

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CURTRINA MARTIN, INDIVIDUALLY )  
AND AS PARENT AND NEXT FRIEND )  
OF G. W., A MINOR, ET AL., )  
                                Petitioners, )  
                                v. ) No. 24-362  
UNITED STATES, ET AL., )  
                                Respondents. )  
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Pages: 1 through 59  
Place: Washington, D.C.  
Date: April 29, 2025

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10  - - - - -

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12                                    Washington, D.C.  
13                                    Tuesday, April 29, 2025

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15                   The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 10:08 a.m.

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6 of the Respondents.  
7 CHRISTOPHER E. MILLS, ESQUIRE, Charleston, South  
8 Carolina; Court-appointed amicus curiae in support  
9 of the judgment below on Question 1.  
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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 24-362, Martin versus United States.

Mr. Jaicomo.

ORAL ARGUMENT OF PATRICK M. JAICOMO

ON BEHALF OF THE PETITIONERS

MR. JAICOMO: Mr. Chief Justice, and may it please the Court:

Congress amended the Federal Tort Claims Act in 1974 to ensure a legal remedy for the intentional torts of federal police. The text of the law enforcement proviso is phrased affirmatively as a freestanding rule. With regard to acts or omissions of investigative or law enforcement officers of the United States Government, the FTCA shall apply to any claim arising out of six intentional torts. The United States is therefore liable for these intentional torts when committed by FBI agents empowered by law to execute searches, seizures, and arrests.

Petitioners bring the claims Congress expressly permitted, but the Eleventh Circuit

1 held that sovereign immunity bars them. As a  
2 result, the Court asked the parties to address  
3 two questions: first, whether the Supremacy  
4 Clause bars FTCA claims. The answer is no, and  
5 the parties agree. As a federal statute, the  
6 FTCA is protected by federal supremacy, not  
7 restricted by it.

8 Second, whether the  
9 discretionary-function exception is  
10 categorically inapplicable to proviso claims.  
11 The answer is yes for two distinct reasons.

12 Read in harmony, the provisions cover  
13 different categories. Once a plaintiff  
14 satisfies Section 1346(b)(1) by alleging the  
15 elements of an intentional tort, the  
16 discretionary-function exception does not apply  
17 because intentional torts require unlawfulness.  
18 There's no such thing as a discretionary  
19 intentional tort.

20 Read in hostility, assuming  
21 interstatutory conflict, the text, informed by  
22 familiar canons of construction and this Court's  
23 precedent, demonstrates that Congress gave the  
24 proviso's waiver of sovereign immunity the last  
25 word. The proviso is the clearest statement of

1 liability in the entire FTCA.

2 So the government's argument in this  
3 case and the Eleventh Circuit's holding below  
4 invite a simple question: If even proviso  
5 claims Congress amended the statute to  
6 affirmatively guarantee are barred by sovereign  
7 immunity, what is left of the Federal Tort  
8 Claims Act?

9 I welcome the Court's questions.

10 JUSTICE THOMAS: How broadly does the  
11 proviso extend?

12 MR. JAICOMO: Well, if -- if this  
13 Court reads the proviso in harmony with the  
14 discretionary-function exception, it doesn't  
15 expand any more broadly than it needs to to make  
16 sure that those two don't come into conflict.  
17 But, if the Court presumes that there is  
18 conflict, Your Honor, then it would extend --  
19 supersede the other exceptions.

20 JUSTICE THOMAS: So, in this case, how  
21 would it apply?

22 MR. JAICOMO: In this case, it would  
23 apply because the Court would simply say the  
24 discretionary-function exception doesn't apply  
25 to this category of claims. The law enforcement

1 proviso does. And that's the end of the  
2 analysis for the second question presented.

3 JUSTICE THOMAS: So how -- how do we  
4 know in statutory interpretation how far a  
5 proviso like this applies?

6 MR. JAICOMO: Well, Your Honor, there  
7 are a number of -- of statutory canons of  
8 construction, and I think the answer to this  
9 specific question here is we know that it  
10 extends beyond simply subsection (h) because  
11 Congress stated it as an affirmative  
12 freestanding rule as opposed to somehow being  
13 parasitic to the language before it in  
14 subsection (h).

15 JUSTICE THOMAS: Well, wouldn't you  
16 expect it to be placed someplace other than in  
17 one subsection after a colon?

18 MR. JAICOMO: So I would say as a  
19 general rule, Your Honor, the answer would  
20 probably be yes, but the reason the answer is no  
21 here is because, when Congress enacted the law  
22 enforcement proviso, it understood that the only  
23 barrier to liability for the United States was  
24 the intentional torts exception, meaning  
25 Congress's understanding of the



1 discretionary-function exception is the same as  
2 the one I'm articulating here today.

3 JUSTICE JACKSON: And you get that  
4 from what? The legislative history?

5 MR. JAICOMO: No, Your Honor. I -- we  
6 get it directly from the language of the law  
7 enforcement proviso. But the legislative  
8 history or at least the context in which this  
9 amendment was made make very clear that our  
10 interpretation is the correct one.

11 JUSTICE JACKSON: But I guess I don't  
12 understand why in absolutely every case you say  
13 the two are mutually exclusive. I mean, isn't  
14 there a possibility -- I mean, I -- I completely  
15 understand your view that on the facts of this  
16 case --

17 MR. JAICOMO: Yeah.

18 JUSTICE JACKSON: -- given the origins  
19 of how the law enforcement proviso came into  
20 being, it was a wrong-house raid scenario just  
21 like the one that you are addressing here, I  
22 understand how you say that this should not be a  
23 situation in which the claims are barred, but  
24 does reaching that conclusion require us to say  
25 that there can never be a situation in which the

1 discretionary-function exception applies in the  
2 law enforcement context?

3 That seems to be what you're saying,  
4 those two are just totally separate, and I -- I  
5 wonder whether the kinds of policy  
6 determinations that I thought the discretionary  
7 function was about could arise in some law  
8 enforcement circumstances, albeit perhaps not  
9 here.

10 MR. JAICOMO: So let me -- let me say  
11 a few things, and then maybe we can have a  
12 dialogue about how this would operate.

13 But, to answer your question, no,  
14 certainly, the Petitioners in this case do not  
15 need this broader rule to be articulated for us  
16 to win this case. This is the quintessential  
17 proviso case. This is the type of case that  
18 motivated Congress, as we know from all the news  
19 coverage and the language of -- of the statute,  
20 to enact the proviso.

21 But, of course, we're offering this  
22 answer in -- in response to the second question  
23 that the Court granted here, which is asking  
24 categorically how these two things interact.

25 But, to get then to that question,

1 it -- it -- it's simply the case that, as we can  
2 see from this Court's precedent addressing the  
3 discretionary-function exception and the broader  
4 intentional torts exception since 1946, there's  
5 been no overlap even between those categories.

6 And so now we're moving into the space  
7 with intentional torts committed by law  
8 enforcement officers where there simply can't be  
9 a situation where you're exercising the type of  
10 discretionary function that the exception in  
11 2680(a) covers where you're also somehow  
12 committing an intentional tort because those  
13 intentional torts will all hinge on some portion  
14 of the elements or defenses being there's a lack  
15 of legal justification, there's no probable  
16 cause, or something along those lines.

