

No. 17-1229

---

---

IN THE

**Supreme Court of the United States**

---

HELSINN HEALTHCARE S.A.,

*Petitioner,*

*v.*

TEVA PHARMACEUTICALS USA, INC., *et al.*,

*Respondents.*

---

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

---

---

**BRIEF FOR SPCM S.A. AND  
HIGH TECH INVENTORS ALLIANCE AS  
AMICI CURIAE SUPPORTING RESPONDENTS**

---

---

JAMES W. DABNEY  
*Counsel of Record*  
KHUE V. HOANG  
RICHARD M. KOEHL  
EMMA L. BARATTA  
STEFANIE M. LOPATKIN  
HUGHES HUBBARD & REED LLP  
One Battery Park Plaza  
New York, New York 10004  
(212) 837-6000  
james.dabney@hugheshubbard.com

JOHN F. DUFFY  
HUGHES HUBBARD & REED LLP  
1775 I Street, N.W.  
Washington, D.C. 20006  
(202) 721-4600

*Counsel for Amici Curiae*

October 16, 2018

---

---

284164

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF THE ARGUMENT.....	2
I.    35 U.S.C. § 101 AND THIS COURT’S PRECEDENTS LIMIT PATENT- ELIGIBILITY TO “NEW” TECHNOLOGIES. ....	5
A.    U.S. Patent Law and Policy Has Long Authorized Patent Grants Only for “New” Claimed Inventions.....	6
1. This Court Has Construed “on Sale” Expansively and as Time-Based.....	8
2. AIA Carried Forward “on Sale” as a Criterion Defining “New” or Novelty...	9
B.    This Court’s Precedents Have Long Interpreted 35 U.S.C. § 102 and Its Predecessor Statutes as Enforcing the Overarching Policy of Limiting Patent Protection to Subject Matter That Is Actually “New.” .....	11
C.    Petitioner’s Position Would Dramatically Undermine the On- Sale Category of Prior Art. ....	16

II. THE GOVERNMENT’S PROPOSED INTERPRETATION OF “AVAILABLE TO THE PUBLIC” CONFLICTS WITH APPLICABLE PRECEDENTS OF THIS COURT. ....	17
III. THE AIA’S ADDITION OF A NEW CATEGORY OF PRIOR ART DID NOT CONSTRICT THE PRE-EXISTING CATEGORIES OF PRIOR ART.....	21
A. Petitioner’s Interpretation of § 102(a)(1) Violates Multiple “Stabilizing Canons” of Statutory Construction.....	22
B. Petitioner’s Interpretation Is Semantically Implausible.....	23
C. Petitioner’s Interpretation Is Contextually Implausible. ....	26
IV. PETITIONER’S INTERPRETATION OF THE AIA RAISES A SERIOUS CONSTITUTIONAL QUESTION. ....	30
CONCLUSION .....	35

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>Andrews v. Hovey</i> , 123 U.S. 267 (1887).....	9
<i>Bedford v. Hunt</i> , 3 F. Cas. 37 (C.C.D. Mass. 1817) (Story, J.).....	14, 15, 17, 19
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989).....	15, 28, 30
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998).....	22
<i>Brush v. Condit</i> , 132 U.S. 39 (1889).....	13, 18, 19
<i>Coffin v. Ogden</i> , 85 U.S. (18 Wall.) 120 (1874).....	<i>passim</i>
<i>Consolidated Fruit-Jar Co. v. Wright</i> , 94 U.S. 92 (1877).....	17
<i>Corona Cord Tire Co. v. Dovan Chem. Corp.</i> , 276 U.S. 358 (1928).....	13, 14, 19
<i>Deepsouth Packing Co. v. Laitram Corp.</i> , 406 U.S. 518 (1972).....	18
<i>Diamond v. Diehr</i> , 450 U.S. 175 (1981).....	2, 7

**TABLE OF AUTHORITIES**  
**Cont'd**

<b>Cases</b>	<b>Page(s)</b>
<i>Eldred v. Ashcroft</i> , 537 U.S. 186 (2003).....	33, 34
<i>Epic Sys. Corp. v. Lewis</i> , 138 S. Ct. 1612 (2018).....	16, 17
<i>Gayler v. Wilder</i> , 51 U.S. (10 How.) 477 (1851).....	<i>passim</i>
<i>Golan v. Holder</i> , 565 U.S. 302 (2012).....	30, 33, 34
<i>Graham v. John Deere Co.</i> , 383 U.S. 1 (1966).....	30, 33
<i>Hall v. Macneale</i> , 107 U.S. 90 (1883).....	13
<i>Montclair v. Ramsdell</i> , 107 U.S. 147 (1883).....	26
<i>Parker v. Flook</i> , 437 U.S. 584 (1978).....	18
<i>Pfaff v. Wells Electronics, Inc.</i> , 525 U.S. 55 (1998).....	<i>passim</i>
<i>Price v. Forrest</i> , 173 U.S. 410 (1899).....	8
<i>Reiter v. Sonotone Corp.</i> , 442 U.S. 330 (1979).....	24

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.