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IN THE  
**Supreme Court of the United States**

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EZAKI GLICO KABUSHIKI KAISHA, D/B/A EZAKI GLICO CO.,  
LTD. & EZAKI GLICO USA CORP.,

*Petitioners,*

*v.*

LOTTE INTERNATIONAL AMERICA CORP.  
& LOTTE CONFECTIONARY CO. LTD.,

*Respondents.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**AMICUS BRIEF FOR THE INTERNATIONAL TRADEMARK  
ASSOCIATION IN SUPPORT OF PETITIONERS**

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## INTERESTS OF THE AMICUS CURIAE

The International Trademark Association (“INTA”)<sup>1</sup> is a not-for-profit global organization dedicated to the support and advancement of trademarks and related intellectual property. Founded in 1878 as the United States Trademark Association, INTA has more than 7,200 member organizations from 191 countries. Its members include trademark and brand owners, as well as law firms and other professionals who regularly assist in the creation, registration, protection, and enforcement of trademarks. INTA was founded in part to encourage the enactment of federal trademark legislation after the United States’ first trademark act was invalidated on constitutional grounds. In connection with subsequent legislation, INTA has been instrumental in making recommendations and assisting legislators with trademark law. Of particular note in this case, INTA has submitted amicus briefs in this Court’s two most recent decisions addressing the concept of trademark functionality, *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001) and *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995). INTA also has participated as amicus curiae in numerous other cases in this Court<sup>2</sup> and

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, this brief was authored solely by INTA and its counsel, and no part of this brief was authored by counsel for a party. No party or counsel for a party, nor any other person or entity other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), both Petitioners and Respondents were provided timely notice and have consented to the filing of this brief.

<sup>2</sup> Cases in which INTA has filed amicus briefs in this Court include: *U.S. Patent & Trademark Office v. Booking.com B.V.*, 140 S. Ct. 2298 (2020); *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020); *Peter v. NantKwest, Inc.*, 140 S. Ct. 365 (2019); *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418 (2015); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138 (2015); *Pom Wonderful LLC v. CocaCola Co.*, 573 U.S. 102 (2014); *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll.*

other courts across the country. INTA’s members are also frequent participants in litigation both in courts and in administrative proceedings before the United States Patent and Trademark Office (“PTO”) and the Trademark Trial and Appeal Board (“TTAB”), with respect to the Lanham Act.

### **SUMMARY OF THE ARGUMENT**

The test for functionality in trademark law is one this Court has addressed in three modern cases. Drawing on decades of precedent, in which federal courts considered how to differentiate product features capable of achieving trademark protection from product features that are not, as well as the First Restatement of Torts, this Court stated in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 850 n.10 (1982), that “a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” This test was thereafter twice reaffirmed by this Court in *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995), and, with some modifications specific to cases in which product features have been the subject of expired utility patents, *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23, 33 (2001).

In the decision below on which review is sought, *Ezaki Glico Kabushiki Kaisha v. Lotte Int’l Am. Corp.*, 986 F.3d 250 (3d Cir. 2021), the Third Circuit consciously failed to follow all of these prior decisions, as well as the extensive body of law giving rise to and applying these

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*Sav. Bank*, 527 U.S. 627 (1999); *Dickinson v. Zurko*, 527 U.S. 150 (1999); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); and *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988).



precedents, in favor of a new test for functionality that asks only one question: is the product feature for which trademark protection is sought “useful.” If so, that feature is incapable of being protected as a trademark. If the feature is not “useful,” then trademark protection is possible.

There are multiple problems with this new formulation of functionality. First, it conflicts with more than a century of caselaw in which the concept of functionality was considered, articulated and applied, both by this Court in the aforementioned cases and in every judicial circuit.

Second, the test ignores the rationale for the concept of functionality – to enable courts to draw lines between product features necessary for competitors to use, and that are therefore unprotectable, and product features unnecessary for competition that would, if used by competitors after becoming associated with a particular seller, cause consumer confusion. A test of functionality that focuses solely on the issue of “usefulness” would enable competitors to take advantage of product features associated exclusively with particular sellers and thereby promote consumer confusion. This is because all product features, to varying degrees, have some “useful” purpose, otherwise there would be no need to include them. Indeed, what the Third Circuit has done is to obliterate the distinction between *de facto* and *de jure* functionality, in which courts have distinguished between product features that have a function, as almost all do (*de facto* functionality), and product features that make products work better because of the function they perform (*de jure* functionality). While the latter type of features have never been protectable as trademarks, and rightly so, the former have been, until now.