17 JUSTICE SOTOMAYOR: Counsel, I don't  
18 think it was quite fair to say that everybody  
19 agrees on the first question. Amici doesn't  
20 agree on the first question.

21 But putting that aside, because amici  
22 could address Nguyen, and I understand your  
23 argument on that first question, I believe it's  
24 that Nguyen, which was the basis of this  
25 circuit's decision, was a case involving state

1 law conflict with federal law. There's no  
2 conflict here because federal law is what makes  
3 the officers liable, correct?

4 MR. JAICOMO: That's correct, Your  
5 Honor.

6 JUSTICE SOTOMAYOR: So there can't be  
7 sovereign immunity preemption of federal law  
8 itself?

9 MR. JAICOMO: That's correct, Your  
10 Honor.

11 JUSTICE SOTOMAYOR: All right. Now,  
12 going to the second point, there are 12  
13 exceptions besides the law enforcement exception  
14 at issue here. I don't think you quarrel with  
15 the proposition that if a police officer  
16 assaults someone in a foreign land, which is  
17 another proviso among those 12, that the  
18 intentional tort provision would not control,  
19 correct?

20 MR. JAICOMO: That's correct, Your  
21 Honor.

22 JUSTICE SOTOMAYOR: What you're asking  
23 us to do is to say 11 of the 12 other exceptions  
24 are still operative against the law enforcement  
25 proviso, but only this one, the discretionary

1 one, is not. Is that your position?

2 MR. JAICOMO: Not quite, Your Honor.

3 JUSTICE SOTOMAYOR: Well, but that's  
4 what it sounds like to me because, if the other  
5 12 are applicable --

6 MR. JAICOMO: Mm-hmm.

7 JUSTICE SOTOMAYOR: -- because the  
8 text itself of the law enforcement provision  
9 says that the provisions of this chapter, and  
10 the chapter includes all 12 of the other  
11 exceptions, shall apply to any claim for a  
12 police officer's assault and battery.

13 MR. JAICOMO: Yes. So, if I could  
14 clarify what -- what I mean, Your Honor, as we  
15 articulate in the briefs, we have two separate  
16 paths and two different interpret --  
17 interpretive methods for how the Court could  
18 address QP 2.

19 On the first path, which is the  
20 harmony approach, there is not any overlap  
21 between provision (a) and provision --  
22 subprovision (h), and so you don't need to get  
23 into what to do if there's a conflict.

24 If the Court, as the government asks,  
25 assumes that there's a conflict here, even

1       though none was found below in the Eleventh  
2       Circuit, then our analysis would extend beyond  
3       the reach of subsection (h).

4                 And to address your specific textual  
5       question about the language of Chapter 171, the  
6       government actually agrees with us at Footnote 3  
7       of its brief, where it says the appropriate  
8       natural reading of that means that the Chapter  
9       171 other than Section 2680.

10                And the reason why that's the case is  
11       because that same language appears in the  
12       preamble of Section 2680, and it also appears in  
13       subsection (c) and subsection (h).

14                And so to take the position that  
15       subsection 2680 would cancel itself out would  
16       require the Court to read that language  
17       differently in the preamble than how it would  
18       read it in subsections (c) and (h).

19                JUSTICE SOTOMAYOR:  It does seem to me  
20       that what you're asking us to do is to answer  
21       the question we didn't grant cert on.

22                MR. JAICOMO:  So I would --

23                JUSTICE SOTOMAYOR:  You're asking us  
24       to say that an intentional tort is never  
25       discretionary.  As Justice Ketanji Jackson

1 mentioned, I don't -- I'm not quite sure that's  
2 true.

3           The -- the case involving the  
4 Secret Service agent who arrested someone who  
5 appeared to be threatening a protectee --

6           MR. JAICOMO: Mm-hmm.

7           JUSTICE SOTOMAYOR: -- under state  
8 law, if that person was not engaged in conduct  
9 that directly appeared to be threatening, that  
10 might not be an intentional tort, a false  
11 arrest.

12           And yet I think there's enough measure  
13 of discretion of deciding when someone could be  
14 a threat to the president or to some other  
15 protectee, that would fall within the  
16 discretionary.

17           MR. JAICOMO: So let me -- let me  
18 respond in a few ways, Your Honor.

19           First was your -- your -- your -- your  
20 note about the scope of the second question  
21 presented. So I would -- I would say that our  
22 arguments here fall squarely within that scope  
23 because, as we explained, to understand whether  
24 there's a categorical application of one  
25 provision to the other, of course, we need to

1 know what the categories are to see if they  
2 overlap at all. And that's not some sort of  
3 word games from us.

4 If you read the -- the government's  
5 BIO at pages 21 and 22, where they propose the  
6 language for what this Court ultimately adopted  
7 as QP 2, they follow on with the next sentence  
8 explaining that what's wrong with our position  
9 is that it mischaracterizes the scope of the  
10 discretionary-function exception.

11 And so that question is not only  
12 explicitly in the language of Question  
13 Presented 2.

14 JUSTICE SOTOMAYOR: Well, I -- I'm not  
15 sure because that's -- there's a huge circuit  
16 split and a lot of judges talking about how to  
17 define that -- the discretionary exception.

18 Judge Bibas said -- has a -- has a  
19 wonderful concurrence in which he says it's been  
20 read too broadly.

21 MR. JAICOMO: Yes.

22 JUSTICE SOTOMAYOR: I might be  
23 sympathetic to that argument, okay, but I don't  
24 know whether we should be answering it.

25 MR. JAICOMO: So -- so I agree that



1 we -- that the Court shouldn't be answering that  
2 broader question.

3           And -- and, to clarify, in our cert  
4 petition, we relied on Judge Bibas's  
5 articulation of there being three separate  
6 circuit splits. We offered a fourth as well.  
7 And the one articulated in Section 2(a) of our  
8 cert petition is the one we're talking about  
9 here, this question of whether the law  
10 enforcement proviso and the  
11 discretionary-function exception interact and,  
12 if so, what happens.

13           And this Court, of course, granted on  
14 that narrower question, which now asks the Court  
15 only to consider what to do with intentional  
16 torts and torts that are committed by law  
17 enforcement officers as opposed to the entire  
18 sphere of negligent torts that would also  
19 potentially come into play.

20           JUSTICE GORSUCH: So -- so why  
21 wouldn't -- why wouldn't a perfectly sensible  
22 approach be to say you might lose on whether the  
23 proviso applies outside of (h) and send it back  
24 for further consideration of the  
25 discretionary-function arguments that you've

1 made before us, that Judge Bibas has raised and  
2 that are the subject of I don't know how many  
3 circuit splits? Wouldn't that be a -- a  
4 sensible course?

5 MR. JAICOMO: So the reason I would  
6 suggest that the Court doesn't take that  
7 approach, Your Honor, is that that would  
8 effectively be the Court overruling the Nguyen  
9 decision but leaving in place all the other bad  
10 decisions like Shivers that --

11 JUSTICE GORSUCH: We would leave in  
12 place everything as we found it, to be sure.  
13 And I -- I don't doubt that there's a  
14 interesting circuit split that might merit our  
15 attention sometime soon, but this is an awkward  
16 vehicle to address it given that it really  
17 wasn't teed up for us that way because of the  
18 peculiar nature of circuit law below.

