No. 98-1201

In the Supreme Court of the United States

OCTOBER TERM, 1998

MATSUSHITA ELECTRIC COMPANY AND
TOKO MARINE & FIRE INSURANCE COMPANY,
PETITIONERS

v.

JOHN ZEIGLER, CUSTOMS AGENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Westfall Act, 28 U.S.C. 2679, bars a negligence action against a United States Customs Officer acting within the scope of his employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 158 F.3d 1167. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1998. The petition for a writ of certiorari was filed on January 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) provides that, with certain exceptions, the United States shall be liable, to the same extent as a private party, "for injury or loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b) (Supp. III 1997). The statute provides an express exception for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. 2680(c).

Individual federal employees generally may not be held personally liable for actions taken within the scope of their employment, pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. 2679, (the Westfall Act or the Act). The Westfall Act provides that if the Attorney General certifies that an employee defendant was acting within the scope of his employment "at the time of the incident out of which the [tort] claim arose," then "any civil action or proceeding commenced upon such claim * * * shall be deemed an action against the United States * * *, and the United States shall be substituted as the party defendant." 28 U.S.C. 2679(d)(1). The Act also specifies that the plaintiff's remedy against the United States in such circumstances is ordinarily exclusive and precludes any separate action against the individual employee:

> The remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any em-

> ployee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim.

28 U.S.C. 2679(b)(1). Congress provided two exceptions to Section 2679(b)(1)—a civil action may be brought against an individual federal employee either "for a violation of the Constitution of the United States" or "for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2).

2. In April 1994, petitioner Matsushita Electric Company (Matsushita) shipped a computer chip placement machine from Japan to Georgia for import into the United States. During shipping, the machine was encased in a vacuum seal to protect its metal parts from humidity. When the machine reached the United States, the United States Customs Service decided to inspect it. John Zeigler, a customs officer, cut open the vacuum seal and performed the inspection. The machine was not resealed. The United States Customs Service subsequently cleared the machine for entry into the United States, but the purchaser rejected the machine because its metal parts were corroded by rust. Pet. App. 2a.

Matsushita and its insurer, petitioner Tokio Marine & Fire Insurance Company, brought this action for damages against John Zeigler and against the Hartsfield Warehouse Company, owner of the facility in which the

customs inspection took place.* The United States Attorney certified that Zeigler had been acting within the scope of his employment when he broke the vacuum seal surrounding the machine, and the United States accordingly moved to substitute itself for Zeigler as the party defendant pursuant to the Westfall Act. The United States also moved to dismiss the action, arguing that the FTCA exception for claims arising from the detention of goods by customs officers precluded Matsushita's claim against the United States. The district court granted both motions. Pet. App. 2a.

The United States Court of Appeals for the Eleventh Circuit affirmed. Pet. App. 1a-9a. The court of appeals first held that 28 U.S.C. 2680(c)'s exception to liability for claims arising from customs officers' detention of goods barred Matsushita's tort claim against the United States. Pet. App. 3a. The court noted that this Court in *Kosak* v. *United States*, 465 U.S. 848 (1984), had construed the Section 2680(c) exception broadly to extend to claims arising from the allegedly negligent handling or storage of property that had been detained. Pet. App. 3a.

The court of appeals went on to hold that substituting the United States for the individual defendant, Zeigler, was required, even though Matsushita's suit against the United States was barred. The court observed that "[o]n its face, the plain language of [the Westfall Act] makes clear that where, as here, a federal employee acts within the scope of his or her employment, an individual can recover only against the United States" unless the plaintiff's suit falls within one of the

* Petitioners subsequently settled their claim against the Hartsfield Warehouse Company, and the Company is not a party in this Court.

exceptions to the Act. Pet. App. 5a. The court also noted that substituting the United States for the individual defendant is mandatory (under Section 2679(d)(1)) once the Attorney General certifies that the employee was acting within the scope of employment. *Ibid.*

The court of appeals rejected Matsushita's contention that the statutory scheme should not apply "in a case in which the purported remedy would be illusory." Pet. App. 5a. The court concluded that "the plain meaning of [the Westfall Act]'s text," coupled with this Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1991), made it unmistakably clear that Congress intended the plaintiff's action against the United States to be the exclusive remedy, unless the legislation itself recognized an alternative cause of action. Pet. App. 5a. The court emphasized that this Court in *Smith* held that the Westfall Act immunized government employees from suit even when an FTCA exception precluded recovery against the government. Rejecting Matsushita's argument that *Smith* should be distinguished because there the substitution at issue did not abrogate a common law right of action against the individual employee, the court of appeals determined that the "broad and all-encompassing language of [the Act]" barred Matsushita's action against Zeigler. *Id.* at 6a.