Third, to discard the careful framework courts have applied for so long in making functionality determinations, in which design choices and the availability of alternative product

features have played a crucial role, in favor of a test that asks only whether a feature is “useful” would call into question the existence of trademark protection for dozens of well-known product features registered as trademarks, including those collected in the attached **Appendix A**. Were the Third Circuit test for functionality to be widely applied, the practical ramifications for both brand owners and consumers would be substantial.

As a result, the INTA strongly recommends that the Court grant the petition for *certiorari* filed by Ezaki Glico to reaffirm that mere “usefulness” is not the test for functionality, and that the availability of alternative designs for product features alleged to be trademarks can be considered as part of the analysis of functionality in cases where the features were not the subject of utility patents. The INTA takes no position as to whether the configuration of Ezaki Glico’s POCKY stick is or is not functional and, if it is not, whether that configuration is entitled to protection as a trademark. Rather, the INTA’s interest here is broader and seeks to further the uniform, predictable application of principles of functionality that, until issuance of the decision below, were generally well settled under this Court’s prior holdings. Review here is necessary to restore the concept of functionality to its analytical and precedential moorings, while simultaneously rejecting an oversimplified test that has no basis in prior cases, principles of free competition, or trademark protection policy.

## **ARGUMENT**

### **I. FUNCTIONALITY PROTECTS THE RIGHT OF COMPETITORS TO USE ESSENTIAL PRODUCT FEATURES, WHILE ALLOWING NON-ESSENTIAL PRODUCT FEATURES TO BE PROTECTED AS TRADEMARKS**

The question of whether product features qualify for trademark protection and, if so, under what circumstances, is not new. To the contrary, courts have considered these issues for over a century, well before the U.S. Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.* (the

“Lanham Act”). As far back as 1904, the Second Circuit recognized, in a case involving competing syringes, that no one has the right, absent an issued patent, to monopolize “elements of mechanical construction which are essential to the successful practical operation of a manufacture, or which primarily serve to promote its efficiency for the purpose to which it is devoted.” *Marvel Co. v. Pearl*, 133 F. 160, 161 (2d Cir. 1904); *see also Pope Automatic Merchandising Co. v. McCrum-Howell Co.*, 191 F. 979, 981 (7<sup>th</sup> Cir. 1911) (“in the absence of a patent this particular combination must be viewed as the culmination of a mechanical evolution, to the equal benefits of which all society is entitled”).

By at least 1917, courts had begun allowing for protection of “nonfunctional” product features, which the Second Circuit defined as “nonessential elements, since these are usually enough to distinguish the goods, and are the least burdensome for the defendant to change.” *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299, 301 (2d Cir. 1917). Provided that such “nonessential elements” had acquired secondary meaning, *i.e.* had become associated by the public with a particular seller, they were capable of being protected as trademarks. *Id.* at 300. But, where particular product features were deemed essential to the ability of competitors to market their own goods, trademark protection was unavailable. *See Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 F. 960, 965 (2d Cir. 1918) (“The question is always commercial: we ought not to impose any burdens which, either by changing the appearance of the article itself, or by imposing expense upon its production, will operate to give the plaintiff such advantage in the market as will substantially handicap his competitors.”); *Le Mur Co. v. W.G. Shelton Co.*, 32 F.2d 79, 81 (8<sup>th</sup> Cir. 1929) (“A manufacturer, therefore, must be admitted to have good right to make and vend any unpatented article embodying therein the necessary functional parts so that the whole will function.”).

In 1938, Section 742 of the First Restatement of Torts articulated the principle of functionality as follows: “A feature of goods is functional . . . if it affects their purpose, action or performance, or the facility or, economy of processing, handling or using them; it is non-functional if it does not have any of such effects.” Elaborating, comment a to Section 742 stated that “the determination of whether or not such features are functional depends upon the question of fact whether prohibition of imitation by others will deprive the others of something which will substantially hinder them in competition.” This Court, also in 1938, agreed with this formulation of functionality in *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 122 (1938), holding that the pillow shape of shredded wheat was functional because “the cost of the biscuit would be increased and its high quality lessened if some other form were substituted for the pillow-shape.”

The First Restatement formulation of functionality, consistent with *Kellogg* and the general consensus of earlier authorities, recognized that non-essential product features were entitled to trademark protection if they possessed secondary meaning, but that features essential to a product’s manufacture, to the way it works, or the price at which it was sold, were functional and unprotectable. And as comment a to Section 742 highlights, the question of whether a product feature is essential asks, in part, whether that feature is something competitors need to use, such that the loss of the feature would “substantially hinder them in competition.” In other words, are there reasonably equivalent alternatives to the feature that competitors could use, such that their ability to compete would not be substantially hindered, if a particular product feature were to be protected as a trademark? If so, such a product feature is more likely to be non-functional.