19 MR. JAICOMO: So I -- I would say,  
20 Your Honor, as the government argued in its BIO  
21 for asking this separately phrased question to  
22 be taken, it said this is actually the threshold  
23 question not for QP 2 but --

24 JUSTICE GORSUCH: I -- I understand  
25 that, but I think it thought a different version

1 of it was the threshold question, and that is  
2 how far does the proviso extend, does it extend  
3 beyond (h).

4 MR. JAICOMO: Well, Your Honor, it, to  
5 be --

6 JUSTICE GORSUCH: I think -- I can  
7 understand how you had read it -- would read it  
8 differently, but I think that's what the  
9 government was asking us to decide.

10 MR. JAICOMO: Well, Your Honor, I  
11 would just point out, again, at the BIO at 21  
12 and 22, they articulate this point and they say  
13 that resolving this question of QP 2 is  
14 threshold to QP 1 because the Eleventh Circuit's  
15 articulation of the Supremacy Clause bar is  
16 effectively just an importation of what it  
17 understands the discretionary-function exception  
18 to be.

19 And so, if this Court were to only  
20 address QP 1, it would essentially be resolving  
21 the question only for the Eleventh Circuit but  
22 leaving all the other circuits --

23 JUSTICE GORSUCH: No, I -- I would  
24 answer both QPs, I think, but I -- I'm wondering  
25 whether -- whether saying the proviso doesn't

1 extend beyond (h) but leaving you to argue below  
2 that the discretionary-function exception  
3 doesn't include unconstitutional acts,  
4 intentional torts.

5 MR. JAICOMO: Well --

6 JUSTICE GORSUCH: And that would be  
7 something you could argue below.

8 Now, if I can just -- you can respond  
9 to that, but I --

10 MR. JAICOMO: Sure.

11 JUSTICE GORSUCH: -- before I --  
12 before I let you go --

13 MR. JAICOMO: Okay.

14 JUSTICE GORSUCH: -- I'd like you  
15 all --

16 MR. JAICOMO: I'll be up here.

17 (Laughter.)

18 JUSTICE GORSUCH: Well, I've got a lot  
19 of friends who want to have their chance too.

20 I'd also like you to address the  
21 government's suggestion that we shouldn't  
22 address the Supremacy Clause question because we  
23 don't need to in this case.

24 MR. JAICOMO: Okay. So --

25 JUSTICE GORSUCH: Your -- your

1 thoughts about that?

2 MR. JAICOMO: Sure. So the first  
3 question on why the Court shouldn't simply say  
4 the answer is that there isn't a categorical  
5 situation for QP 2 and send it back is that then  
6 we go back to the Eleventh Circuit, where the  
7 case law is such that there is no constitutional  
8 exception even.

9 And so you're sending the Petitioners  
10 back down into the Eleventh Circuit, where even  
11 the government agrees that the Eleventh Circuit  
12 precedent, which we'll say it doesn't matter if  
13 the Constitution's been violated, you can still  
14 act with discretion, is wrong. And we'll be  
15 stuck there with the hope of perhaps getting  
16 en banc review of the Eleventh Circuit.

17 And the government will have then  
18 short-circuited the Nguyen decision without  
19 having to confront the way that the  
20 discretionary-function exception actually  
21 overlaps with -- with the law enforcement  
22 proviso.

23 Now, to answer the second question  
24 about why or whether this Court should address  
25 QP 1, of course, it should address QP 1, but the

1 point that the government is trying to get the  
2 Court to decide QP 2 on its preferred new text  
3 of QP 2, which is whether it extends to the  
4 other 12 subcategories, that would -- that just  
5 goes to show that these two things are basically  
6 the same.

7           The -- the Supremacy Clause bar of the  
8 Eleventh Circuit is just a dressed-up version of  
9 the discretionary-function exception, as the  
10 Eleventh Circuit and many of the other circuits  
11 have too broadly understood.

12           And so this Court can simply address,  
13 by citing to *Gaubert*, here's where we know the  
14 line comes for the edge of the  
15 discretionary-function exception without getting  
16 into every nook and cranny to still say: Even  
17 with that line, maybe the further line not fully  
18 defined, we know that intentional torts  
19 committed by law enforcement officers are not  
20 going to touch that form of discretion as  
21 Congress articulated in -- in subsection (a).

22           JUSTICE JACKSON: So would it be  
23 helpful to you that if we were to send it  
24 back -- on Justice Gorsuch's suggestion that we  
25 just address the categorical separation between

1 the two, would it be helpful to say something  
2 about whether or not we are speaking to the  
3 scope or extent of the discretionary-function  
4 exception?

5 I mean, I -- I understood your  
6 response to Justice Gorsuch to be that if you  
7 just say no categorical exclusion of  
8 discretionary function, it goes back and the  
9 Eleventh Circuit is going to say: Fine,  
10 discretionary function applies, barred.

11 And that your point is that, even if  
12 there's no categorical preclusion, we still have  
13 to have a debate about the extent to which the  
14 discretionary function actually covers these  
15 situations or the one that you've presented in  
16 this case.

17 MR. JAICOMO: That's correct. And I  
18 would even go a little bit further, Your Honor,  
19 and say, if the ultimate result is this Court  
20 takes the government's selected approach and  
21 just does -- answers basically each QP with a  
22 one-word answer and send the case back down,  
23 then it will also implicitly be saying that the  
24 exact sort of case that Congress amended this  
25 act to allow is going to be doomed by the

1 Eleventh Circuit's precedent, which inverts the  
2 Gaubert standard and says: Unless something  
3 specifically tells you in federal law you can't  
4 do anything, you have open discretion to do it,  
5 and we would be --

6 JUSTICE ALITO: No, we -- we wouldn't  
7 be saying that. All we would be saying is that  
8 it is -- we're deciding this particular case. I  
9 know you would like us to go quite far, but all  
10 we would be saying is that the -- that the  
11 law -- the proviso applies only to (h), and the  
12 Eleventh Circuit's Supremacy Clause cases appear  
13 to be a work-around based on trying to work  
14 around their prior determination that the  
15 proviso applies across the board.

16 Now that may not be good for you, I  
17 understand that, and that's what -- that's why  
18 you're arguing what you're arguing. But, as far  
19 as the development of our case law is concerned,  
20 why should we go further than that and get into  
21 this enormously complicated question about the  
22 scope of the discretionary-function exception?

23 MR. JAICOMO: So, Your Honor, I  
24 wouldn't ask the Court to get into the more  
25 enormously complicated aspects of the



1 discretionary-function exception. Again, we're  
2 simply saying there's a line where it's  
3 obviously not going to touch things like the law  
4 enforcement proviso.