The court of appeals also rejected Matsushita's argument that its claim against Zeigler fell within the exception to the Westfall Act for cases "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2)(B). Matsushita had argued that the statute authorizing customs officers to inspect and detain goods, 19 U.S.C. 1499, contained an implicit duty of care giving rise to a cause of action in

tort against individual officers. The court of appeals, however, determined that "[n]othing in § 1499 creates any rights in individuals" and concluded that Zeigler's duty of care arose not from statute, but "from common law negligence principles." Pet. App. 8a-9a. The court likewise rejected Matsushita's contention that the statute authorizing the federal treasury to satisfy judgments against revenue officers under certain circumstances created a cause of action against Zeigler that fell within the scope of the exception. *Id.* at 9a.

The court of appeals concluded that the district court had properly applied the statutes requiring both the substitution of the United States for Zeigler and the subsequent dismissal of the action against the United States. Accordingly, it affirmed the judgment of the district court. Pet. App. 9a.

ARGUMENT

The decision of the court of appeals is correct and does not warrant this Court's review. The court of appeals applied the relevant statutes in a straightforward manner to the facts presented, and correctly held that Matsushita's arguments for avoiding the application of the statutes were foreclosed by this Court's decision in *United States* v. *Smith*, 499 U.S. 160 (1991).

1. Matsushita does not dispute the court of appeals' determination that its claim against the United States is barred by the exception to the FTCA contained in 28 U.S.C. 2680(c). See Pet. App. 3a. That exception provides that the United States shall not be liable under the FTCA for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer." 28 U.S.C. 2680(c). Matsushita's claim

against the United States arose from such a detention of goods and it is therefore clearly outside the scope of liability under the FTCA. See generally *Kosak* v. *United States*, 465 U.S. 848 (1984). Rather, Matsushita challenges the court of appeals' application of the Westfall Act to bar its action against Zeigler. Matsushita contends that the Act should not bar a suit against an individual federal employee if applying the statute would abrogate a pre-existing common law remedy against the individual employee. See Pet. 8. Matsushita argues (Pet. 6-7) that the common law recognized a cause of action for negligence against customs officers and that this action survives the enactment of the Act.

For the reasons given by the court of appeals, Matsushita is incorrect. The Westfall Act plainly provides that "[t]he remedy against the United States provided by [the FTCA] for injury or loss of property * * * resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is *exclusive of any other civil action or proceeding* for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1) (emphasis added). The statute, by its terms, clearly bars Matsushita's suit against Zeigler.

Matsushita nonetheless argues that the legislative history of the Act reveals that Congress "did not intend to eliminate recognized causes of action against individual United States Customs Officers." Pet. 5. Legislative history, of course, generally cannot justify a court's departure from the plain language of a statute when that language is clear. See, *e.g.*, *United States* v. *Gonzales*, 520 U.S. 1, 4-6 (1997). And in this case, the

argument based on legislative history is also foreclosed by this Court's decision in *United States* v. *Smith*, *supra*.

The plaintiffs in *Smith* sued a military doctor for medical malpractice in connection with the birth of their child at an Army hospital in Italy. 499 U.S. at 162. This Court sustained the Westfall Act substitution of the United States for the individual defendant, even though the United States was shielded from liability by the FTCA exception (28 U.S.C. 2680(k)) for claims arising in a foreign country. This Court stated explicitly that "Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether." 499 U.S. at 166. The Court also observed that the existence of two explicit statutory exceptions should deter the courts from "inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA." *Id.* at 167.

Matsushita nonetheless argues that "Congress did not intend to eliminate recognized causes of action" against certain individual defendants when it enacted the Westfall Act. Pet. 5. For support, Matsushita cites legislative materials and conclusions set forth in the dissenting opinion in *Smith*. *Ibid.* (citing and quoting 499 U.S. at 181 n.6 (Stevens, J., dissenting alone)). But the majority opinion in *Smith* expressly considered this legislative history and then rejected the suggestion that remedies against individual federal employees would survive the enactment of the Westfall Act, explaining that "the legislative history reveals considerably less solicitude for tort plaintiffs' rights than the dissent suggests." *Id.* at 175. Indeed, this Court discerned in the legislative history a clear intent that

"*any* claim against the government that is precluded by [FTCA] exceptions * * * also is precluded against an employee." *Ibid.* (internal quotation marks omitted) (quoting H.R. Rep. No. 700, 100th Cong., 2d Sess. 6 (1988)). The Court concluded that the language of the enacted statute "clearly implemented" Congress's intent to preclude suits against employees to the extent that substituted suits against the United States were barred, and it applied the statute straightforwardly as it was written. *Ibid.* See also *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 422 (1995) (citing *Smith* for the proposition that the "immunity of the United States" would not be grounds for a plaintiff to "bring [an individual defendant] back into the action").