In the decades that followed, courts increasingly considered the existence of alternative product designs as part of the functionality inquiry, and when such alternatives were available,

they were viewed as evidence of non-functionality. See *Truck Equipment Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1215, 1218 (8<sup>th</sup> Cir. 1976) (semi-trailer design was one of many alternatives available to competitors); *Haeger Potteries, Inc. v. Gilner Potteries*, 123 F. Supp. 261, 270 (S.D. Cal. 1954) (where ashtrays could be designed in many ways, unique features of plaintiff's ashtray design were not functional). In *In re Morton Norwich*, 671 F.2d 1332, 1339 (C.C.P.A. 1982), the court held that the design of a bottle and spray top were not functional, in part because "a molded plastic bottle can have an infinite variety of forms or designs and still function to hold liquid," such that competitors had no need to copy the applicant's design.

The consideration of alternative designs was part of a holistic approach to functionality, in which courts rejected the simple equation of functionality with utility. In *In re Deister Concentrator Co.*, 289 F.2d 496, 502, 506 (C.C.P.A. 1961), the court held that "a feature dictated solely by 'functional' (utilitarian) considerations may not be protected as a trademark; but mere possession of a function (utility) is not sufficient reason to deny protection." And although the court denied trademark protection to the rhomboidal ore concentrating and coal cleaning table design at issue in that case, it took pains to note that:

we are not denying registration merely because the shape possesses utility but because the shape is in essence utilitarian. Where a shape or feature of construction is in its concept arbitrary, it may be or become a legally recognizable trademark because there is no public interest to be protected. In such a case protection would not be lost merely because the shape or feature also serves a useful purpose.

*Id.* at 506. See also *Sicilia Di R. Biebow & Co. v. Cox*, 732 F.2d 417, 429 (5<sup>th</sup> Cir. 1984) ("A design that merely assists in a product or configuration's utility is not functional and may therefore be protected.").

This Court has guided the modern conception of functionality. In *Inwood Laboratories*, the Court noted in *dicta* that "[i]n general terms, a product feature is functional if it is essential to

the use or purpose of the article or if it affects the cost or quality of the article.” *Id.*, 456 U.S. at 850 n.10. This general standard for functionality, which is plainly drawn from the First Restatement and consistent with the cases summarized above, was reaffirmed in both *Qualitex*, 514 U.S. at 165,<sup>3</sup> and the Court’s most recent case concerning functionality, *TrafFix Devices*, 532 U.S. at 33, in which the Court characterized the *Inwood Labs* formulation of functionality as the “traditional rule.” Thus, this Court, the First Restatement and multiple lower courts have all agreed that mere “utility,” or usefulness, is not the equivalent of “functionality.”

However, in *TrafFix Devices*, a case in which the “principal question” was “the effect of an expired [utility] patent on a claim of trade dress infringement,” *id.* at 29, this Court adopted a corollary to the *Inwood Labs* standard – where the claimed product feature is “the reason the device works,” there is no need for a court to consider alternative designs, as such a feature is necessarily functional. *Id.* at 34.<sup>4</sup> Likewise, “[a] utility patent is strong evidence that the features therein claimed are functional.” *Id.* This latter holding was not a significant departure from prior cases. *See Best Lock Corp. v. Schlage Lock Co.*, 413 F.2d 1195, 1199 (C.C.P.A. 1969) (“It is our view that the expired utility patent is adequate evidence that the under-rim configuration here sought to be registered is indeed functional”). And the Court in *TrafFix Devices* did not comment on whether the availability of design alternatives – evidence that had

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<sup>3</sup> In *Qualitex*, the Court clarified that a product feature is “essential to the use or purpose of the article or if it affects the cost or quality of the article,” and therefore functional, “if exclusive use of the feature would put competitors at a significant non-reputation related disadvantage.” *Id.* at 165.

<sup>4</sup> With respect to the consideration of alternative designs contemplated by *Qualitex*, *TrafFix Devices* stated that “It is proper to inquire into a ‘significant non-reputation-related disadvantage’ in cases of esthetic [sic] functionality, the question involved in *Qualitex*. Where the design is functional under the *Inwood* formulation, there is no need to proceed further to consider if there is a competitive necessity for the feature.” 532 U.S. at 33.

been considered for decades in the functionality inquiry – is relevant to cases involving product features that were not the subject of expired utility patents. Thus, while *TrafFix Devices* did promulgate a simplified functionality inquiry for cases involving expired utility patents, it did not displace decades of precedent in which courts have considered the availability of alternative designs for product features as part of the inquiry into functionality. Nor did the Court in *TrafFix Devices*, or in any other case, ever equate functionality with utility, let alone “usefulness.”