5           And the reason that this Court should  
6 get into that question here is because, as you  
7 explained, the Eleventh Circuit's work-around  
8 for what to do with this is its Supremacy Clause  
9 bar. But many of the other circuits have  
10 created work-arounds. They're just messier and  
11 built into a factual analysis of each case,  
12 where, for instance, all of the other cases  
13 except for Linder have held, well, of course,  
14 the discretionary-function exception can't reach  
15 the sort of heartland law enforcement things,  
16 but maybe, in this case, because it's an INS  
17 arrest or because it's something outside of what  
18 we perceive to be normal law enforcement, things  
19 are different.

20           And so the line is being drawn right  
21 now by all the circuits. They're just confused  
22 about where to draw it. And because of that  
23 confusion, the line varies from circuit to  
24 circuit. And so, if this Court is going to take  
25 this issue up and provide any clarity, it should

1 provide clarity to all of the circuits instead  
2 of just the Eleventh Circuit.

3           And I think that's doubly important  
4 here because, again, Congress went out of its  
5 way in 1974 to go through all the steps it  
6 needed to go through to specifically amend the  
7 FTCA to say this very affirmative freestanding  
8 thing: If you're a federal law enforcement who  
9 commits an intentional tort, we, the United  
10 States, not you, the officer, will pay for it to  
11 make sure that there's a remedy for the innocent  
12 victims of your mistake or wrongdoing.

13           And so it's more important than simply  
14 just answering a categorical question. There  
15 needs to be some guidance on this so that this  
16 statutory provision actually has effect because,  
17 going back to Justice Jackson's discussion with  
18 me, the result in this case of the Martin family  
19 having no remedy here is that that provision has  
20 no effect. It's a complete nullity if that is  
21 the outcome of this case.

22           JUSTICE GORSUCH: It does seem to me  
23 that we need to address the Supremacy Clause  
24 question because, if we were to send this case  
25 back on the narrow grounds we've been discussing

1 with you and that you're resisting so well, it's  
2 possible that the Eleventh Circuit could wind up  
3 agreeing with you that the  
4 discretionary-function exception doesn't reach  
5 your case. Perhaps that requires the en banc  
6 court's intervention, but it might do so. And  
7 then it would still have its Supremacy Clause  
8 jurisprudence that would bar your case. So, at  
9 the very least, it seems to me that we need to  
10 address that.

11 Do you -- do you see it differently,  
12 and what -- what are your thoughts about that?

13 MR. JAICOMO: No. No, Your Honor. I  
14 think the Court should definitely address the  
15 Supremacy Clause bar as the Eleventh Circuit  
16 articulated it because that bar, of course, as  
17 it's phrased as any -- any actions that are  
18 within the nexus of federal officials' acts and  
19 within the furthest reaches of the Constitution  
20 are going to be provided Supremacy Clause  
21 protection basically takes away most of, if not  
22 all of, the thrust of the FTCA, which, of  
23 course, is why my friend amicus on the other  
24 side has said, well, maybe we can just go back  
25 to private bills, which is I think the -- the

1 main mischief that Congress was intending to  
2 remedy with the FTCA in the same way that the  
3 mischief that they were trying to remedy with  
4 the proviso are the very sort of intentional  
5 torts committed by the FBI agents in this case.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Thomas, anything further?

8 Justice Alito?

9 Justice Kagan?

10 Justice Kavanaugh?

11 Justice Jackson?

12 Thank you, counsel.

13 MR. JAICOMO: Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Mr. Liu.

15 ORAL ARGUMENT OF FREDERICK LIU

16 ON BEHALF OF THE RESPONDENTS

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

19 This Court granted cert on two  
20 questions: one about the reach of the proviso  
21 in subsection (h) and the other about the  
22 Supremacy Clause. To resolve this case, this  
23 Court need only decide the question about the  
24 proviso, namely, whether the proviso in  
25 subsection (h) modifies the

1 discretionary-function exception in subsection  
2 (a).

3           The answer's no. Congress placed the  
4 proviso in subsection (h), and given that  
5 choice, the proviso modifies only subsection  
6 (h). It does not modify the  
7 discretionary-function exception in (a).

8           That exception, therefore, bars  
9 Petitioners' claims, and, because it does, this  
10 Court need not reach the other question  
11 presented, which asks whether the Supremacy  
12 Clause bars those claims.

13           The Eleventh Circuit resorted to the  
14 Supremacy Clause only because, under circuit --  
15 circuit precedent, the proviso in (h) modifies  
16 the discretionary-function exception in (a) and  
17 renders that exception inapplicable.

18           But, if this Court rejects that  
19 interpretation of the proviso, it should simply  
20 affirm on the ground that the  
21 discretionary-function exception bars  
22 Petitioners' claims without reaching the  
23 Supremacy Clause issue.

24           Now Petitioners have injected a third  
25 issue into the case, whether their claims

1 satisfy the discretionary-function exception in  
2 the first place, in other words, whether they  
3 satisfy the two-part test this Court articulated  
4 in United States versus Gaubert. But that issue  
5 isn't fairly encompassed by the questions  
6 presented, and it's not independently  
7 cert-worthy.

8 In any event, if this Court does reach  
9 the issue, all that it would need to do is  
10 reaffirm Gaubert because Petitioners' claims  
11 clearly satisfy Gaubert's test.

12 And I welcome the Court's questions.

13 JUSTICE THOMAS: Do -- can a proviso  
14 such as this extend more broadly than -- than  
15 your -- than this case?

16 MR. LIU: So the presumption is a  
17 proviso applies only to the thing that it's  
18 attached to, but there are cases where the Court  
19 has found that presumption rebutted and has thus  
20 read a proviso to state a general freestanding  
21 rule.

22 We don't think there's any indication  
23 here, any basis for finding the presumption that  
24 the proviso applies only to the thing it's  
25 attached to be rebutted. And so we think the --

1 the general principle that a proviso applies  
2 only to the thing it's attached survives and --  
3 and applies here.

4 CHIEF JUSTICE ROBERTS: Well, I  
5 mean --

6 JUSTICE SOTOMAYOR: Counsel, I'm  
7 having a -- I'm sorry.

8 CHIEF JUSTICE ROBERTS: -- your  
9 approach puts a lot of weight on strict  
10 adherence by drafts -- draftsmen in Congress to  
11 organization along that line. It's certainly  
12 plausible that (h) was the main thing that the  
13 proviso was addressed to but not necessarily the  
14 only thing.

15 MR. LIU: Yeah, I don't really think  
16 that's plausible. I mean, put yourself in the  
17 shoes of the 1974 Congress. It had before it  
18 all of Section 2680, the lead-in language, plus  
19 13 exceptions, starting with (a), ending with  
20 (n), and if Congress had wanted to create a  
21 universally applicable proviso, i.e., one that  
22 applied to all 13 exceptions, I don't think they  
23 would have put it in the middle in -- in (h).

24 CHIEF JUSTICE ROBERTS: No, that's the  
25 most logical place to put it, but a heroic

1 assumption to think back to 1974 and put myself  
2 in Congress's shoes, but it's also, you know,  
3 they've got a lot of things going on, they're  
4 very busy, and if it applies logically more  
5 generally, I don't know why we wouldn't at least  
6 entertain that.