Contrary to Matsushita's suggestion, therefore, the Westfall Act does not "preserve recognized remedies that had existed outside the reach of the FTCA" (Pet. 4). Rather, the application of the Act to Matsushita's claims against Zeigler must be sustained under this Court's controlling decision in *Smith*.

2. Nor does Matsushita's claim against Zeigler survive the Westfall Act substitution on the ground that it falls within the statutory exception for a claim "for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. 2679(b)(2)(B). Matsushita is simply mistaken in contending that its action against Zeigler "was and is now predicated upon two United States statutes [19 U.S.C. 1499 and 28 U.S.C. 2006] which set forth a United States Customs' Officer's rights and responsibilities." Pet. 11. Rather, as this Court explained in *Kosak*, 465 U.S. at 860, and as Matsushita's own history of the cause of action acknowledges (Pet. 6-7), a claim against an individual customs official for negligently damaging goods is based on common law

negligence principles. The court of appeals in this case correctly so held. Pet. App. 8a.

As the court of appeals properly observed, neither Section 1499 nor Section 2006 creates any rights in individuals. See Pet. App. 8a-9a. Section 1499 (*reprinted at* Pet. App. 10a-12a) authorizes customs officers to inspect merchandise, and sets forth procedures for those inspections. Section 2006 (*reprinted at* Pet. App. 14a) authorizes the Treasury to pay certain judgments against revenue officers. Neither statute creates any rights that can be vindicated by individuals affected by customs officers' performance of their duties. Indeed, if Matsushita were correct in suggesting that Zeigler should be held individually responsible because he had a "statutory right to inspect goods and [a] corresponding obligation to do so reasonably and responsibly" (Pet. 11), then the exception provided in Section 2679(b)(2)(B) would swallow Section 2679(b)(1)'s rule of individual non-liability. Under Matsushita's view, every statute granting a federal employee the right to perform a task would carry with it a right of action against the individual employee for negligent performance, a result that squarely conflicts with the structure and purpose of the Westfall Act.

3. Similarly misplaced is Matsushita's reliance on a footnote from this Court's opinion in *Gutierrez de Martinez* v. *Lamagno*, *supra*. See Pet. 12-13. In *Gutierrez de Martinez*, another case involving an exception to the FTCA that shielded the United States from liability, this Court held that the Attorney General's certification of employment under the Westfall Act is subject to judicial review. 515 U.S. at 423-425. The Court's decision was based in part on its recognition of the "fatal consequences" to the plaintiffs of the "un-

recallable substitution of the United States as the party defendant," a substitution that "would cause the demise of the action." *Id.* at 422. The Court acknowledged these consequences even though the plaintiffs in that case had "filed a common-law tort action," *Gutierrez de Martinez* v. *DEA*, 111 F.3d 1148, 1151 (4th Cir.), cert. denied 118 S. Ct. 335 (1997), just as Matsushita did here. Because this Court's decision in *Gutierrez de Martinez* expressly recognizes that the Westfall Act can properly be applied to deprive a plaintiff of an effective remedy in a common-law action, it hardly supports petitioner's contrary claim.

Matsushita relies in particular on a footnote in *Gutierrez de Martinez* for the claim that a tort action against an individual customs officer has survived the Westfall Act (Pet. 12-13 (citing and quoting *Gutierrez de Martinez*, 515 U.S. at 427 n.5)), but that reliance is misplaced. The footnote explains that certain FTCA exceptions "are for cases in which other compensatory regimes afford relief," citing as an example Section 2680(c) (the exception for claims arising out of the collection of tax or customs duties) and *Kosak* v. *United States*, *supra* (construing that exception). 515 U.S. at 427. *Kosak* in turn noted that alternative remedies for the negligence of a customs officer were available in some cases at common law or under the Tucker Act, 28 U.S.C. 1346 *et seq*. See 465 U.S. at 860 & n.22. But *Kosak*'s discussion of common law remedies preceded the 1988 enactment of the Westfall Act, which definitively eliminated individual liability of a federal employee for most actions taken in the scope of employment. This Court's footnote citation to *Kosak* in 1995 may simply refer to the continued existence of other remedies under the Tucker Act; it cannot fairly

be read as a considered judgment that common law tort remedies survive the Westfall Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1999