

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

HELFINN HEALTHCARE S.A.,)
)
) Petitioner,)
)
) v.) No. 17-1229
)
) TEVA PHARMACEUTICAL USA, INC.,)
)
) ET AL.,)
)
) Respondents.)
)

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 17-1229, Helsinn
5 Healthcare versus Teva.

6 Mr. Shanmugam.

7 ORAL ARGUMENT OF KANNON K. SHANMUGAM

8 ON BEHALF OF THE PETITIONER

9 MR. SHANMUGAM: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 In the America Invents Act, Congress
12 transformed the nation's patent laws. As part
13 of its shift from a first-to-invent to a
14 first-to-file system, Congress revised the
15 definition of "prior art" and clarified the
16 proper understanding of the phrase "on sale."

17 The on-sale bar, like the other bars
18 in the definition, reaches only a disclosure
19 that makes the claimed invention available to
20 the public. That interpretation is consistent
21 with the plain text of the definition and its
22 legislative history. It's consistent with the
23 predominant objective of the on-sale bar as
24 repeatedly articulated by this Court; namely,
25 to preserve the public's access to inventions

1 that have entered the public domain.

2 CHIEF JUSTICE ROBERTS: Well, it might
3 not be consistent with the actual meaning of
4 the word "sale," though, right?

5 MR. SHANMUGAM: The critical phrase --

6 CHIEF JUSTICE ROBERTS: If you're
7 having -- if you're -- if something's on sale,
8 it doesn't have to be on sale to everybody. It
9 could be just I'm going to sell something to
10 you.

11 MR. SHANMUGAM: Well, the critical
12 phrase, Mr. Chief Justice, is not "sale." It
13 is "on sale." And I do think that the more
14 natural understanding of "on sale" is that
15 something has been made available for purchase
16 by the public.

17 And so, for instance, if after this
18 argument in the lawyers lounge I turn to my
19 friend, Mr. Jay, and I say, I see that you
20 didn't bring a coat today, I'll sell you my
21 coat for \$5, I'm not sure that that would be
22 putting my coat on sale in the same way that it
23 would be if I turned around to the audience and
24 said I'll sell this coat to the highest bidder.

25 JUSTICE KAVANAUGH: Why not? I don't

1 -- and if it's sold, it's pretty hard to say
2 something that has been sold was not on sale.

3 MR. SHANMUGAM: I think that the
4 concept of "on sale," Justice Kavanaugh,
5 conveys some sense of broader availability or,
6 at a minimum, that there's some ambiguity about
7 that.

8 That is to say, I think I'm willing to
9 recognize that perhaps you could make the
10 argument that even offering something privately
11 to one person could be said to be putting
12 something on sale.

13 Our view as a textual matter is that
14 to the extent that there's any ambiguity --

15 JUSTICE KAVANAUGH: Isn't it always
16 the case that if you offer it to even one
17 person or to a small group of people, it's on
18 sale?

19 MR. SHANMUGAM: I think that I
20 would --

21 JUSTICE KAVANAUGH: I -- I guess I'm
22 not understanding that.

23 MR. SHANMUGAM: I think I would say,
24 Justice Kavanaugh, that something can be on
25 sale regardless of how widely it is, in fact,

1 sold. So, for instance, if you put something
2 in the shop window and no one, in fact, wants
3 to buy it and no one, in fact, buys it, it can
4 still be on sale.

5 But, again, to the extent that there's
6 any doubt about the phrase "on sale" in vacuo,
7 I think that that doubt probably was eliminated
8 before the AIA by the surrounding phrases, all
9 of which, by Respondents' recognition, convey
10 some notion of public availability.

11 And then any lingering doubt was
12 completely removed by the inclusion of the
13 catch-all phrase in the AIA.

14 JUSTICE BREYER: You said that the
15 opinions of this Court support you, but, of
16 course, you know perfectly well is you have --
17 we only have Justice Story, Learned Hand, and I
18 guess various others, maybe John Marshall for
19 all I know, who -- who -- who said that that
20 isn't the sole purpose, that the purpose of
21 this on-sale rule including private sales is to
22 prevent people from benefiting from their
23 invention prior to and beyond the 20 years that
24 they're allowed.

25 MR. SHANMUGAM: Justice --

1 JUSTICE BREYER: And -- and that's --
2 so I read that, I had my clerk look it up,
3 seems right.

4 MR. SHANMUGAM: Justice Breyer,
5 Respondents' whole argument before this Court,
6 I would respectfully submit, is really a junior
7 varsity version of congressional ratification.
8 No fewer than six times in their brief they
9 refer to the two centuries of precedent.

10 JUSTICE BREYER: Uh-huh.

11 MR. SHANMUGAM: I would respectfully
12 vigorously disagree with that, particularly
13 with regard to this Court's decisions. And let
14 me get to Judge Hand, but let me start with
15 this Court's decisions, starting with Justice
16 Story's opinion in Pennock.

17 This Court has consistently
18 articulated the predominant purpose of the
19 on-sale bar as preserving the public's access
20 to inventions that have entered the public
21 domain.

22 Indeed, if you go back to Pennock,
23 Justice Story, at a time when the on-sale bar
24 was not yet codified in the statute,
25 articulated the purpose in precisely that term

1 both with regard to the public use bar and with
2 regard to the on-sale bar. He said, if the
3 inventor shall put the invention into public
4 use or sell it for public use before he applies
5 for a patent, this shall furnish another bar to
6 his claim.

7 And all the way through to this
8 Court's decision in Pfaff, this Court has
9 referred to "the reluctance to allow an
10 inventor to remove existing knowledge from
11 public use" and has said that that purpose
12 undergirds the on-sale bar. And I --

13 JUSTICE KAVANAUGH: Doesn't commercial
14 exploit -- exploitation also undergird the bar?

15 MR. SHANMUGAM: I don't think we would
16 dispute that that is one way of characterizing
17 the underlying purpose, and that is what Judge
18 Hand said in the Metallizing opinion.

19 JUSTICE BREYER: And, of course, that
20 can all be secret. It's not very hard.

21 MR. SHANMUGAM: But I don't think --

22 JUSTICE BREYER: You have an invention
23 --

24 MR. SHANMUGAM: I think to --

25 JUSTICE BREYER: -- that is practiced

1 -- well, I'm looking at the word "practice."
2 And it's not just one word. It's also
3 practicing the invention. And you can practice
4 the invention in such a way that the user of
5 the invention can't find out what the invention
6 is. That's not uncommon.

7 MR. SHANMUGAM: Let me say --

8 JUSTICE BREYER: And, therefore, we
9 have two that do not involve the public
10 awareness of the invention itself or how it is
11 produced.

12 MR. SHANMUGAM: So let me say just one
13 last thing about this Court's decisions and
14 then address that concern directly.

15 I think that if you were to adopt our
16 interpretation under which public availability
17 is required to trigger the on-sale bar, just
18 like all of the other bars, you would not have
19 to discard any of the reasoning of this Court's
20 cases and you wouldn't have to change any of
21 the outcomes of this Court's cases. We believe
22 that all of this Court's cases on their facts
23 would come out the same way.

24 Now, with regard to this alternative
25 formulation of the purpose, which I think

1 really first appeared prominently in Judge
2 Hand's opinion in Metallizing and then did --
3 did get picked up in a couple of this Court's
4 decisions, I'm willing to accept that, when you
5 have a sale, there is obviously a commercial
6 aspect to that. The person who sells the item
7 receives some consideration in response to
8 that.