7 MR. LIU: Well, I -- I don't think  
8 it -- I mean, I don't think it applies logically  
9 more generally. All the textual and structural  
10 indications indicate that Congress put it in (h)  
11 because it wanted to apply in (h). And so it's  
12 not just that it's in (h); it's also that  
13 Congress used the -- the phrase "provided that,"  
14 which is words Congress uses when it wants to  
15 introduce a proviso which then triggers this  
16 presumption that it applies only to the thing  
17 it's attached. It's the fact that Congress,  
18 before the "provided that," used a colon, which  
19 suggests a connection between the proviso and  
20 the thing that immediately precedes it. It's  
21 the fact that Congress put a period after the  
22 proviso which then separates the proviso from  
23 every other exception in the statute.

24 It's the fact that -- even my friend  
25 concedes -- that it would be implausible for



1 Congress to have wanted the proviso to apply to  
2 certain exceptions, especially subsection (k),  
3 which is the foreign country exception. No one  
4 thought Congress wanted to open the door to the  
5 application of substantive foreign law in cases  
6 involving police conduct.

7           It's the idea that there is a similar  
8 parallel proviso or exception in subsection (c),  
9 and no one thinks that exception applies to all  
10 the other exceptions. I think everyone agrees  
11 that that exception applies only to subsection  
12 (c).

13           And so I think you have all the  
14 relevant text --

15           JUSTICE SOTOMAYOR: So, counsel, what  
16 was Congress doing? It passed this proviso  
17 because of the Collinsville raids. There,  
18 officers, without a warrant, broke into a home.  
19 They tied up people. They were as threatening  
20 as in the current situation. Why bother if --  
21 we accept that they had the discretion to think  
22 there was danger. With or without a warrant,  
23 the emergency doctrine exception would let them  
24 break down a door.

25           So what was Congress thinking?

1                   MR. LIU: So I -- I don't think that  
2 the conduct in the Collinsville raids falls  
3 within the discretionary-function exception.

4                   JUSTICE SOTOMAYOR: But why? Only  
5 because there was no warrant?

6                   MR. LIU: Because their conduct was  
7 well beyond the discretion conferred on them  
8 because it violated clearly established Fourth  
9 Amendment rights.

10                  JUSTICE SOTOMAYOR: Ah, that's  
11 interesting because, in Gaubert, we said, if an  
12 official drove an automobile on a mission  
13 connected with his official duties and  
14 negligently collided with another car, the  
15 exception, discretionary exception, would not  
16 apply.

17                  That was because, and I'm quoting,  
18 "Although driving requires the constant exercise  
19 of discretion, the officials' decision in  
20 exercising that discretion" negligently -- I'm  
21 putting in that word -- "can hardly be said to  
22 be grounded in regulatory policy."

23                  I mean, I don't see the difference  
24 between that and saying that an officer's action  
25 in using a GPS to break into the wrong house

1 has -- has any policy related to it. It's like  
2 driving negligently. You got to that house by  
3 mistake. You drove negligently and hit someone.

4 So I don't understand how the act of  
5 going into a wrong house can be discretionary.

6 MR. LIU: Well, we understand the  
7 discretion here to be the discretion as to how  
8 to identify the target of a search warrant.

9 JUSTICE SOTOMAYOR: Oh, he had it  
10 identified. He got the right target. He just  
11 had the wrong house. It's not a question of did  
12 he make a mistake in his warrant application  
13 about this individual being a drug dealer, all  
14 right? There, I might agree with you, okay?

15 I'm talking about a wrong-house raid.  
16 He has the right target, the right house, but  
17 breaks into the wrong one.

18 MR. LIU: Right, and it's because, as  
19 the courts below found, of a reasonable mistake  
20 that the officer made --

21 JUSTICE SOTOMAYOR: Well, that's the  
22 issue, is that consistent with Gaubert, and I'm  
23 asking you to show -- to explain to me how that  
24 formulation is consistent with Gaubert.

25 MR. LIU: Well, I would just run the

1       conduct here through Gaubert's two-part test, so  
2       step one of the test asks whether there is a  
3       federal law, statute, or regulation that  
4       specifically prescribes a course of action that  
5       the employee needs to follow.

6                   JUSTICE SOTOMAYOR:  Go -- there is.  
7       Go get a search warrant for a drug dealer's  
8       house.  Now what policy says now go search a  
9       house that's not the drug dealer's house?

10                  MR. LIU:  Well, no policy says that.  
11       What -- what they --

12                  JUSTICE SOTOMAYOR:  And that is  
13       negligent driving.

14                  MR. LIU:  Well --

15                  JUSTICE GORSUCH:  No -- no policy says  
16       don't break down the wrong house, the door of a  
17       house?

18                  MR. LIU:  No, I -- I -- I -- excuse  
19       me.  Of course --

20                  JUSTICE GORSUCH:  And don't --  
21       don't --

22                  MR. LIU:  Of course, it's --

23                  JUSTICE GORSUCH:  -- don't traumatize  
24       its occupants?  Really?

25                  MR. LIU:  Of course, it's the -- the

1 United States' policy to execute the warrants at  
2 the right house, but state --

3 JUSTICE GORSUCH: I should hope so.

4 MR. LIU: But stating the -- the  
5 policy at that high level of generality doesn't  
6 foreclose or prescribe any particular course of  
7 action in how an officer goes about in  
8 identifying the right house.

9 And, as the district court found at  
10 52(a), the sort of discretion left to the  
11 officers here to determine the right house is  
12 filled with policy considerations. The -- the  
13 officers here were weighing public safety  
14 considerations, efficiency considerations,  
15 operational security, the idea that they didn't  
16 want to delay the start of the execution of the  
17 warrants because they wanted to execute all the  
18 warrants simultaneously.

19 Those are precisely the sorts of  
20 policy tradeoffs that an officer makes in  
21 determining, well, should I take one more extra  
22 precaution to make sure I'm at the right house.  
23 Here, Petitioner suggests, for example, that the  
24 officer should have checked the house number on  
25 the mailbox.

1 JUSTICE GORSUCH: Yeah, you might look  
2 at the address of the house before you knock  
3 down the door.

4 MR. LIU: Yes. And -- and, as the  
5 district court found at 52(a), that sort of  
6 decision is filled with policy tradeoffs because  
7 checking the house --

8 JUSTICE GORSUCH: Really?

9 MR. LIU: -- number at the end of the  
10 driveway means exposing the agents to potential  
11 lines of fire from the windows --

12 JUSTICE GORSUCH: How about making  
13 sure you're on the right street? Is that -- is  
14 that --

15 JUSTICE JACKSON: And how does that --

16 JUSTICE GORSUCH: I mean, just the  
17 right street?

18 JUSTICE JACKSON: How -- how --

19 MR. LIU: No. I mean, I -- I was just  
20 going to say --

21 JUSTICE GORSUCH: Checking the street  
22 sign, is that -- is that, you know, asking too  
23 much?

24 MR. LIU: What I would say is exactly  
25 what the courts below found, which is that the

1 officers here made a reasonable mistake as to  
2 where they were.