## II. THE NEW THIRD CIRCUIT TEST EQUATING FUNCTIONALITY WITH “USEFULNESS” IS AT ODDS WITH BOTH THE POLICIES UNDERLYING THE FUNCTIONALITY DOCTRINE AND MORE THAN A CENTURY OF PRECEDENT

The Third Circuit test of usefulness conflicts with the settled law summarized above.

The “traditional rule,” *TrafFix Devices*, 532 U.S. at 33, for assessing functionality was set forth in *Inwood Labs*: a product’s feature is functional “if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Inwood Labs*, 456 U.S. at 850-51 n. 10. Every circuit court follows the *Inwood Labs* test, including (until now) the Third Circuit. *See, e.g., Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 865 (9th Cir. 2020); *CTB, Inc. v. Hog Slat, Inc.*, 954 F.3d 647, 657 (4th Cir. 2020); *Groeneveld Transp. Efficiency, Inc. v. Lubecore Int’l, Inc.*, 730 F.3d 494, 503-04 (6th Cir. 2013); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 219 (2d Cir. 2012); *Dippin’ Dots, Inc. v. Frosty Bites Distrib., LLC*, 369 F.3d 1197, 1200 (11th Cir. 2004); *Shire U.S., Inc. v. Barr Labs, Inc.*, 329 F.3d 348, 353-54 (3d Cir. 2003); *Eppendorf-Netheler-Hinz GMBH v. Ritter GMBH*, 289 F.3d 351, 355-56 (5th Cir. 2002); *Valu Eng’g, Inc. v. Rexnord Corp.*, 278 F.3d 1268, 1274-76 (Fed. Cir. 2002); *Publ’ns Int’l, Ltd. v. Landoll, Inc.*, 164 F.3d 337, 342 (7th Cir. 1998); *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 37 (1st Cir. 1998).

In adopting its new approach, the Third Circuit jettisoned the nuances and complexities attendant to the functionality inquiry and replaced them with a simple, single criterion: if a product feature is “useful,” then it is “functional.” However, choosing a colloquial definition of “usefulness” over the settled legal definition can, at best, only sow confusion, as it allows courts to use their unguided seat-of-the pants assessments severed from precedent and principle. At worst, it could preclude all trademark protection for product features, because all products and product features have some “usefulness,” however broadly defined. The Third Circuit test is, in short, little more than a tautology under which (employing a colloquial understanding of the term) something is functional if it is functional.

Inexplicably, the Third Circuit elected to disregard the universally-followed functionality formulation for the sole reason that the Supreme Court had not expressly decreed that it must be the *only* test. *Ezaki Glico*, 986 F.3d at 257. This aspect of the Third Circuit’s holding is inscrutable, for when this Court articulates a test for the resolution of a legal question, and does so repeatedly and consistently, no principle of jurisprudence permits the inference that the omission of the prescription “only” from that test is a license for lower courts to create other tests, particularly one that departs from the entire history of a legal doctrine. This aspect of the Third Circuit’s holding is, indeed, more extraordinary in light of the long, generally consistent history underlying the evolution of the functionality doctrine, all of which the Third Circuit disregarded. Moreover, by applying a dictionary definition rather than the legal definition articulated by this Court, the Third Circuit has obscured, if not obliterated, the longstanding distinction between a product feature that simply has a function and one that is legally functional. That is a simple but fundamental distinction, articulated as follows by the Federal Circuit and widely followed by federal courts:



[O]nly *de jure* functional designs, as contrasted with *de facto* functional designs, can be exempted from trademark protection. . . . “In essence, *de facto* functional means that the design of a product has a function, i.e., that a bottle of any design holds fluids. *De jure* functionality, on the other hand, means that the product is in its particular shape *because* it works better in this shape.”

*Textron, Inc. v U.S. Int’l Trade Comm’n*, 753 F.2d 1019, 1024-25 (Fed. Cir. 1985) (third emphasis added) (citations omitted); *see also Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1012 (9th Cir. 1999); *In re Becton Dickinson & Co.*, 675 F.3d 1368, 1374 (Fed. Cir. 2012).

The distinction between *de facto* and *de jure* functionality captures whether a product or product feature simply has a function, or whether it works “better” because it has a particular feature. The Third Circuit itself expressly acknowledged that this concept in some manner is part of its own redefinition of functional as merely useful: “As the leading trademark treatise concurs, ‘functional’ means useful. ‘To boil it down to a phrase: something is ‘functional’ if it works better in this shape.’” *Ezaki Glico Kabushiki Kaisha*, 986 F.3d at 258, quoting 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §7:63 (5th ed. 2020). Although it may not be necessary in all instances to assess alternative designs (as for instance in *TrafFix*, where the dual-spring design was literally claimed in an expired utility patent),<sup>5</sup> the question of whether something works better in a given shape implies “better than what?”