9 But I don't think it's fair to say
10 that what Judge Hand was doing was saying that
11 the on-sale bar reaches all forms of pre-patent
12 commercialization. I think that that is an
13 over-reading of the on-sale bar.

14 And I think that, critically, even our
15 interpretation of the on-sale bar obviously
16 substantially limits an inventor's ability to
17 profit from his or her invention because, if
18 you do have public availability and a sale,
19 that is still going to be prohibited.

20 JUSTICE GINSBURG: Mr. Shanmugam, is
21 it --

22 MR. SHANMUGAM: Our submission is
23 simply that the statute --

24 JUSTICE GINSBURG: -- may -- may --
25 would you please clarify one thing? I -- I

1 thought that one argument was that the AIA
2 changed the way it was. But your definition of
3 "on sale" seems to apply -- you seem to say
4 there was no change; "on sale" never included
5 the secret sale.

6 MR. SHANMUGAM: Justice Ginsburg, as I
7 said at the outset, I think that what Congress
8 did in the AIA was to clarify the proper
9 understanding of the phrase. And I do think
10 that at least our argument concerning the
11 noscitur a sociis canon would still have
12 applied even before the AIA. Obviously, we
13 have the addition of the catch-all phrase.

14 And I think, under this Court's
15 decisions construing materially identical
16 language, catch-all provisions do shed light on
17 the meaning of the categories that precede
18 them. But in our view --

19 JUSTICE KAVANAUGH: If that was a --

20 MR. SHANMUGAM: -- in terms of what
21 the --

22 JUSTICE KAVANAUGH: -- if that was a
23 clarification, it was a terrible clarification
24 because there were a lot of efforts, as you
25 well know, to actually change the "on sale"

1 language, and those all failed.

2 MR. SHANMUGAM: I think, in fairness,
3 Justice Kavanaugh, I would say that this was
4 exactly the way to achieve Congress's dual
5 objective. First --

6 JUSTICE KAVANAUGH: You don't think it
7 would have been easier to just change it
8 directly, as many members of Congress tried to
9 do repeatedly and failed?

10 MR. SHANMUGAM: I -- I think that that
11 is, with respect, an overstatement of what
12 members of Congress tried to do. I think that,
13 at most, as Respondents point out, there were
14 bills that would have deleted "public use" and
15 "on sale" from the definition.

16 But I think that there was good
17 reason, actually, to retain those phrases. As
18 the legislative history to which -- to which
19 Respondents point suggests, there was a
20 surrounding jurisprudence concerning these
21 terms which Congress may have wanted to retain,
22 things like the ready for patenting
23 requirement.

24 Retaining those phrases also made
25 clear that where the inventive embodiment is in

1 the public domain, the statute reaches those
2 cases no differently from when the inventive
3 idea is in the public domain.

4 What Congress was trying to do in the
5 catch-all provision -- and the House and Senate
6 reports, the most definitive form of
7 legislative history, bear this out -- was to
8 achieve two objectives: to make sure that they
9 reached all forms of prior art, such as oral
10 presentations, PowerPoint presentations, and
11 the like, and also to clarify that any form of
12 prior art must be publicly available.

13 And notably -- and this gets to
14 Justice Ginsburg's question about whether there
15 was a change in the law -- I do think that what
16 Congress was doing was abrogating some of the
17 outlying lower court decisions that had
18 extended both the on-sale bar and the public
19 use bar to cases where there was not public
20 availability.

21 And, indeed, the legislative history
22 identifies by name some of the public use cases
23 that had so held, cases like the Beachcombers
24 decision from the Federal Circuit and the
25 JumpSport decision. We also point to some of

1 the on-sale cases that had extended to sales
2 that did not involve public availability, cases
3 like Special Devices and Caveney.

4 And I think, Justice Kavanaugh, that
5 that's precisely why you should think that what
6 Congress did here was fit for a purpose.

7 I think we would certainly acknowledge
8 that Congress could have modified the language
9 of "on sale," but what Congress wanted to do,
10 we would respectfully submit, was also to fix
11 some of this outlying Federal Circuit case law
12 on public use.

13 Now, of course, that phrase "public
14 use" one might think would have inherently
15 conveyed some notion of public availability, as
16 Respondents themselves suggest in their brief.
17 But, at the same time, you had the Federal
18 Circuit extending the public use bar to
19 circumstances in which inventions were
20 displayed, and private parties, the JumpSport
21 case involved a trampoline in the inventor's
22 backyard. These were cases where, in our view,
23 there would not have been public availability.

24 And so Congress, in including the
25 catch-all provision, did what Congress did in

1 cases like Seatrain Lines and Paroline. It
2 shed light on the meaning of the pre-existing
3 specified provisions, and to be sure, in those
4 cases, everything was enacted at the same time,
5 but, as a textual matter, you have to read the
6 statute as a whole.

7 And, again, Respondents' argument here
8 really rests on this notion of congressional
9 ratification. The first part of that is the
10 part that I've already addressed, this notion
11 that there was some settled body of law saying
12 that you don't have to have public
13 availability. And not only did this Court
14 never say that, this Court never did that.

15 But, of course, the second component
16 of any congressional ratification argument is
17 that you have to have statutory language that
18 was not changed. And this provision was
19 dramatically revised and, to be sure, some
20 elements of the pre-AIA definition, including
21 the phrase "on sale," were retained, but at the
22 same time, Congress added the catch-all phrase.
23 It defined a claimed invention. And, of
24 course, it shifted to a first-to-file system,
25 which largely addresses this concern about

1 improper commercialization because, of course,
2 any inventor who engages in commercial activity
3 without applying in a first-to-file system runs
4 the risk that another inventor will beat them
5 to the Patent Office.

6 And that is a concern, I would
7 respectfully submit, that is particularly acute
8 in a context like this.

9 JUSTICE KAVANAUGH: On -- on the first
10 part of what you just said as to what the law
11 was, the amicus brief, the Lemley amicus brief
12 says the law has always treated secret sales
13 and uses as prior art. Are you disagreeing
14 with that?

15 MR. SHANMUGAM: I am disagreeing with
16 that. And, again, in our view -- and the
17 government can offer its view with the
18 institutional heft of the Patent Office --
19 there is no decision of this Court that would
20 have to be disturbed.

21 In our view, there are a handful of
22 Federal Circuit cases that would come out
23 differently if a public availability
24 requirement is applied.

25 And I want to say one more --

1 JUSTICE BREYER: What about Bonito
2 Boats? I mean, in Bonito Boats, this Court,
3 while it isn't necessary for the holding, does
4 quote Learned Hand, and it does say it is a
5 condition upon the inventor's right to a patent
6 that he shall not exploit his discovery
7 competitively after it is ready for patenting.
8 He has to go ahead and patent it or keep it a
9 secret forever.

10 So an inventor who, in fact, in year
11 one has his invention ready for patenting, and
12 goes around from one person to another secretly
13 selling it to each with a confidentiality
14 agreement, is a person who is exploiting his
15 agreement -- his invention, and, therefore,
16 since he didn't do it through a patent, he
17 loses the right for a patent.