3 The allegation from Petitioners'  
4 claims is that they should have done more. They  
5 should have stopped and got out of the caravan  
6 of vehicles and checked the street sign. They  
7 should have --

8 JUSTICE JACKSON: But, I guess, Mr.  
9 Liu, the question is: How does that really  
10 differ from Colesville? I mean, the problem  
11 that I think is sort of what is happening in  
12 your analysis is that you say that the  
13 Colesville conduct does not fall within the  
14 discretionary-function exception, which seems to  
15 me to be a concession that even if we agree with  
16 you that these aren't in two separate  
17 categories, law enforcement and discretionary  
18 function, we still have to figure out how broad  
19 the discretionary-function exception is --

20 MR. LIU: Yeah.

21 JUSTICE JACKSON: -- which is the  
22 question you say we're not allowed to answer.

23 MR. LIU: The conduct is Collinsville  
24 flunks the first step of the Gaubert two-part  
25 test. The first --

1 JUSTICE JACKSON: And is that the  
2 discretionary-function test?

3 MR. LIU: Yes.

4 JUSTICE JACKSON: All right. So then  
5 we are having to assess the scope of the  
6 discretionary function in this conduct -- in  
7 this context. I don't see --

8 MR. LIU: I don't think so.

9 JUSTICE JACKSON: -- how you can -- I  
10 don't see how you can say we have separated that  
11 out of the question presented, we can't look at  
12 it, and you're still answering these questions  
13 in this way.

14 MR. LIU: No, because I -- I -- I  
15 think this case comes to the Court on the  
16 assumption, as the court -- courts below found  
17 at 17 to 18a and at 58a, that the conduct here  
18 did satisfy Gaubert's two-part test.

19 Now the only out that Petitioners have  
20 left then is to say that the proviso  
21 nevertheless removes those claims from the scope  
22 of (a). That's what I took to be the threshold  
23 statutory question that this Court granted cert  
24 to decide.

25 If I might just address one -- one



1 point that my friend raised --

2 JUSTICE SOTOMAYOR: I -- I'm sorry,  
3 counsel. You're doing exactly what the other  
4 side is doing. You are begging the question,  
5 which is how far is -- does the discretionary  
6 exception go.

7 The other side wants an absolute rule  
8 that all intentional torts are not covered. You  
9 want the opposite, which is, if there's any --  
10 any discretion in the activity, then no  
11 negligences or intentional actions are covered.

12 MR. LIU: No, I don't --

13 JUSTICE SOTOMAYOR: The two of you are  
14 going into separate corners.

15 MR. LIU: I -- I'm not asking for an  
16 absolute rule. I'm asking for the Court to just  
17 stick with the test in Gaubert --

18 JUSTICE SOTOMAYOR: Yes, because you  
19 got a great decision below, but is that fair?

20 MR. LIU: Sometimes that test will  
21 result in the United States being exposed to  
22 liability. Sometimes it won't. It's not an  
23 absolute test.

24 If I may just address my friend's  
25 suggestion that the proviso did nothing when

1 Congress enacted it, we don't view that to be  
2 the case. Before the proviso was enacted,  
3 officers like Guerra had two layers of  
4 protection from liability. They had the  
5 discretionary-function exception and then they  
6 had an extra special layer of protection  
7 provided by subsection (h), which gave the  
8 United States blanket immunity for any claim  
9 based on a particular type of tort.

10 What the proviso did was remove that  
11 special layer of protection, but it left in  
12 place --

13 JUSTICE SOTOMAYOR: That -- that --  
14 that is so ridiculous. Congress is looking at  
15 the Collinsville raid and providing a remedy to  
16 people who have been wrongfully raided, and  
17 you're now saying, no, they really didn't want  
18 to protect them fully. They were just going to  
19 take them out of that exception but leave in the  
20 discretionary exception.

21 I gave you discretion in Collinsville.  
22 The officers are permitted to break into a home  
23 if they think an emergency existed. That's why  
24 those officers did that.

25 MR. LIU: Yeah. And --

1 JUSTICE SOTOMAYOR: They may have been  
2 wrong about the emergency existing. They may  
3 have been wrong about the warrant law. But,  
4 under your test, it's their discretion to arrest  
5 when they think there's an emergency.

6 MR. LIU: No. What -- what -- what --  
7 what we understand the proviso to do is to  
8 remove that blanket special layer of protection  
9 in (h). That requires the U.S. in these types  
10 of cases to battle it out under the  
11 discretionary-function exception.

12 And that's quite significant because  
13 there's a large set of cases that are going to  
14 flunk this Court's two-part test in Gaubert,  
15 chief among them the raids in Collinsville.

16 And so, by removing the proviso --

17 JUSTICE SOTOMAYOR: They'll flunk  
18 the -- that's right, flunk it. All right.  
19 Thank you.

20 MR. LIU: So, by removing the proviso,  
21 it exposes -- it requires the United States to  
22 hash it out under the discretionary-function  
23 exception. As I -- as I say, there are plenty  
24 of cases that are going to fall outside that  
25 discretionary-function exception.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel. Is there anything else you wanted to  
3 add to that point?

4 MR. LIU: No. Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you.  
6 Justice Thomas?

7 Justice Alito? No?

8 Justice Kagan? No?

9 JUSTICE KAVANAUGH: Just so I'm --

10 CHIEF JUSTICE ROBERTS: Justice  
11 Kavanaugh?

12 JUSTICE KAVANAUGH: Just so I'm clear,  
13 we can say the Supremacy Clause is not a bar. I  
14 know you don't want us to reach that, but we can  
15 say that. We can say the proviso does not apply  
16 beyond (h). And we can stop there and leave  
17 questions about how to apply the discretionary-  
18 function exception to the facts of this case for  
19 remand, correct?

20 MR. LIU: That's right. I would say  
21 that the courts below already did that analysis,  
22 and so a remand --

23 JUSTICE KAVANAUGH: But, if so, they  
24 can say that?

25 MR. LIU: They can say that again on

1 remand.

2 JUSTICE KAVANAUGH: Thank you.

3 MR. LIU: Thanks.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: Can I just -- before  
8 you leave the podium, can I just ask you about  
9 your point that we should not reach the  
10 Supremacy Clause question?

11 I guess I have a concern about our  
12 jurisdiction in this particular set of -- this  
13 particular situation because I'm looking at 28  
14 U.S.C. 1254, which outlines our certiorari  
15 jurisdiction. It allows us to hear appeals from  
16 lower courts by writ of certiorari granted upon  
17 the petition of any party.

18 And the only question that we're  
19 looking at now that was put to us by petition is  
20 the Supremacy Clause question. The government  
21 in this case asked us in the bio to add the  
22 third -- what we now call the second question.

23 MR. LIU: Mm-hmm.

24 JUSTICE JACKSON: And so I guess I  
25 don't understand that -- you know, I appreciate

1 that we could also hear that question, but I'm a  
2 little worried about suggesting that we can  
3 exercise jurisdiction to resolve a question that  
4 never appeared -- only a question that never  
5 appeared any -- in any cert petition before us.

