninth Circuit’s rule, under which those activities would not have been “registrations” because they were not the initial registrations. *See* Pet. 15-22.

Respondents’ argument also accomplishes little on its own terms. Though the precise facts are slightly different, each of the four cases in the split involved the same basic act of “registration”: a “new registration agreement” between registrant and registrar. *Schmidheiny*, 319 F.3d at 583; *see Prudential Ins.*, 58 F.4th at 789 (ACPA defendant registered domain name after purchase from different owner); *Jysk*, 810 F.3d at 772 (same owner entered new registration agreement after lapse of old agreement); *GoPets*, 657 F.3d at 1028 (new registration agreement with new registrant). And in



any event, whatever the precise metes and bounds of a “registration,” respondents do not dispute that what happened here—re-registration following the purchase of a domain name from a third party—would be a “registration” in the Third, Fourth, and Eleventh Circuits.

Respondents additionally hypothesize (Br. in Opp. 25-28) that had the ACPA plaintiffs in the Third, Fourth, and Eleventh Circuits litigated their cases under completely different legal theories, perhaps they could have succeeded even under the Ninth Circuit’s cramped approach. For instance, respondents theorize (*id.* at 27) that if the plaintiff in *Jysk* had focused its ACPA claim on a different registration act, perhaps its claim would have been viable in the Ninth Circuit, too. But future litigants in the Third, Fourth, and Eleventh Circuits cannot avoid the clear rules of decision announced in *Schmidheiny*, *Prudential Insurance*, and *Jysk*, respectively, just because those cases theoretically could have been decided in the plaintiffs’ favor under different theories. Those courts held what they held, and their *actual* holdings are in undeniable conflict with the Ninth Circuit’s holding in *GoPets*—as every lower court has acknowledged. *See* Pet. 15-23.

## II. RESPONDENTS’ NARROW INTERPRETATION OF THE ACPA IS WRONG.

Respondents devote the bulk of their attention (Br. in Opp. 12-23) to the merits, but they notably do not defend the Ninth Circuit’s holding—which distinguished between initial and subsequent registrations. Instead, they draw a new line: between “claiming a domain name that is otherwise unclaimed” and acts related to the

registration “of an already-claimed domain name.” *Id.* at 13. At any rate, respondents’ novel theory is incorrect.

A. Respondents begin by conceding (Br. in Opp. 12-13) that “mak[ing] formal entry” of a new registrant’s domain-name ownership with a registrar fits the plain-text meaning of the term “registration.” *Id.* at 12 (internal quotation marks omitted). Respondents claim (*id.* at 13), however, that the ACPA’s reference to “registration” carries a “distinct technical meaning that encompasses only claiming a domain name that is otherwise unclaimed.” In respondents’ view, this interpretation is supported by “established internet terminology.” *Id.*

*GoPets* did not rely on this rationale. To the contrary, *GoPets* acknowledged that “a variety of actions that modify the registration . . . could conceivably be described as ‘registrations’ within the meaning of § 1125(d)(1).” 657 F.3d at 1030-31. The Ninth Circuit found no textual basis to constrain that term; it instead added a judicial constraint on its reach as a matter of policy. *Id.* at 1031-32.

Regardless, respondents’ evidence of “established internet terminology,” Br. in Opp. 13, is weak. Respondents’ principal support (*id.* at 14) lies in a terse “best practices” memorandum issued by the “Internet Engineering Task Force,” stating only that “[i]nformation that creates or updates a registration needs to be authenticated.” Rich Petke & Ian King, *Registration Procedures for URL Scheme Names* (Nov. 1999), <https://www.rfc-editor.org/rfc/rfc2717.html>. A different memorandum from the same entity purportedly “refers to ‘registration’ as claiming a domain name that does not yet have an IP number,” from which respondents infer

(Br. in Opp. 14-15) that if a domain name had an existing IP number, a transfer in its ownership could not constitute “registration.” Strained inferences from these memoranda, of which there is no evidence Congress was even aware, are not compelling evidence of the ACPA’s meaning.<sup>1</sup>

Respondents also examine the ACPA’s legislative history, but the best evidence they muster (Br. in Opp. 15-16) is that the term “registration” was occasionally used to describe the initial registration of a domain name. That much is undisputed; the question presented is whether “registration” is *limited* to such an initial registration, a question on which the legislative history apparently provides no guidance.

B. Respondents’ textual arguments similarly fail to persuade. Respondents first argue (Br. in Opp. 17-18) that if anything other than claiming a unclaimed domain name counts as “registration,” there would be no difference between “register[ing]” and traffic[king] in” a domain name, 15 U.S.C. § 1125(d)(1)(A)(ii), rendering the latter *actus reus* superfluous. This is incorrect. Under the majority view, both the bad-faith transferor and the bad-faith transferee have “trafficked” in a domain name even though only the latter “registers” it. And respondents’ construction only exacerbates superfluity concerns: under their construction, the lone act that counts as “registering” a domain name is already covered under “trafficking.”

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<sup>1</sup> Respondents make (Br. in Opp. 14-15) similarly strained inferences from other scattered technical documents issued years (or decades) after the ACPA’s enactment.

Respondents' next argument (Br. in Opp. 18-19) relates to the ACPA's timing rule—liability accrues when a person “registers, traffics in, or uses” a domain name in bad faith only if the infringed mark was “distinctive at the time of registration of the domain name.” 15 U.S.C. § 1125(d)(1)(A)(ii)(I). Respondents assert (Br. in Opp. 18) that if the transfer of a domain name to a new registrant counts as a “registration,” then the “timing requirement would necessarily be satisfied every time anyone traffics in a domain name that is distinctive *at the time of the trafficking*.” This is not correct—there might be a time gap between the purchase (*i.e.*, the “trafficking”) and the registration. And at any rate, it is not clear what respondents are trying to demonstrate. The phrase “distinctive at the time of registration” is clearly not surplusage—it carves out situations in which the mark became distinctive only after registration.