18 That seemed to me the clear -- pretty
19 clear rationale of Learned Hand, of why the
20 Court did that in Bonito Boats, of why Justice
21 Story said what he said, and I think it's that
22 that the Lemley brief was relying upon when
23 they made that statement.

24 MR. SHANMUGAM: We are not disagreeing
25 that that can be fairly read to be a purpose of

1 the on-sale bar. My submission is a much more
2 modest one. It is that, in order to accept
3 Respondents' submission, you have to think that
4 the on-sale bar really pursues that purpose at
5 all costs.

6 And part of the reason why we know
7 that that is not true is because Respondents
8 themselves concede that, if this arrangement
9 had been structured slightly differently, if
10 this had been structured as a right to profit
11 sharing rather than a -- a structure where you
12 have upfront payments followed by payments per
13 unit for any eventual product, if there even is
14 one --

15 JUSTICE BREYER: Can we -- can we
16 accept that point, write something in your
17 favor on that, that is, that there is a
18 question of what is on sale. It's not the
19 public/private question.

20 There are experimental exceptions, for
21 example, and perhaps there should be other, if
22 not exceptions, at least care taken to be
23 certain that it is an exploitation of the
24 invention when it is a private sale.

25 I mean, to go that far seems

1 consistent with what we have previously said
2 and what they say with the exceptions in the
3 statute.

4 It's where you want much more than
5 that, really, that -- you've read --

6 MR. SHANMUGAM: I -- I don't think we
7 want --

8 JUSTICE BREYER: -- the Lemley brief.
9 I've read the Lemley brief. We've all read
10 these different --

11 MR. SHANMUGAM: Justice Breyer, I
12 don't think we want much more than that. We
13 might suggest, respectfully, that the opinion
14 be written slightly differently.

15 JUSTICE BREYER: Yes.

16 MR. SHANMUGAM: I mean, I think that
17 we think that this Court should correct the
18 Federal Circuit's error, which is to say that
19 public availability is not required.

20 Now Respondents, we believe, have
21 forfeited any argument that there is public
22 availability here. But we also think that this
23 would be an easy case under a public
24 availability requirement, both because this
25 involved a sale to a single distributor, MGI,

1 that was under an obligation of
2 confidentiality, and also because this was a
3 development arrangement of which distribution
4 was an eventual possible part.

5 There was not even a product at the
6 time of this arrangement. And so we certainly
7 think that this would be an easy case under a
8 public availability requirement.

9 I'd like to reserve the balance of my
10 time for rebuttal. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Stewart.

14 ORAL ARGUMENT OF MALCOLM L. STEWART
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING THE PETITIONER

17 MR. STEWART: Mr. Chief Justice, and
18 may it please the Court:

19 In the government's view, there are
20 two basic reasons that the transaction at issue
21 here shouldn't be held to trigger the on-sale
22 bar. First, MGI was not a company that
23 intended to use the drug for its -- that
24 planned to use the drug for its intended
25 purpose by administering it to patients. MGI

1 proposed to function as a financial
2 intermediary that would take title to the
3 Palonosetron but ultimately would resell it.

4 And, second, even as to MGI itself,
5 the transaction did not provide any assurance
6 that title would ultimately pass because the
7 terms of the deal were subject to various
8 contingencies. And I'd like to focus on the --
9 the first point first.

10 None of this -- none of the Court's
11 decisions in either the public use or the --
12 the on-sale bar apply -- holding those bars to
13 apply have dealt with situations involving
14 distribution intermediaries. All -- all but
15 one of those cases have involved fact patterns
16 in which the invention was actually out there
17 in the world being used for its intended
18 purposes, and that was what was held to trigger
19 the on-sale or the public use bar.

20 The only exception to that is Pfaff,
21 because Pfaff involved an offer for sale that
22 had not yet been consummated, and the Court
23 held that the bar was triggered even though the
24 invention had not yet been supplied.

25 But even in Pfaff, you had a firm

1 offer to Texas Instruments that proposed --
2 that intended to use the component for its
3 ultimate purposes to be incorporated into
4 larger machines. You didn't have an entity
5 that intended to buy the product solely for
6 resale.

7 And -- and I think in terms of how do
8 we usually understand phrases like "on sale" or
9 "available to the public," our reading really
10 conforms much more closely to usual public
11 practices. That is, if you imagine a situation
12 with a new product like an iPhone, it's
13 manufactured. It's sold to a wholesaler. The
14 wholesaler sells it to a retailer. And then
15 the retailer sells it to consumers. There's a
16 train of transactions that constitute UCC
17 sales.

18 But, if you ask an ordinary speaker of
19 the language at what point did the iPhone go on
20 sale or become available to the public, you
21 would say that it's when consumers could buy
22 it, when the people who planned to use the
23 phone for its intended purpose --

24 JUSTICE SOTOMAYOR: If you ask a
25 consumer. But if you ask in the industry to

1 distributors, they'll say the moment that Apple
2 was going to start shipping it to distributors.

3 MR. STEWART: I think you --

4 JUSTICE SOTOMAYOR: That I didn't win
5 is irrelevant to me. It was on sale the moment
6 distributors were going to pick it up and ship
7 it out.

8 MR. STEWART: You -- you might use a
9 phrase like "on sale to distributors" or "on
10 sale to resalers" -- "resellers," but I don't
11 think you would use the phrase "on sale"
12 standing alone. And it would certainly be odd
13 to describe the phone as being made available
14 to the public at the time that Apple was
15 accepting bids as to who could --

16 JUSTICE SOTOMAYOR: This definition of
17 "on sale," to be frank with you, I've looked at
18 the history cited in the briefs, I looked at
19 the cases, I don't find it anywhere.

20 You're sort of giving "on sale to the
21 public" its meaning, but those are not the
22 words used by Congress. Congress could have
23 said "on sale to the public." And then we
24 might have to grapple with this. Congress just
25 said "on sale."

1 MR. STEWART: It said -- it retained
2 the phrase "on sale," but it added the phrase
3 "or otherwise available to the public." And
4 that served two purposes.

5 It functioned as a catch-all so that
6 things that were not enumerated might still
7 constitute prior art. But it also served the
8 purpose of clarifying that the preceding
9 enumerated categories were different ways of
10 making the invention available to the public.

11 And as we pointed out in the brief,
12 the on sale -- the --

13 JUSTICE SOTOMAYOR: Doesn't that
14 defeat your argument?

15 MR. STEWART: I'm sorry?

16 JUSTICE SOTOMAYOR: If that phrase has
17 an independent meaning, and you've just given
18 it two, then why don't we take the words
19 Congress used with their history? Because they
20 didn't say "on sale to the public"; they just
21 said "on sale." And when you have a historical
22 term that has a history, as a matter of course,
23 we look at that history.

24 MR. STEWART: I -- I think it's
25 certainly appropriate to -- to look to the

1 Court's -- to -- to the history, in particular
2 to this -- particularly to this Court's prior
3 decisions. And if this Court had previously
4 held the on-sale bar to be applicable to sales
5 to distribution intermediaries, then we might
6 say this is a fairly oblique way of overturning
7 those decisions.

8 Our -- our key point is this Court --
9 JUSTICE KAGAN: So is that right? If
10 -- if -- if you assume for a moment that the
11 law was pretty settled before the AIA, then do
12 you think that the AIA would -- that the
13 language added in the AIA would have been
14 capable of flipping that settled law?