6 MR. LIU: Yeah, I -- I don't think  
7 that's quite right. I -- I understand the  
8 granting of the petition to be necessary for  
9 this Court to exercise its power but that once  
10 it's granted the petition --

11 JUSTICE JACKSON: Then we can totally  
12 change it and add questions that don't exist?

13 MR. LIU: I do think --

14 JUSTICE JACKSON: That weren't there?

15 MR. LIU: I do think it's within this  
16 Court's discretion at that point to decide for  
17 reasons of prudence or otherwise exactly what  
18 questions it wishes to -- to decide in reviewing  
19 the judgment below because that's ultimately  
20 what's -- what's being reviewed, is the  
21 judgment.

22 JUSTICE JACKSON: Okay.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Mills.

1 ORAL ARGUMENT OF CHRISTOPHER E. MILLS,  
2 COURT-APPOINTED AMICUS CURIAE  
3 IN SUPPORT OF THE JUDGMENT BELOW ON  
4 QUESTION 1

5 MR. MILLS: Mr. Chief Justice, and may  
6 it please the Court:

7 The FTCA does not make the United  
8 States liable for lawful acts of its agents.  
9 That is true for three reasons.

10 First, Section 2674 makes the  
11 government liable only to the same extent as a  
12 private person in like circumstances under state  
13 law, and a private person cannot face state  
14 liability that conflicts with federal law.

15 Second, Section 2674 reserves any  
16 other defenses, including those only available  
17 to government agents. Government agents are not  
18 liable for acts within their federal duties.

19 Third, a federal court in an FTCA case  
20 stands in state court shoes, which means it must  
21 consider applicable federal law. Otherwise, the  
22 United States would be liable where a private  
23 person and a government agent would not,  
24 contradicting the statute.

25 Thus, the United States can have a

1 Supremacy Clause defense in FTCA cases.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: The -- I -- I don't  
4 quite understand your argument. I think you  
5 suggest that you can raise sovereign immunity as  
6 a defense, a private individual?

7 MR. MILLS: No, Your Honor. My -- my  
8 argument is that a private individual can raise  
9 the Supremacy Clause as a defense --

10 JUSTICE THOMAS: Okay.

11 MR. MILLS: -- to state tort  
12 liability.

13 JUSTICE THOMAS: Okay.

14 MR. MILLS: And -- and they have in  
15 this Court's case law. So Hunter versus Wood  
16 involves the government -- the -- this Court  
17 giving a Supremacy Clause defense to a private  
18 railroad ticket agent who was following federal  
19 law.

20 JUSTICE THOMAS: Do you think that a  
21 private individual can enforce federal law?

22 MR. MILLS: Yes, Your Honor. So I  
23 think Hunter is -- is a perfect example of that.  
24 There, the railroad agent was following a  
25 federal court order. Here, you have something



1 similar with the agents following the warrant.  
2 You also have that sort of flavor in other  
3 cases. For example, when an airline denies  
4 boarding to someone who, under FAA regulations,  
5 doesn't show the proper ID, that's another  
6 example of a federal law duty.

7 JUSTICE THOMAS: Why do you think the  
8 Eleventh Circuit took this tack of sovereign  
9 immunity?

10 MR. MILLS: So I -- I -- I don't  
11 dispute the -- the parties' contention that  
12 there seems to be a concern based on the  
13 Eleventh Circuit precedent sort of -- and its  
14 interpretation of the intentional tort proviso.  
15 But, more importantly, I think the Eleventh  
16 Circuit was right. I think their position  
17 follows from Section 2674.

18 JUSTICE KAGAN: But I guess,  
19 Mr. Mills -- I -- I mean, you're -- you're --  
20 you're quite right, of course, that private  
21 parties can raise preemption arguments and that  
22 the United States could raise the same sort of  
23 preemption arguments.

24 But I guess the question that I have  
25 is, how is that really relevant to this case?

1 Because that's not the nature of the immunity  
2 defense that the Eleventh Circuit applied here.  
3 It wasn't a statutory preemption sort of  
4 argument. It was a, you know, basic sovereign  
5 immunity kind of argument.

6 MR. MILLS: I -- I disagree,  
7 Your Honor. I think it was a standard  
8 preemption analysis, just like this Court's  
9 decision in Neagle. And so I think Neagle is --  
10 is a prong of this Court's statutory preemption  
11 analysis that obviously comes up more rarely  
12 than the typical preemption cases, but it  
13 involves the exact same conflict between federal  
14 law says you must do this and state law says you  
15 can't take this action reasonably necessary to  
16 do that. So I think that there -- you do have  
17 the same implied conflict that you would in  
18 other statutory preemption cases.

19 And -- and I think the private  
20 person -- you know, the -- the key there is that  
21 it's in like circumstances. So, you know, as an  
22 example, I would point the Court to 28 U.S.C.  
23 530B, which says federal government attorneys  
24 are subject to state rules of professional  
25 conduct "to the same extent as other attorneys

1 in that state."

2 And the lower courts and the federal  
3 government have read that language -- look at  
4 their BIO in 1613-23 -- to mean that a  
5 preemption defense is available even though the  
6 federal statute references or incorporates the  
7 state rules. The government says no attorney  
8 can be subject to a state rule that conflicts  
9 with federal law, and because government  
10 attorneys are -- are subject to them only to the  
11 same extent, therefore, neither -- neither can  
12 the government attorneys.

13 And that's the exact same point I'm  
14 making here. No private person can face state  
15 liability that conflicts with and thus is  
16 preempted by federal law. And so, within the  
17 scope of 2674, neither can the United States.

18 But, even if you set -- set aside the  
19 private individual aspect, you still have the --  
20 the third paragraph in Section 2674, which --  
21 which provides any other defenses, including  
22 defenses available -- available to government  
23 agents.

24 On the Petitioners' theory, Neagle, in  
25 the famous case where he protected Justice

1 Field, escapes liability because he had a  
2 federal duty. But, on the Petitioners' theory,  
3 today, he could turn around -- the --  
4 Mrs. Terry, the wife of the assailant, could  
5 turn around and sue the United States for  
6 damages, and the United States would be civilly  
7 liable even though Neagle was performing his  
8 federal duties.

9 Same thing in this case. If the  
10 agents had gone to the right house, under their  
11 theory, and state tort liability would have  
12 applied under whatever the state law happens to  
13 be, the United States would be civil -- civilly  
14 liable for money damages for going to the right  
15 house.

16 So I think that that underscores that  
17 there has to be a Supremacy Clause defense  
18 available when the federal agent was -- was  
19 acting within their federal duties.

20 And -- and then the last -- last  
21 aspect I would point to is this Court's  
22 decisions in Richards and Hess, where -- where  
23 the Court said you have to consider applicable  
24 federal law. Again, the Court said that's the  
25 only way to make sure that the statute doesn't

1 extend more liability to the United States than  
2 that faced by private individuals or -- or the  
3 government agents.

4 Here, applicable federal law includes  
5 superseding federal duties, and -- and -- and  
6 that follows directly from this Court's decision  
7 in Neagle and the rest of the Supremacy Clause  
8 defense cases we cite.

9 JUSTICE JACKSON: Mr. Mills, to be  
10 clear, the Eleventh Circuit is the only circuit  
11 that has adopted this particular line of  
12 thinking with respect to these kinds of cases,  
13 is that right?