Just because a product feature is “useful” does not mean that it works better in that shape than various alternatives, much less that it is “essential to the use or purpose of the article.”

*Inwood Labs*, at 850-51 n.10. Indeed, whether a feature is essential likewise will, in many cases,

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<sup>5</sup> As another example, diamond quilting on toilet paper (which had been covered by an expired utility patent) has been deemed functional because it makes the toilet paper softer and more absorbent. *See Georgia-Pacific Consumer Prods. L.P. v. Kimberly-Clark Corp.*, 647 F.3d 723 (7th Cir. 2011).

require consideration of whether alternatives make the feature non-essential. So too, whether a feature “affects the cost or quality of the article” will generally entail some understanding of how the product *is* made or *could be* made using alternate methods to fathom the design choices embedded in the cost and quality of the product in issue.

Sufficient understanding of how any given product is made may sometimes be so apparent as to require no elaboration or explication. This was true in *TrafFix*, where the dual-spring design was the heart of what the patent claimed and taught.<sup>6</sup> But other more complex designs generally cannot be understood in isolation. If one had only ever examined one car or one chair, the engineering and design decisions involved in making that product would not be apparent, such that it would be impossible to know how essential various features were, or how they affected cost or quality. That can best be accomplished in many cases through consideration of the alternatives available to competitors.

The Third Circuit test of usefulness omits all of these important nuances in favor of an approach that is overly simplistic, at odds with longstanding prior precedent, and that would have serious practical ramifications for trademark owners and consumers. That a design feature is useful should be the beginning of the inquiry, not the end.

### III. EQUATING FUNCTIONALITY WITH USEFULNESS RISKS UNDERMINING TRADE DRESS PROTECTION

In departing from more than a century of precedent, the Third Circuit disrupts the settled expectations of parties that have pursued and obtained trade dress registrations for product features and transacted business with the understanding that such features are protected. The

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<sup>6</sup> It may be true here as well. Reasonable minds can disagree as to whether the POCKY stick at issue qualifies as protectable trade dress, and INTA does not take a position in this regard. But INTA submits that the new Third Circuit test for functionality is deeply flawed and at odds with established precedent.

Third Circuit’s new test is also at odds with the policies and procedures of the PTO, which examines applications seeking trademark protection for product features and incorporates the well-settled judicial test of functionality into its examination procedures. *See* Trademark Manual of Examination Procedure § 1202.02(a)(iii)(A) (22nd ed. Oct. 2018) (citing both *Inwood Labs*, 456 U.S. at 850 n.10 and *Qualitex*, 514 U.S. at 165). This commercial reliance weighs “heavily in favor of following the earlier rule.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (“[R]eliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions.”); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved[.]”). Abrupt changes in legal standards discourage reliance on judicial decisions. As such, courts should be cautious before promulgating rules that upend the reliance on well-established legal standards, particularly when the interpretation of a statute is at issue. *See Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (“We recognize that ‘considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.’” (quoted source omitted)).<sup>7</sup>

As such, the Third Circuit’s novel test creates a dissonance among circuits courts and with the PTO. Until recently, registered trade dress owners could expect the same degree of

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<sup>7</sup> While the Third Circuit’s decision did not purport to overrule prior decisions, it did promulgate a new test for functionality under 25 U.S.C. § 1125(a)(3), which requires a party prosecuting a trade dress infringement claim based on unregistered trade dress to prove that such trade dress is non-functional. Thus, in the Third Circuit, the application of this statute will necessarily differ from the manner in which it is applied in all other circuits.

trademark protection for product features throughout the country and could rely on a long line of cases articulating the standard governing the inquiry into functionality. Moreover, they could also look to numerous cases where federal courts or agencies upheld trade dress registrations with seemingly “useful” features.