15 MR. STEWART: If you thought it was
16 settled by this Court's decisions that the
17 on-sale bar applied to this sort --

18 JUSTICE KAGAN: How about if I say it
19 was settled because this Court had decided
20 Pfaff and because the Federal Circuit had a
21 number of cases?

22 MR. STEWART: I -- I don't think
23 that's sufficient to treat the law as settled,
24 especially because there is evidence both from
25 the face of the statute, the fact that

1 "otherwise available to the public" was added,
2 also from the legislative history, that
3 Congress was attempting to clarify that the
4 enumerated terms were ways of making the
5 invention available to the public.

6 I mean, the other thing I would say to
7 -- to follow up on something that my -- my
8 colleague mentioned is that one of the
9 justifications for the on-sale bar
10 traditionally has been prevent the inventor
11 from profiting before he is ready to put his
12 invention up for patent.

13 And that justification -- that
14 justification is neither sufficient nor
15 necessary on Respondents' view of the case.
16 That is, as Mr. Shanmugam pointed out,
17 Respondents themselves agree that there are
18 other transactions by which Helsinn could have
19 gotten money up front, could have gotten seed
20 money in return, for instance, for promising a
21 share of the profits. Those would not have
22 triggered the on-sale bar.

23 The other thing is that, in the
24 Federal Circuit's decisions, it's not even
25 necessary that the inventor profit from the

1 sale in order for the -- the on-sale bar to
2 apply. The Federal Circuit has confronted fact
3 patterns in which the inventor will ask an
4 outside supplier to produce physical
5 embodiments of the invention and deliver those
6 to the inventor.

7 Obviously, the inventor is not
8 profiting from that. The inventor is paying
9 money for the production. And the court -- the
10 Federal Circuit has said that triggers the --
11 that at least potentially triggers the on-sale
12 bar --

13 JUSTICE KAGAN: So --

14 MR. STEWART: -- because there's a UCC
15 sale.

16 JUSTICE KAGAN: So, Mr. Stewart, I'm
17 going to ask you to accept my assumption, and
18 it's a big assumption, I realize that. But
19 just accept the assumption that the law was
20 settled prior to the AIA and it was settled
21 Mr. Jay's way, not your way.

22 Then is the new language that the AIA
23 put in the statute -- would that be enough to
24 unsettle it?

25 MR. STEWART: No, I think that would

1 be a fairly oblique way of attempting to
2 overturn kind of a settled body of law. But,
3 as I say, the -- the body of law that the
4 Federal Circuit has developed doesn't map onto
5 any policy justification.

6 The other thing I would say about
7 Pfaff is that, in Pfaff, the Court emphasized
8 that the sale was what it referred to as a
9 commercial sale rather than an experimental
10 sale. And the Court at some length discussed
11 the body of cases involving the experimental
12 use doctrine and the --

13 JUSTICE KAVANAUGH: You --

14 MR. STEWART: I'm sorry, Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: Go ahead.

17 MR. STEWART: And the -- the Court has
18 recognized that even when an invention is being
19 used out in the public square in a manner that
20 is visible to the public, it's not the sort of
21 public use that triggers the public use bar if
22 it is being done for experimental purposes, to
23 verify that the invention will work as a stage
24 precedent to patenting.

25 And the Court in Pfaff strongly

1 indicated, if a sale is made so that the buyer
2 can engage in experimentation, rather than to
3 use the product to achieve its intended
4 benefits, that won't trigger the on-sale bar.

5 JUSTICE KAVANAUGH: You -- you
6 mentioned the legislative history, but, here,
7 isn't this a classic example of trying to
8 snatch victory from defeat in some of the
9 legislative statements?

10 In other words, there was this law
11 before, as Justice Kagan mentions, a huge
12 effort to change it, lots of proposals to
13 change it. They all fail, and then a couple
14 statements said on the floor on which you're
15 relying. I -- I think the legislative history,
16 read as a whole, goes exactly contrary.

17 MR. STEWART: Well, to answer that,
18 let me point to -- to one of the things --

19 JUSTICE KAVANAUGH: What's wrong with
20 thinking that way?

21 MR. STEWART: I think what's wrong
22 with thinking that way is that, as we've
23 pointed out in our brief, the -- the prior art
24 provision encompasses two conceptually distinct
25 ways of placing an invention in the public

1 domain.

2 If the invention is patented or
3 described in a printed publication, that means
4 that the inventive idea has been made available
5 to persons skilled in the art such that they
6 would be able to make it. And the on-sale bar
7 and public use bars deal with situations in
8 which physical embodiments of the invention had
9 been placed in the -- the public domain.

10 Now some of the proposals that you
11 refer to, Justice Kavanaugh, would have said
12 things to the effect of it has been patented --
13 patented, described in a printed publication,
14 or otherwise available to the public.

15 I think, if that language had been
16 used and there had been no reference to on sale
17 or public use, it would have been at least a
18 permissible inference that the "otherwise
19 available to the public" referred solely to
20 circumstances in which the inventive idea had
21 been disclosed.

22 And that would have -- that really
23 would have overturned a great deal of this
24 Court's law concerning the on-sale and public
25 use bars because those can be triggered even if

1 the public is not aware of how the invention
2 works, so long as physical body -- embodiments
3 have been made available.

4 So I think Congress got the best of
5 both worlds by -- by clarifying that all these
6 things have to be public in some manner, but
7 also clarifying that making physical
8 embodiments available is sufficient.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Stewart.

11 Mr. Jay.

12 ORAL ARGUMENT OF WILLIAM M. JAY

13 ON BEHALF OF THE RESPONDENTS

14 MR. JAY: Thank you, Mr. Chief
15 Justice, and may it please the Court:

16 A product that is sold or offered for
17 commercial sale is on sale, as this Court has
18 consistently read that term. That established
19 meaning didn't change when Congress added a new
20 category of invalidating prior art to the
21 statute. That's events that make the invention
22 available to the public in other ways not
23 already covered by the statute.

24 So Helsinn's argument, as you heard
25 this morning, is that although it sold its

1 invention, that sale did not place the
2 invention on sale. We submit that not only did
3 Helsinn place the invention on sale, it also
4 made the invention available to the public.

5 But I'd like to begin with first the
6 plain meaning of "on sale." We think that the
7 reason that the statute uses "on sale" and that
8 this Court has always read it this way,
9 including in Pfaff, is to cover offers for
10 sale. If it just -- if the statute simply said
11 sales, then it wouldn't cover offers. And
12 offers are important for two important reasons
13 -- for two key reasons.

14 One, an offer shows -- the willingness
15 to place the invention on sale, to make an
16 offer to sell the product, shows that the
17 inventor is ready to commercialize the
18 invention. And if they're ready to
19 commercialize the invention, and then the
20 second half of the Pfaff test is met, the
21 invention itself is ready for patenting, then
22 the inventor ought to be going to the Patent
23 Office and applying for a patent.

24 If instead the inventor wants to
25 commercialize the invention, deriving profit

1 from it, then the inventor can do that but
2 should not expect a legal monopoly that could
3 extend past the statutory term.

4 JUSTICE ALITO: Well, I think the most
5 serious argument you have to deal with is the
6 meaning -- the plain meaning -- the fairly
7 plain meaning of the new statutory language.