14 MR. MILLS: That's right. No other  
15 court has considered it one way or the other.

16 JUSTICE JACKSON: And how long? Do  
17 you know how long this has been the precedent in  
18 the Eleventh Circuit, the application of the  
19 Supremacy Clause in this way?

20 MR. MILLS: Since 2009.

21 JUSTICE JACKSON: Thank you.

22 MR. MILLS: And -- and in the -- in  
23 that 15 years, there have only been three cases  
24 before the Eleventh Circuit. The Supremacy  
25 Clause defense more broadly, the Cobb article we

1 cite in the brief says that since 1787, there  
2 have only been 59 cases involving a Supremacy  
3 Clause defense.

4 So, contrary to the Petitioners'  
5 argument, this is not a defense that would swamp  
6 the FTCA. It simply means that when the federal  
7 agents are performing their federal duties, the  
8 United States can't be liable in money damages.

9 CHIEF JUSTICE ROBERTS: Anything  
10 further? Justice Alito?  
11 Justice Sotomayor?  
12 Justice Barrett?  
13 Thank you, counsel.  
14 Rebuttal?

15 REBUTTAL ARGUMENT OF PATRICK M. JAICOMO

16 ON BEHALF OF THE PETITIONERS

17 MR. JAICOMO: Thank you, Your Honor.

18 I'd like to respond to a few of the  
19 questions that came up when my friend from the  
20 government was discussing things with -- with  
21 the Court.

22 The first thing I'd like to point out  
23 along the lines of what Justice Sotomayor was  
24 asking is that the government's position in this  
25 case and the Eleventh Circuit's decision below,

1 their understanding of the  
2 discretionary-function exception would do two  
3 things. One, it would eat up almost all of the  
4 entire FTCA, but, two, more importantly, it  
5 would certainly eat up all the claims that the  
6 proviso was enacted to provide liability for.

7 And, here, the language of the proviso  
8 itself is very direct. But the Senate report  
9 backs that language up, and, there, the Senate  
10 talked about the fact that what they were doing  
11 was removing a barrier to liability, not just a  
12 barrier so the rest of the FTCA could then still  
13 get in the way, even though the officers had  
14 violated the proviso.

15 And so to say that subsection (a)  
16 still applies to bar almost all of, unless you  
17 take the government's qualified immunity  
18 application, the claims that the proviso raises  
19 would mean that Congress has enacted a  
20 completely useless law in 1974.

21 That simply can't be the case. Even  
22 addressing it to the circumstances of  
23 Collinsville, as Justice Jackson asked questions  
24 about, or this case, Gaubert doesn't apply.

25 The government gets around this by

1 taking the position that the Eleventh Circuit  
2 has taken, which is to say, unless there is  
3 something telling you you can't do this, and the  
4 something either has to be a statute or a  
5 clearly established law, you have discretion.

6 That's not what Gaubert says. There's  
7 a whole step two to the analysis, which none of  
8 the courts in the Eleventh Circuit or elsewhere  
9 that take a broader approach considered.

10 Of course, there's discretion in the  
11 colloquial sense when police are raiding a  
12 house. But that discretion is not legislative  
13 or administrative decision-making grounded in  
14 social or economic policy. It's the same  
15 discretion we see with driving a car or flying a  
16 plane or seizing horses in the Hadley case.

17 And so it simply can't be the case  
18 that what Congress did when it enacted the  
19 proviso was to say: Even though the officers in  
20 this case had a warrant commanding them to go to  
21 one address, there was discretion for them to go  
22 to another. So they should lose on step one.

23 If we get to step two, there's no  
24 question that there was no policy here. As my  
25 friend said, the government's policy is to raid



1 the right house. They didn't do that. The  
2 preparation is kind of immaterial to the  
3 ultimate result here.

4 If you really, really meant to drop  
5 the pizza off at the right address, it doesn't  
6 matter, you still need to give a refund if you  
7 drop it off at the wrong address.

8 Even then, if we look just to the  
9 concept of the conflict of the language, we  
10 assume that there's a conflict, which, again, we  
11 do not think the Court should do and the Court  
12 does not need to do.

13 The decision in Alaska is on point  
14 with this case. We talk about colons and  
15 periods and indentations and -- and the  
16 preamble. All of that stuff was available in  
17 Alaska. The government was on the wrong side of  
18 that case, and it made the arguments we are now  
19 making, and those arguments prevailed. And, in  
20 fact, even the dissenting justices cited things  
21 that now support us here.

22 Unlike in Alaska, where the proviso  
23 was limited to such claims, here, we have an  
24 affirmative freestanding rule, as Justice Scalia  
25 requested. And unlike in Alaska, here, it

1 doesn't -- it doesn't matter that this was in  
2 the middle of the -- the set of exceptions,  
3 because Alaska was the same way. The Submerged  
4 Lands provision was (m), this other provision  
5 was (e). None of that mattered.

6           What's very clear here from the  
7 language Congress enacted and from the fact that  
8 it took the time to add this amendment was that  
9 they wanted the claims if they satisfied the  
10 proviso to move forward.

11           And it's crucial to keep in mind that  
12 if Petitioners win on this issue, they don't win  
13 this case. We're fighting to get a day in court  
14 where then we can duke it out over the elements  
15 of torts and defenses in the Georgia -- under  
16 the Georgia elements standard.

17           So it's not as if this case being  
18 decided by this Court will even render the  
19 government liable. We still have more steps to  
20 take, but we want to be able to take those  
21 steps. And through the law enforcement proviso,  
22 Congress -- Congress said that we should be able  
23 to take those steps.

24           Now, on the question about the -- the  
25 second question presented in jurisdiction, I

1 can't say whether there's a jurisdictional  
2 problem, but what I can tell you is that when we  
3 wrote our QP and then saw the government's  
4 suggested language for narrowing it, we  
5 understood that to mean our QP but narrowed. If  
6 it was a completely separate issue that assumed  
7 the scope covered our -- our claims, we would  
8 have objected that that was an inappropriate  
9 conditional cross-petition.

10 But we didn't, and we rightly  
11 understood then that when this Court did that,  
12 it was narrowing our question to the specifics  
13 that the government offered, as the government  
14 says at page 22 of its BIO.

15 That narrowing still requires the  
16 Court to consider to some extent the scope of  
17 the discretionary-function exception, and if it  
18 doesn't, the government's theory, which has  
19 prevailed across most of the circuits, that  
20 anything that has any element of judgment or  
21 choice is good enough to get you into that  
22 exception means that the FTCA will become  
23 largely a nullity.

24 This covers cases like the law  
25 enforcement proviso cases, but it also covers

1 the more run-of-the-mill cases like VA  
2 malpractice, where, obviously, a doctor has as  
3 much discretion to decide which artery to close  
4 off than a police officer does which door to go  
5 to, or it will cover --

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel. Thank you.

8 MR. JAICOMO: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Mills,  
10 this Court appointed you to brief and argue this  
11 case as an amicus curiae in support of the  
12 judgment below. You have ably discharged that  
13 responsibility, for which we are grateful.

14 The case is submitted.

15 (Whereupon, at 11:01 a.m., the case  
16 was submitted.)

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## Official - Subject to Final Review

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