But the new functionality test articulated in the Third Circuit has resulted in a changed landscape, in which the owners of product features claimed as trademarks will receive very different, far more limited protection. To illustrate the scope of this problem, the Court should consider the exemplary list of product features registered with the PTO that are depicted in **Appendix A**. Many features on this list will be recognizable to American consumers. Some are product features that courts and the T.T.A.B. within the PTO have determined to be non-functional and protected. *See Blumenthal Distrib.*, 963 F.3d 859, 863 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1514, 209 L. Ed. 2d 253 (2021) (U.S. Reg. No. 3,105,591 for chairs); *Converse, Inc. v. Int'l Trade Comm'n Skechers U.S.A., Inc.*, 909 F.3d 1110, 1124 (Fed. Cir. 2018) (U.S. Reg. No. 4,398,753 for shoes); *Dwyer Instruments Inc. v. Sensocon Inc.*, No. 3:09-CV-00010-TLS-CAW, 2012 WL 3207254, at \*7 (N.D. Ind. Mar. 23, 2012) (U.S. Reg. No. 3,397,050 for pressure gauges); *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539, 553 (6th Cir. 2005) (U.S. Reg. No. 1,782,606 for guitars); *Nabisco, Inc. v. PF Brands, Inc.*, 50 F. Supp. 2d 188, 193 (S.D.N.Y.), *aff'd*, 191 F.3d 208 (2d Cir. 1999) (U.S. Reg. No. 1,640,659 for goldfish crackers); *Dogloo, Inc. v. Doskocil Mfg. Co.*, 893 F. Supp. 911, 922 (C.D. Cal. 1995) (U.S. Reg. No. 1,631,630 for dog shelters); *In Re Weber-Stephen Prod. Co.*, 3 U.S.P.Q.2d 1659 (T.T.A.B. 1987) (U.S. Reg. No. 1,481,521 for the Weber grill design); *In Re Zippo Mfg. Co.*, 50 U.S.P.Q.2d 1852 (T.T.A.B. 1999) (U.S. Reg. No. 2,606,241 for Zippo lighters). And even within the Third Circuit, protection for the design of a Rubik’s cube was upheld as non-

functional. *Ideal Toy Corp. v. Plawner Toy Mfg. Corp.*, 685 F.2d 78, 81 (3d Cir. 1982). The holdings of these cases, and many others, would all be at least called into question under the Third Circuit’s usefulness standard.

In addition to conflicting with these decisions, the Third Circuit’s new rule calls into question many well-known examples of currently registered product features that could – arguably – be deemed “useful” under the new test. *See*, in Appendix A, U.S. Reg. No. 1,711,158 for the Whirlpool Corporation mixing machine; U.S. Reg. No. 2,793,439 for the iconic Lamborghini winged doors; U.S. Reg. No. 2,853,770 for Ford Motor Company’s side mirror used on many of its vehicles; U.S. Reg. No. 5,947,639 for Lodge Manufacturing Company’s coiled pot handle; U.S. Reg. No. 6,056,374 for Apple Inc.’s Airpod headphones; U.S. Reg. No. 6,145,209 for a seat cushion; and U.S. Reg. No. 6,245,626 for an agitator and mixer. All of these registered trademarks, and the entirety of those listed in the Appendix, contain obvious useful elements that could render them unfit for trademark registration if their validity were to be litigated in the Third Circuit. Such uncertainty and inconsistency should be avoided because it would undermine the “actual and perceived integrity of the judicial process,” *Payne*, 501 U.S. at 827, and would deprive trademark owners of the “predictable application of legal rules,” which, in turn, prevents them from safely discerning their own legal rights. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980). The potential inability to enforce those intellectual property rights undermines those rights to a great degree. This Court should correct the error in the decision below to avoid uncertainty and inconsistent results among different courts.

IV. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI TO REAFFIRM THE LONGSTANDING TEST FOR FUNCTIONALITY AND TO MAKE CLEAR THAT ALTERNATIVE DESIGNS ARE RELEVANT TO THE FUNCTIONALITY INQUIRY, BUT FOR NARROW EXCEPTIONS SUCH AS BEING CLAIMED IN A UTILITY PATENT

The protection of trademarks, regardless of the form they may take, is “the essence of competition...To protect trademarks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages of reputation and good will by preventing diversion from those who have created them to those who have not.” S. Rep. No. 70-1333, at 3 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1274, 1275. Nonfunctional and distinctive elements added to a particular good are brand signals that serve the Lanham “Act’s purpose to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992). What the Third Circuit has done in *Glico* is not to promote competition, but to discourage it, while simultaneously increasing the potential for consumer confusion through the unrestricted use of broadly “useful” product features that consumers nonetheless understand to be trademarks. To correct this error, the Court should reaffirm, once and for all, that the “traditional rule” for functionality, *TrafFix Devices*, 532 U.S. at 33, is that first articulated in *Inwood Labs* and later twice reaffirmed by this Court – “a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article.” *Id.*, 456 U.S. at 850 n. 10. The necessary corollary to this formulation is that an inquiry cabined to the assessment whether a product feature is “useful” is not the appropriate standard.

Likewise, in light of the Third Circuit’s holding that alternative designs play no role in the analysis of functionality, even where a non-expired utility patent is at issue, the Court should

also clarify that alternative designs can be considered as evidence of non-functionality in appropriate cases. Indeed, without educating oneself on alternative designs, it is impossible to know what design considerations might motivate an engineer to pick one design for a product feature over another. It might be that the POCKY stick was designed without considering alternatives, but most products permit or require design choices to be made. A car design, a chair design, or even a container design (such as a bottle) entail choices, and one cannot assess if a feature was “essential” to the use or purpose, or affected cost or quality, without considering the design choices available to the creator of the original design or later designs accused of infringement. By incorporating this important principle into the doctrine of functionality, the Court will bring added clarity to an area of law in which it is important to have clear standards that can be applied by courts to very fact-intensive cases, while simultaneously enabling those courts to consider evidence that can be of great importance in reaching a just determination as to whether a product feature is or is not functional.