8 So you say "on sale" means on sale
9 publicly or on sale privately, right?

10 MR. JAY: Right. On --

11 JUSTICE ALITO: All right.

12 MR. JAY: -- on sale, period, full
13 stop.

14 JUSTICE ALITO: Okay. So suppose that
15 the statute had been amended to read just the
16 way it does, except -- so it would -- with one
17 exception. So it says the claim -- the claimed
18 invention was patented, described in a printed
19 publication, or in public use, on sale publicly
20 or on sale privately, or otherwise available to
21 the public.

22 That would be nonsense, wouldn't it?

23 MR. JAY: I -- I think it would be
24 confusing. That -- that's certainly right.
25 But I do think that it would specify that one

1 of the categories of invalidating prior art
2 would be on sale privately.

3 And in your hypothetical, I think this
4 Court would give effect to the choice that
5 Congress made, even though one of the items in
6 the list might stick out somewhat and not --

7 JUSTICE ALITO: It would be -- it
8 would be nonsense because the meaning of
9 "otherwise" is in the same -- in some other
10 manner, to do the same thing in some other
11 manner.

12 And you have -- what we have now after
13 this change is an enumerated -- is an
14 enumeration of a number of things that are
15 public, a printed publication in public use,
16 two things that are obviously public.

17 Then we have on sale. And then it
18 says, "or otherwise available to the public."
19 And I find it very difficult to get over the
20 idea that this means that all of the things
21 that went before are public.

22 MR. JAY: So two points. Of course --

23 JUSTICE ALITO: That's what
24 "otherwise" means.

25 MR. JAY: So, of course, you know,

1 Your Honor sort of asked me to assume that this
2 is a statute that's being written from scratch,
3 and I think that that takes off the table all
4 of the history of the statute as it was before
5 2011.

6 But, second, even taking -- even
7 taking that off the table and looking at the
8 statute, a statute like the one that you've
9 proposed, the reason that your example is
10 different from this statute is that, in your
11 example, there's one category, on sale
12 privately, that doesn't even have any overlap
13 with available to the public.

14 And we've never disputed that many
15 sales do, in fact, make inventions available to
16 the public. But we do think that "on sale" has
17 its own meaning, and one important part of that
18 meaning is offers.

19 And we think that structurally, if "on
20 sale" is to include offers, and we think there
21 is no way to read that definition to exclude
22 offers, offers are not generally going to make
23 an invention available to the public.

24 My friends on the other side in their
25 brief suggest that that might happen in a

1 newspaper advertisement. But it's extremely
2 unusual to see in a newspaper advertisement all
3 of the details of a claimed invention
4 disclosed.

5 So we think that the function of
6 "otherwise" in the statute as amended, again,
7 even taking off the table all of the history,
8 is to acknowledge that there is overlap between
9 the previous four categories and the new
10 category of invalidating prior art that's being
11 added, so as to make sure that the new category
12 doesn't swallow or change the meaning of a
13 prior one.

14 Let me illustrate that with an
15 example.

16 JUSTICE ALITO: So -- so the new
17 category consists of offers?

18 MR. JAY: The new -- sorry, the new
19 category consists of things that make the --
20 that otherwise make the invention available to
21 the public.

22 JUSTICE ALITO: And what would be
23 within that category?

24 MR. JAY: An oral presentation at a
25 conference without slides, you know, PowerPoint

1 slides that get distributed. That's one
2 example. Another that's discussed in the High
3 Tech Inventors Alliance brief is collaboration
4 among many people on an app -- an app -- a
5 collaboration app which is not on the Internet
6 and is not indexed and would not count as a
7 printed publication but ought to be the kind of
8 disclosure.

9 I mean, the government agrees with us,
10 and I think, by the end of the briefing,
11 Respondent -- Petitioner has agreed with us
12 that this new category's primary function is to
13 create new invalidating prior art disclosures
14 that weren't invalidating before the AIA.

15 And we think that it would be strange
16 for Congress, by creating a new invalidating
17 category, in other words, narrowing the scope
18 of things that could be patentable, to
19 indirectly and by the -- the strangest
20 implication, narrow a category of prior art and
21 widen the scope of things that could be
22 patented.

23 I think it's -- as a historical matter
24 about this case, I think it's important to
25 understand that Petitioner had gotten three

1 patents before the AIA, all of which were
2 invalidated below. And Petitioner hasn't
3 sought cert on that, and, indeed, told this
4 Court at page 3 of the reply brief that it
5 could assume that that decision was correct
6 under the -- under the prior interpretation of
7 the AIA -- I'm sorry, of the "on sale" words.

8 JUSTICE SOTOMAYOR: Mr. Jay --

9 MR. JAY: Yes.

10 JUSTICE SOTOMAYOR: -- you were cut
11 off before you gave an example. I wasn't quite
12 moved by your baseball example. So do you have
13 something else in something that's based in law
14 where "otherwise" was used in the way you
15 suggest?

16 And the second part of my question is,
17 will we be the only country that has a
18 first-to-file system that includes private
19 sales?

20 MR. JAY: So let me answer the second
21 part first --

22 JUSTICE SOTOMAYOR: Confidential-wise.

23 MR. JAY: -- just because I think -- I
24 think -- I think it's a pretty straightforward
25 answer. The on-sale bar itself is unique. The

1 other -- other countries don't have an on-sale
2 bar that includes public sales. They just
3 don't have an on-sale bar at all. So --

4 JUSTICE SOTOMAYOR: I'm sorry.
5 Explain that to me, an on sale -- no -- there
6 is no on-sale bar --

7 MR. JAY: Right.

8 JUSTICE SOTOMAYOR: -- public or
9 private?

10 MR. JAY: Right. Sales are not a
11 category in the other countries' patent systems
12 that are discussed in the briefing. The point
13 made is that those countries don't rely on
14 secret prior art, but they also don't have an
15 on-sale bar at all.

16 So, in this country, we have and have
17 decided -- and Congress has decided to retain a
18 category of invalidating prior art that -- that
19 -- that has, as the purpose, measuring whether
20 the inventor is commercializing the invention,
21 is ready to commercialize the invention, an
22 invention that, under the second half of the
23 test, is ready for patenting.

24 So -- so that is itself somewhat
25 unique. And I think that's the answer to why

1 you don't see this in other countries.

2 On -- on your -- on the first question
3 you asked, Your Honor, what I was getting to
4 with -- with Justice Alito about the -- the
5 addition of "otherwise available to the
6 public," rather than just "available to the
7 public," we think the word "otherwise" serves
8 to acknowledge that there is overlap and to
9 avoid this strange situation.

10 So, if the statute had said described
11 in a printed publication, dot, dot, dot, or
12 available to the public, one implication of
13 that might be, if there weren't a clarifying
14 word like "otherwise" to make clear that that
15 new category was a residual category intended
16 to catch things not already caught, the
17 implication might be that, well, gosh, in order
18 to give content to the other items in the list,
19 we better read them to include things that are
20 not available to the public, such as printed
21 publications that are not indexed, that are not
22 available to the public.

23 There is a lengthy -- an extensive
24 body of law on that. So, for example, a Ph.D.
25 thesis that's on a shelf somewhere but is not

1 indexed and not readily findable does not count
2 as a printed publication.

3 We think that the best reading of this
4 new category is that it creates a new set of
5 invalidating prior art and it does not unsettle
6 any of the prior categories, whether patented,
7 described in a printed publication, in public
8 use, or on sale.