Respondents also observe (Br. in Opp. 19-20) that the ACPA appears to treat “registration” and “acquisition” of domain names as different concepts in its list of factors indicative of bad faith. Attacking a straw man, respondents claim (*id.* at 19) that under TRX's view, “registration” and “acquisition” have identical meanings. Not so. A bad-faith actor can “acqui[re] . . . multiple domain names,” 15 U.S.C. § 1125(d)(1)(B)(i)(VIII), without taking the further step of registering any of them. And again, it is unclear how respondents' narrow interpretation of “registration” solves this purported superfluity problem.

C. Respondents eventually come around (Br. in Opp. 20-23) to the Ninth Circuit's approach in *GoPets*:

pure policy considerations. Respondents' gloss on the *GoPets* approach is not compelling.

Like the Ninth Circuit, respondents fret (Br. in Opp. 20) that the ACPA might interfere with property interests by imposing liability on someone who lawfully obtained a domain name. But this overlooks the key prerequisite for ACPA liability: *bad-faith* conduct. 15 U.S.C. § 1125(d)(1)(A)(i). And as TRX has explained (Pet. 25-26), the very purpose of the ACPA was to *alter* the ordinary operation of property law in the case of cybersquatting, so appeals to the ordinary operation of property law as a reason to construe the ACPA to *permit bad-faith cybersquatting activity* are not persuasive. In respondents' hypothetical (Br. in Opp. 20 n.6), John would not be liable unless he sold the domain *in bad faith*. And respondents would immunize not just John, but also Jane and all other bad-faith actors who later acquire the domain name *after* the mark it resembles becomes distinctive. It is implausible that Congress, in its concerted effort to combat cybersquatting and protect digital commerce, enacted such a feckless statute.

### III. THIS CASE IS A CLEAN VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

This case is an ideal vehicle to decide whether “registration” under the ACPA includes re-registrations. The operative complaint, as construed by the lower courts, alleges that respondent Ming acquired <trx.com> from another owner and re-registered the domain name in bad faith after the TRX mark had become

distinctive.<sup>2</sup> Pet. App. 3a, 22a, 31a-33a. On TRX’s view, this gave rise to ACPA liability: that <trx.com> was *first* registered before TRX’s marks were in use does not speak to whether Ming’s conduct was “registration.” On respondents’ view, these facts cannot support ACPA liability because Ming is alleged to have acquired the domain name when it was already registered. *See* Br. in Opp. 19 n.5. The district court dismissed the complaint for a pure legal reason: under *GoPets*, the ACPA is categorically inapplicable to re-registrations. Pet. App. 22a, 33a. The Ninth Circuit affirmed on that basis. *Id.* at 3a.

Attempting to throw roadblocks, respondents first highlight (Br. in Opp. 29) the Ninth Circuit’s observation that “[t]he district court reasonably rejected JFXD’s Second Amended Complaint because JFXD had already pleaded facts that made contradictory allegations in its newest complaint implausible.” Pet. App. 3a. But respondents misunderstand that statement. After the district court dismissed based on *GoPets*, it authorized TRX to file an amended complaint. *Id.* at 20a. TRX did so, adding language alleging that <trx.com> was purchased “from the public domain” in an effort to elude *GoPets*. *Id.* at 22a. But the district court held that notwithstanding the new allegation, the record was clear that respondent Ming had “bought the domain name on the secondary market,” and that the new allegations therefore did not make it “plausible” that the “domain name became available to any member of the public.” *Id.* Accordingly, the district court held, “Ninth Circuit

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<sup>2</sup> In this Court, no party challenges the lower courts’ construction of the operative complaint.

authority preclude[d] [TRX's] cybersquatting claim.” *Id.* (citing *GoPets*, 657 F.3d 1024).

As such, the district court was stating that, in light of the record that already existed, *GoPets* was dispositive, and nothing TRX could allege in an amended complaint could change that fact. In holding that the district court “reasonably rejected [TRX’s] Second Amended Complaint because [TRX] had already pleaded facts that made contradictory allegations in its newest complaint implausible,” Pet. App. 3a, the Ninth Circuit affirmed that determination, and hence confirmed that *GoPets* was dispositive. This petition therefore directly and cleanly tees up the question whether the *GoPets* rule is correct.

On a related note, respondents point (Br. in Opp. 31) to TRX’s allegation that respondent Ming registered <trx.com> off the “public domain,” which respondents characterize as “incoherent.” As just explained, however, TRX added this allegation in light of the district court’s invitation to amend its complaint. The district court concluded that notwithstanding this allegation, the record definitively established that the domain name had been purchased on the secondary market, which meant that *GoPets* controlled. Pet. App. 22a. The Ninth Circuit upheld that determination. *Id.* at 3a. This petition does not challenge the lower courts’ interpretation of the record; it solely challenges *GoPets*.

Respondents also note (Br. in Opp. 29-31) other purported factual disputes, such as conflicting suggestions in the lower-court pleadings and exhibits as to the exact price (\$138,000 or “more than \$138,000”?) and source (GoDaddy or <www.4.cn>?) of Ming’s purchase. *Id.* at

30 (internal quotation marks omitted). But none of this bears on the question presented, which is solely about the meaning of the concept of “registration” in the ACPA. Respondents also argue (*id.* at 32-33) that certiorari should be denied because TRX allegedly presented some unclear or mistaken filings, failed to comply with court orders, and shifted its position. But respondents do not claim waiver or forfeiture of any relevant argument. Whatever the course of prior proceedings, the Ninth Circuit’s judgment rested on pure legal grounds.

### CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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