**CONCLUSION**

INTA urges the Court to grant the underlying petition for certiorari in order to correct the error of law made by the Third Circuit, and to bring needed clarity to both the test for functionality and the question of what evidence courts may consider as part of the inquiry into functionality.

Respectfully Submitted,

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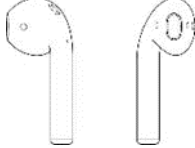

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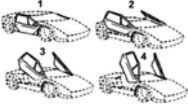




\* *Counsel of Record*


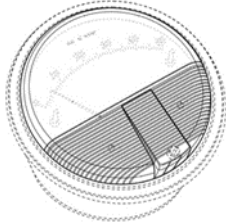
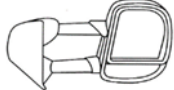

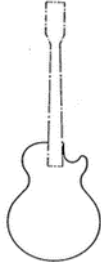
*Attorneys for Amicus Curiae in support of Petitioners*



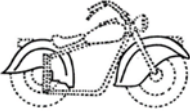




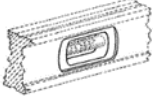
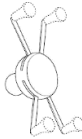
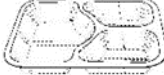

# **APPENDIX**

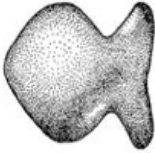
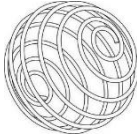
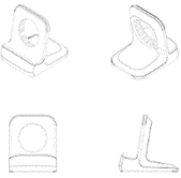

Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
4726738  April 28, 2015	Apple Inc.		Adapters for use with computers, computer peripherals, consumer electronics, portable and handheld digital electronic devices, digital media players, handheld computers, tablet computers, mobile phones, electronic book readers, electronic personal organizer, personal digital assistant, electronic calendar, and global positioning system (GPS) devices.	
6056374  May 19, 2020	Apple Inc.		Sound reproducing apparatus; audio speakers; earphones; headphones; microphones; voice recording apparatuses, namely, digital voice recorders; voice recognition apparatuses, namely, microphones for receiving voice data; radios, radio transmitters, and radio receivers; remote controls for controlling handheld digital electronic devices for use as a telephone, handheld computer, and audio and video player; wireless communication devices for voice or data transmission; and Remote control apparatus.	
6072526  June 9, 2020	Apple Inc.		Sound reproducing apparatus; audio speakers; earphones; headphones; microphones; voice recording apparatuses, namely, digital voice recorders	

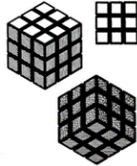



Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
2793439 December 16, 2003	Automobili Lamborghini S.P.A.		Automobiles	
6066151 May 26, 2020	Concept2, Inc.		Exercise equipment, namely, rowing machines, stationary bicycles, and stationary ski-machines	
4398753 September 10, 2013	Converse, Inc.		Footwear	<i>Converse, Inc. v. Int'l Trade Comm'n Skechers U.S.A., Inc.</i> , 909 F.3d 1110, 1124 (Fed. Cir. 2018)
6225244 December 22, 2020	Dart Industries, Inc.		Hand-operated kitchen appliance for dicing, slicing and chopping food	
1631630 January 15, 1991	Dokocil Manufacturing Company		Pet shelters	<i>Dogloo, Inc. v. Dokocil Mfg. Co.</i> , 893 F. Supp. 911, 922 (C.D. Cal. 1995)

Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
3389149 February 26, 2008	Dr. Ing. h.c. F. Porsche Aktiengesellschaft		Automobiles	
3397050 March 18, 2008	Dwyer Instruments, Inc.		Pressure gages and differential pressure gages	<i>Dwyer Instruments Inc. v. Sensocon Inc.</i> , No. 3:09-CV-00010-TLS-CA, 2012 WL 3207254, at *7 (N.D. Ind. Mar. 23, 2012)
2853770 June 15, 2004	Ford Motor Company		Automobiles namely trucks	
3453754 June 24, 2008	Ford Motor Company		Automobile grilles	
1782606 July 20, 1993	Gibson Guitar Corp.		Guitars	<i>Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP</i> , 423 F.3d 539, 553 (6th Cir. 2005)