9 And it certainly doesn't -- doesn't
10 disturb the basic policy justification for the
11 on-sale bar, which deals not with the stock of
12 public knowledge, precisely because, as my
13 friend, Mr. Shanmugam, and my friend, Mr.
14 Stewart, have both -- have both discussed,
15 putting an embodiment out in the public or even
16 offering to put an embodiment of the invention
17 out in -- in the public for money, meaning on
18 sale, that may not tell the public anything
19 about how the invention works.

20 JUSTICE BREYER: Can -- can you answer
21 Justice Alito's and Justice Sotomayor's first
22 question? That is, I can think of examples,
23 but they're a little awkward. I mean, the
24 meet, the sports meet will include football,
25 basketball, running, swimming, or otherwise --

1 or games that otherwise involve a ball, okay?

2 Or breakfast, a healthy breakfast
3 includes Fiber One bran flakes, fruit, tea, and
4 food that otherwise is a -- what do you --
5 fiber heavy, you see. But -- but each of those
6 is somewhat awkward, each of the ones.

7 So it's possible among these excellent
8 briefs -- I thought the bar really earned its
9 pay on both sides -- but, I mean, the -- the --
10 the -- I -- I couldn't come up with a good
11 English example there. So I thought maybe --
12 maybe you have.

13 MR. JAY: So I actually -- and thank
14 you, Your Honor.

15 (Laughter.)

16 MR. JAY: The -- the example that we
17 thought of actually is -- is --

18 JUSTICE BREYER: There were an awful
19 lot of them.

20 MR. JAY: There are -- is very close
21 to your -- your football, baseball, swimming
22 example. And I think, in particular, that if a
23 statute said, you know, don't engage in
24 football, baseball, or swimming, full stop, I
25 think everyone would understand what football

1 and baseball and swimming meant.

2 And if the -- if the statute were then
3 amended to add "or any other activity that
4 involves the use of a ball," that might be a
5 bit awkward, but no one would think that it
6 changed the meaning of swimming, that it
7 required the adoption of a atextual meaning of
8 swimming that doesn't appear in any dictionary,
9 or that it required anything, other than the
10 addition of --

11 JUSTICE KAGAN: Well, I'll give you
12 another one.

13 JUSTICE ALITO: Well, it would be
14 nonsense.

15 JUSTICE KAGAN: I'll give you another
16 one, Mr. Jay. So suppose I say don't buy
17 peanut butter cookies, pecan pie -- this is the
18 key one, ready -- brownies, or any dessert that
19 otherwise contains nuts. Do I -- do I violate
20 the injunction if I buy nutless brownies?

21 MR. JAY: So I think that the reason
22 that that hypothetical -- so I think I would
23 say no. Do I -- do you violate the injunction
24 if you --

25 JUSTICE KAGAN: In other words, can I

1 buy nutless brownies?

2 MR. JAY: I think so -- I think you
3 can. And I think that the reason -- the reason
4 for that is that "brownies" is a -- is a term
5 that might or might not, you know, be read to
6 include brownies with nuts or -- or -- or
7 brownies otherwise.

8 But I don't think that you have that
9 permissible reading of "on sale" here. And, in
10 addition --

11 JUSTICE KAGAN: You're saying it's not
12 even like a little bit doubtful what "on sale"
13 means?

14 MR. JAY: Certainly not by the time
15 the AIA was -- was enacted, no, I don't think
16 that it was. I don't think that it was
17 doubtful by -- by any dictionary that we found,
18 either when the bar was enacted or when it was
19 recodified in 1952, or when it was reenacted in
20 2011. So -- so, no, I don't -- I don't think
21 it's a permissible reading. And in your --

22 JUSTICE KAGAN: Because, in Mr.
23 Shanmugam's excellent brief, he --

24 (Laughter.)

25 JUSTICE KAGAN: -- he certainly seems

1 to think that "on sale" means something
2 different from what you thought it meant. And
3 I guess what my hypothetical is designed to do
4 is to say, look, let's take a term that could
5 be read one way or the other and then let's
6 attach that "otherwise" language to it. And it
7 seems pretty clear that the "otherwise"
8 language would be doing something.

9 MR. JAY: So -- well, of course, it is
10 doing something on both sides' reading, and I
11 think that, you know, that it creates this new
12 category --

13 JUSTICE KAGAN: Yeah, yeah, yeah.

14 MR. JAY: -- but -- right.

15 JUSTICE KAGAN: You know what I mean.

16 MR. JAY: I do. And -- but in that --
17 in both of his excellent briefs, right, you
18 won't find any dictionary definition anywhere
19 of "on sale," no -- no engagement with the
20 meaning of "on sale." There's just a -- just a
21 cross-reference to the government's brief.

22 And the government cites a dictionary
23 that says that "on sale" means available for
24 purchase by customers. And a customer is just
25 someone who buys something. I -- it certainly

1 doesn't mean available in an open, you know,
2 non-hidden way, and it doesn't mean available
3 to the entire world.

4 One sale to one willing purchaser has
5 always been an invalidating sale. And I think
6 that the reason for that -- one reason for
7 that, this Court brought out in Pfaff is that
8 it gives the inventor, him- or herself, a
9 degree of predictability. The inventor
10 controls when -- when she wants to place her
11 invention on sale.

12 If, instead -- if it were something
13 more ambiguous that involved when the invention
14 is not just sold by the inventor to a
15 wholesaler or sold by the wholesaler to a
16 retailer but, instead, when it was placed on
17 sale by the retailer --

18 JUSTICE KAVANAUGH: But given your
19 position --

20 MR. JAY: -- at the end of the
21 process.

22 JUSTICE KAVANAUGH: I'm -- I'm sorry.
23 Given your position, you have the wrong answer
24 to the brownies hypothetical, I think, because
25 --

1 MR. JAY: Oh, so if you -- if you --
2 my answer to the brownies hypothetical is -- is
3 based on the idea --

4 JUSTICE KAVANAUGH: As a term, it
5 covers with nuts or without nuts, right?

6 MR. JAY: So I -- I guess it -- right.
7 It depends --

8 JUSTICE KAVANAUGH: Maybe we lost the
9 hypothetical.

10 MR. JAY: Yeah, right. I guess maybe
11 I'm -- maybe I'm misunderstanding the
12 hypothetical or at least maybe we're having a
13 disagreement about what -- what it means to be
14 -- to be a brownie.

15 (Laughter.)

16 JUSTICE BREYER: Well, it's a good --

17 JUSTICE KAVANAUGH: You were saying it
18 was ambiguous --

19 (Laughter.)

20 JUSTICE KAVANAUGH: You were saying
21 it's ambiguous. And I'm saying that is not
22 ambiguous, right? And you were saying "on
23 sale" is not ambiguous.

24 MR. JAY: I -- so I am saying that "on
25 sale" is ambiguous. And I guess if you --

1 JUSTICE KAVANAUGH: Not --

2 MR. JAY: -- if you open the
3 dictionary and --

4 JUSTICE KAVANAUGH: You're saying it's
5 not ambiguous, "on sale"?

6 MR. JAY: I'm saying that "on sale" is
7 not ambiguous. It certainly was not ambiguous
8 when -- when chosen for continued inclusion in
9 the AIA.

10 JUSTICE KAVANAUGH: Even though it
11 says "otherwise available to the public," it's
12 still not ambiguous?

13 MR. JAY: Even though it says
14 "otherwise available to the public," it's still
15 not ambiguous, that's right, because it -- it
16 would take more than that. And I agree -- I
17 agree with Mr. Stewart when -- when he answered
18 this question.

19 It would take more than that to
20 unsettle the meaning of a term with such a
21 lengthy history and would be a very indirect
22 way, as I think Your Honor brought out in your
23 question in the top half of the argument, to
24 accomplish that.

25 So whatever the definition --

1 dictionary definition, of "brownie" may be, and
2 I guess -- I confess I'm not up on that, I -- I
3 think that the -- the meaning of "on sale" is
4 sufficiently unambiguous.

5 And it certainly -- it certainly is
6 not the case that "otherwise" is some
7 talismanic word that is used in statutes, you
8 know, to unsettle the meaning of -- of words
9 that come before it. I think the best examples
10 that we can give are "the party or other
11 activity that damages the house" in Barnhart.
12 "Party" -- "party," of course, is not even a
13 term of art.

14 JUSTICE KAVANAUGH: Well, they cite
15 the Paroline case as an example of a case where
16 a term -- a statute was structured like this,
17 and the term in the catch-all then was used to
18 influence the interpretation of the preceding
19 terms.

20 MR. JAY: It was --

21 JUSTICE KAVANAUGH: Why is that
22 different?

23 MR. JAY: It was used as -- the Court
24 said, it was used -- it summarized what the --
25 you know, what the preceding terms did. It

1 certainly wasn't used to change or unsettle a
2 preexisting meaning. I think it's different
3 for a couple of reasons.

4 One, the Court said in Paroline:
5 Number one, that it might well have reached the
6 same conclusion even if that language didn't
7 appear in the statute because of the strong
8 statute presumption that remedial statutes
9 contain a proximate cause element. And, you
10 know, that is on page 446 of the opinion.

11 And, then on the next page, you'll see
12 that the -- the Court has a paragraph dealing
13 with the -- with the other language, and it
14 does two things: One, it treats it as a series
15 modifier because it is equally applicable to
16 each of the five categories that's come before.

17 That was kind of like the argument
18 that the other side was making in the court of
19 appeals, that "otherwise available to the
20 public" is a -- is a series modifier that
21 actually modifies, as a matter of English
22 grammar, the terms that come before it in the
23 list. And they've abandoned that argument, and
24 that's why we're not talking anymore about the
25 rule of the last antecedent.

1 And then the third thing was -- was
2 the point about summarizing the categories that
3 come before. In this case, we just don't think
4 that "available to the public" is a fair
5 summary of "on sale" either as a matter of
6 ordinary English or as a matter of the
7 specialized meaning that this Court has given
8 it.

9 And I think that Mr. Shanmugam, you
10 know, suggested that, you know -- you know,
11 Judge Hand kind of created this, the policy
12 behind the on-sale bar, as being something
13 about commercializing. But I think the history
14 goes much further back than that, and I
15 would urge the Court to look at a number of the
16 late 19th Century cases, such as Consolidated
17 Fruit-Jar, in which the Court said that the
18 inventor is not allowed to derive any benefit
19 from the sale or the use of his machine unless
20 he begins -- unless he applies for patenting
21 within the then grace period.

22 JUSTICE GORSUCH: Mr. Jay, say we
23 disagree with you, just for the purposes of
24 this hypothetical, and think that the
25 introduction of the "otherwise" clause

1 introduced some ambiguity about what "on sale"
2 means now.

3 I understand the Patent Office has an
4 interpretation of the statute. What should we
5 do with that, if anything, or should we ignore
6 it?

7 MR. JAY: I -- I think that it -- it
8 would only be relevant if it had the power to
9 persuade. This Court has never given deference
10 to the Patent Office on substantive questions
11 of patentability, on what it takes to overcome
12 the bars put in the statute by Congress where
13 Congress has said you may not have a patent if
14 X, Y, or Z.

15 Now this Court has any number of
16 decisions in which it has held that a patent
17 issued by the Patent Office in conformance with
18 the -- with the office's then examination
19 guidelines were invalid.

20 So we think it's entitled to
21 respectful consideration, just as the
22 government's amicus brief in this case is
23 entitled to respectful consideration. But we
24 respectfully disagree with it. We don't think
25 that -- particularly because it doesn't deal

1 with the meaning of "on sale" and, in its
2 attempt to reconcile that with the new
3 language, it -- its suggestion of this new test
4 about availability to the public, meaning the
5 ultimate consumer, that's not based in
6 anything, text or definition or history or case
7 law of any kind.

8 But -- so we think that a virtue of
9 our position is that you don't need to get into
10 the question of what it means to be available
11 to the public when you're considering a sale.
12 You know, a sale or an offer for sale is a
13 concept that's been baked into this statute for
14 a long time.

15 Mr. Stewart urged the Court to look at
16 a number of aspects of this transaction, and
17 Mr. Shanmugam, in sort of the -- the end of his
18 four-part litany of why this -- why this
19 invention was not available to the public,
20 mentioned that -- that this was a development
21 agreement.

22 And I would urge the Court to look at
23 part 1 of the Federal Circuit's opinion, which
24 deals with the question whether this was a sale
25 at all. That's a pretty specific inquiry into

1 whether the preconditions for this sale prevent
2 it from being a sale, as that term is used and
3 has been used for many, many years.

4 The other side, of course, didn't seek
5 certiorari on that question. We don't think
6 it's properly before the Court. What they did
7 seek certiorari on is -- and if you look
8 specifically at the question presented, it
9 doesn't use "available to the public"; it
10 refers specifically to secrecy, to -- to the
11 existence of a confidentiality agreement, you
12 know, a third-party that is obligated to keep
13 the invention confidential.

14 That's the only manifestation of not
15 available to the public that they put in the
16 question presented. And I think you've heard
17 that, you know, the government's not defending
18 that view, and we think that adopting that view
19 under which stickering a -- an offer or a
20 product with a confidentiality agreement, and
21 thereby taking it off the table for purposes of
22 the on-sale bar, would be an incredibly
23 problematic view for -- for a variety of
24 reasons.

25 One, it would be easy to do.

1 Two, it -- it would seriously
2 undermine the purpose of the -- the on-sale bar
3 because it would allow not just isolated
4 commercialization but really rampant
5 commercialization.

6 And then the third -- a third point
7 about what -- what it means to be available to
8 the public, about whether this -- this
9 distributor should count, and this goes back to
10 a question that -- that Justice Sotomayor asked
11 about, you know, if you asked a consumer, you
12 know, what -- what would it mean to be -- to be
13 on sale.

14 I think if you ask a pharmaceutical
15 company what does it mean for your product to
16 be on sale, what that pharmaceutical company
17 would say is we're selling it to a distributor,
18 because, as we've cited and as we explained in
19 our brief, 90 percent of the pharmaceuticals in
20 this country are sold not -- not directly from
21 the manufacturer to a consumer but to a
22 wholesaler or a -- or a distributor. That's
23 how they're sold.

24 And so the implications of adopting
25 this ultimate consumer test would be to give

1 the pharmaceutical industry in particular and
2 any other industry that operates primarily
3 through wholesalers and distributors a real
4 free pass from the on-sale bar.