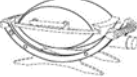


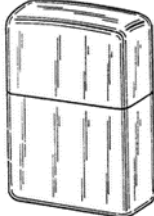
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3105591 June 20, 2006	Herman Miller, Inc.		Furniture, namely chairs	<i>Blumenthal Distrib., Inc. v. Herman Miller, Inc.</i> , 963 F.3d 859, 863 (9th Cir. 2020), cert. denied, 141 S. Ct. 1514, 209 L. Ed. 2d 253 (2021).
4322502 April 23, 2013	Hershey Chocolate & Confectionery, LLC		Candy; chocolate	
2463444 June 26, 2001	Indian Motorcycle International, LLC		The mark consists of a motorcycle to which is affixed the trade dress that is the subject of this application, viz: the deeply-skirted fenders shown in the drawing. The remaining design elements of the motorcycle are disclaimed.	
5947639 December 31, 2019	Lodge Manufacturing Company Corporation		Cookware, namely, pots and pans.	
6145209 September 08, 2020	The Lucci Corp.		Seat cushions for outdoor use	

Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
2833616 April 20, 2004	Milwaukee Electric Tool Corporation		Levels	
6338104 May 4, 2021	National Products, Inc.		Mounting devices for monitors; mounts for portable electronic devices, namely, computers, laptop computers, handheld computers, tablet computers, mobile phones, personal digital assistants, and portable music players	
4021091 September 6, 2011	Oliver Packaging and Equipment Company		A three compartment food container made of paper with a first section at one end extending substantially the width of the tray and having a smoothly curved central convex extension facing an opposite end and a pair of nested adjacent sections having curvilinear extensions partially extending on opposite sides of the central convex extension of the first section, in the proportion and relation as shown in the drawing.	
6192505 November 10, 2020	Opinel SAS		Hand-operated hand tools and implements, namely, knives	

Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
1640659 April 09, 1991	Pepperidge Farm, Incorporated		Crackers	<i>Nabisco, Inc. v. PF Brands, Inc.</i> , 50 F. Supp. 2d 188, 193 (S.D.N.Y.), <u>aff'd</u> , 191 F.3d 208 (2d Cir. 1999)
6245626 January 12, 2021	Runway Blue, LLC		Non-electric agitators for mixing and blending food and drink	
6311033 March 30, 2021	Spigen Korea Co., Ltd.		Smartphone mounts; Stands for handheld digital electronic devices, namely, smartphones and cellphones in the shape of a watch, wrist-worn electronic device in the nature of smartwatches; Stands for personal digital electronic devices, namely, smartphones and cellphones in the shape of a watch, wrist-worn electronic device in the nature of smartwatches	
6198117 November 17, 2020	Soremartec S.A. Société Anonyme		Pastry and confectionery being bread, breadsticks, biscuits, cakes, chocolate, chocolate mousses, cocoa or chocolate spread cream, cocoa and hazelnuts spread cream.	

Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
1265094 January 24, 1984	Spin Master Toys UK Limited		Three Dimensional Puzzles	<i>Ideal Toy Corp. v. Plawner Toy Mfg. Corp.</i> , 685 F.2d 78, 81 (3d Cir. 1982)
5877429 October 08, 2019	Square, Inc.		Point-of-sale terminals; computer hardware for making, processing, authenticating, and reconciling payment transactions, fund transfers and refunds; computer hardware for making, processing, authenticating, and reconciling electronic and mobile payment transactions, fund transfers and refunds; electronic devices, namely, electronic and magnetic coded card readers and related computer hardware for payment transactions, fund transfers and refunds; stands adapted for tablet computers	
3788840 May 11, 2010	Tea Forté, Inc.		Beverage glassware; Carafes; Glass carafes; Pitchers	
5409403 February 27, 2018	The Trustees of the Carroll Hall Shelby Trust, irrevocable California trust			



Reg. # and Date	Owner	Image	Goods	Case Citation (if applicable)
3646587 June 30, 2009	Utz Quality Foods, LLC		Snack foods, namely, pretzels	
1481521 March 22, 1988	Weber-Stephen Products, LLC		Barbeque grills	<i>In Re Weber-Stephen Prod. Co.</i> , 3 U.S.P.Q.2d 1659 (T.T.A.B. 1987)
3987743 July 05, 2011	Weber-Stephen Products, LLC		Barbeque grills	
1711158 September 1, 1992	Whirlpool Corporation		Electric beating and mixing machines and attachments for such machines.	
3099715 June 6, 2006	YZ Enterprises, Inc.		Biscuit.	
2606241 August 13, 2002	Zippo Manufacturing Company		Cigarette lighters	<i>In Re Zippo Mfg. Co.</i> , 50 U.S.P.Q.2d 1852 (T.T.A.B. 1999)

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