5 And that -- getting back to the basic
6 purpose of the bar, that would undermine the
7 statutory term, right? The -- as the Court
8 said in Pfaff, confining the duration of the
9 monopoly to the statutory term is one of the
10 two key principles of the -- underlying the
11 on-sale bar.

12 We think that because Helsinn placed
13 its invention on sale and it was willing -- and
14 part 3 of the Federal Circuit's opinion --
15 opinion explains why it was ready for
16 patenting, so it had one year in which to apply
17 for a patent. It chose not to do that.

18 And then, many years later, after the
19 AIA was passed, it went back to the Patent
20 Office and it tried to get -- and it got a
21 patent that would be subject to the AIA that
22 was, as the Federal Circuit explained,
23 indistinguishable from -- for -- for relevant
24 purposes, materially indistinguishable, from
25 the pre-AIA patents it had -- it had obtained.

1 And it said that the sale that had
2 invalidated -- that was going to invalidate its
3 prior pre-AIA patents doesn't invalidate this
4 post-AIA patent. So I think it's difficult for
5 Helsinn to say that it's not withdrawing
6 anything from the stock of knowledge by getting
7 a patent.

8 JUSTICE KAGAN: Mr. Jay, would the
9 prior secret sale of an invention by somebody
10 other than the patentholder invalidate the
11 patentholder's patent?

12 MR. JAY: I think the answer is yes,
13 but I -- I've not seen cases like that because
14 I think it would be exceptionally difficult to
15 discover, whereas the way that the sale in this
16 case came to light and the way in which sales
17 in patent cases generally come to light is
18 through discovery from the inventor.

19 You know, as the Court said in Pfaff,
20 you want the inventor to have control about the
21 timing and the choice to commercialize the
22 invention.

23 And so a rule that gives the inventor
24 control over that necessarily has to leave out
25 the possibility that someone else might also

1 have the invention and start selling it, but
2 that's not been an implementation problem in --
3 in reality.

4 If the Court has no further questions,
5 I'm prepared to yield back the balance of my
6 time.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Shanmugam, you have four minutes
10 remaining.

11 REBUTTAL ARGUMENT OF KANNON K.

12 SHANMUGAM ON BEHALF OF THE PETITIONER

13 MR. SHANMUGAM: Thank you, Mr. Chief
14 Justice.

15 Our fundamental submission today is a
16 simple one. It is that the phrase "on sale"
17 should not be read in a vacuum but, rather, in
18 the context of the surrounding language.

19 And the fundamental problem and the
20 dispositive problem, I would respectfully
21 submit, with Mr. Jay's submission is that it
22 really would read the word "otherwise" out of
23 the statute.

24 I think that the hypotheticals that
25 were proffered to Mr. Jay make that clear. But

1 let me, at the risk of introducing another one,
2 point to this Court's decision in one of my
3 favorite statutory interpretation cases, United
4 States versus Standard Brewery. That is the
5 case that involved the Wartime Prohibition Act,
6 which prohibited the use of grains to
7 manufacture, in the language of the statute,
8 "beer, wine, and other intoxicating malt or
9 Venice liquor for beverage purposes."

10 And believe it or not, there was
11 actually a case in which a party was making
12 non-intoxicating beer, and the question was
13 whether the statute applied to that. And the
14 Court said no, applying the very principles
15 that we are articulating here.

16 And the Court's rationale was that the
17 qualifying words "other intoxicating" in this
18 act cannot be rejected. In the words of
19 Justice Day, if the intention was to include
20 beer or wine, whether intoxicating or not, the
21 use of this phraseology was quite superfluous.

22 And I would respectfully submit that
23 Mr. Jay really has no alternative way of
24 reading the very familiar term "otherwise."
25 Mr. Jay today, as in his excellent brief,

1 suggests that "otherwise" could be read to
2 cover situations in which there's some overlap.

3 We know that the public use bar and
4 the on-sale bar have considerable overlap in
5 many cases. But it would, of course, have been
6 nonsensical for Congress to have said "in
7 public use or otherwise on sale." That doesn't
8 make sense as a matter of basic English.

9 And Respondents can point to none of
10 this Court's many cases involving catch-all
11 provisions that support that approach to the
12 statutory language.

13 JUSTICE BREYER: You have a whole
14 brief, I mean, you know, you have a brief -- I
15 mean, everybody's is excellent. Okay?

16 But the point is that -- that there is
17 a brief which gives the instance of an inventor
18 who talks daily through the Internet, or
19 otherwise, to 60,000 people and he tells those
20 60,000 people about his invention.

21 And that, they say, and similar or
22 other circumstances, are what this last phrase
23 is meant to cover.

24 MR. SHANMUGAM: Just as --

25 JUSTICE BREYER: Now that gives a

1 meaning to it.

2 MR. SHANMUGAM: Yes. Just as in
3 Standard Brewery, right? That catch-all
4 provision was presumably included for a reason,
5 to include other malt or Venice beverages.
6 That's always true --

7 JUSTICE BREYER: Sometimes. So what,
8 they'll say. Sometimes yes, sometimes no.

9 MR. SHANMUGAM: -- with a catch-all
10 provision. That would have been true with the
11 catch-all provision in Seatrain Lines, the
12 catch-all provision in Paroline. And yet these
13 cases consistently make clear that these sorts
14 of catch-all provisions identify a key
15 characteristic that the preceding provisions
16 should be understood to share. And we know
17 from the legislative history that that was the
18 better view of Congress's intent here.

19 And while Respondents have this very
20 convoluted explanation of the evolution of the
21 statutory language, the one thing they can't
22 point to is any legislative history that
23 construes the final version of the AIA in the
24 way that they suggest.

25 Now I want to say just a word about

1 this contrary argument about "on sale" which
2 really relies on interpreting "on sale" in
3 vacuo.

4 I made the point in my opening
5 argument that there are no cases of this Court
6 that would come out differently under our
7 interpretation. I did not hear Respondents to
8 suggest differently.

9 And, Justice Kagan, to the extent that
10 you asked a question along these lines about,
11 well, can we put together Pfaff and these
12 Federal Circuit cases and get enough to get to
13 some notion of ratification, our interpretation
14 retains Pfaff. It retains both the holding of
15 Pfaff, because I think that that was a case
16 where there was availability to the public.

17 It was a somewhat unusual product
18 because it was a custom-made product. And so I
19 think Texas Instruments really was the sum
20 total of the relevant public, but I think the
21 outcome would be the same.

22 And our whole point about why Congress
23 used this final formulation, to respond to
24 Justice Kavanaugh's questions on this point,
25 was to retain the existing jurisprudence

1 surrounding the bars.

2 And, in particular, with regard to
3 Pfaff, Pfaff, as the Court will be aware,
4 articulated the ready for patenting
5 requirement. That is a requirement in our view
6 that very much would continue to have force.
7 The experimental use exception to which Mr.
8 Stewart referred would also continue to have
9 force.

10 And that explains, I think, even the
11 legislative history, the little bit of
12 legislative history to which Respondents point,
13 and in particular Representative Lofgren's
14 statement, because, by retaining those phrases,
15 while adding the catch-all provision, Congress
16 made clear that that jurisprudence should be
17 retained.

18 The judgment of the Federal Circuit
19 should be reversed. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. The case is submitted. I am sure
22 we'll come up with an excellent opinion.

23 (Laughter.)

24 (Whereupon, at 11:59 a.m., the case
25 was submitted.)

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