

SUPREME COURT OF THE UNITED STATES

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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11
12 Washington, D.C.
13 Tuesday, April 29, 2025
14
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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3 behalf of the Petitioners.
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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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1 P R O C E E D I N G S

2 (10:08 a.m.)

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

6 Mr. Jaicomo.

7 ORAL ARGUMENT OF PATRICK M. JAICOMO
8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

24 But, to get then to that question,
25 it -- it -- it's simply the case that, as we can

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

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

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

20 But putting that aside, because amici
21 could address Nguyen, and I understand your
22 argument on that first question, I believe it's
23 that Nguyen, which was the basis of this
24 circuit's decision, was a case involving state
25 law conflict with federal law. There's no

1 conflict here because federal law is what makes
2 the officers liable, correct?

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

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

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

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

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

21 JUSTICE SOTOMAYOR: What you're asking
22 us to do is to say 11 of the 12 other exceptions
23 are still operative against the law enforcement
24 proviso, but only this one, the discretionary
25 one, is not. Is that your position?

1 MR. JAICOMO: Not quite, Your Honor.

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

5 MR. JAICOMO: Mm-hmm.

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

12 MR. JAICOMO: Yes. So, if I could
13 clarify what -- what I mean, Your Honor, as we
14 articulate in the briefs, we have two separate
15 paths and two different interpret --
16 interpretive methods for how the Court could
17 address QP2.

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

23 If the Court, as the government asks,
24 assumes that there's a conflict here, even
25 though none was found below in the Eleventh

1 Circuit, then our analysis would extend beyond
2 the reach of subsection (h).

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

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

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

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

21 MR. JAICOMO: So I would --

22 JUSTICE SOTOMAYOR: You're asking us
23 to say that an intentional tort is never
24 discretionary. As Justice Ketanji Jackson
25 mentioned, I don't -- I'm not quite sure that's

1 true.

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

5 MR. JAICOMO: Mm-hmm.

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

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

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

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

1 overlap at all. And that's not some sort of
2 word games from us.

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

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

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

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

20 MR. JAICOMO: Yes.

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

24 MR. JAICOMO: So -- so I agree that
25 we -- that the Court shouldn't be answering that

1 broader question.

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

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

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

1 that are the subject of I don't know how many
2 circuit splits? Wouldn't that be a -- a
3 sensible course?

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

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

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

23 JUSTICE GORSUCH: I -- I understand
24 that, but I think it thought a different version
25 of it was the threshold question, and that is

1 how far does the proviso extend, does it extend
2 beyond (h).

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

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

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

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

22 JUSTICE GORSUCH: No, I -- I would
23 answer both QPs, I think, but I -- I'm wondering
24 whether -- whether saying the proviso doesn't
25 extend beyond (h) but leaving you to argue below

1 that the discretionary-function exception
2 doesn't include unconstitutional acts,
3 intentional torts.

4 MR. JAICOMO: Well --

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

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

9 MR. JAICOMO: Sure.

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

12 MR. JAICOMO: Okay.

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

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

16 (Laughter.)

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

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

23 MR. JAICOMO: Okay. So --

24 JUSTICE GORSUCH: Your -- your
25 thoughts about that?

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

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

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

22 Now, to answer the second question
23 about why or whether this Court should address
24 QP 1, of course, it should address QP 1, but the
25 point that the government is trying to get the

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

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

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

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

1 about whether or not we are speaking to the
2 scope or extent of the discretionary-function
3 exception?

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

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

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

1 Gaubert standard and says: Unless something
2 specifically tells you in federal law you can't
3 do anything, you have open discretion to do it.

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

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

21 MR. JAICOMO: So, Your Honor, I
22 wouldn't ask the Court to get into the more
23 enormously complicated aspects of the
24 discretionary-function exception. Again, we're
25 simply saying there's a line where it's

1 obviously not going to touch things like the law
2 enforcement proviso.

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

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

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

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

20 JUSTICE GORSUCH: It does seem to me
21 that we need to address the Supremacy Clause
22 question because, if we were to send this case
23 back on the narrow grounds we've been discussing
24 with you and that you're resisting so well, it's
25 possible that the Eleventh Circuit could wind up

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

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

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

1 mischief that they were trying to remedy with
2 the proviso are the very sort of intentional
3 torts committed by the FBI agents in this case.

4 CHIEF JUSTICE ROBERTS: Justice
5 Thomas, anything further?

6 Justice Alito?

7 Justice Kagan?

8 Justice Kavanaugh?

9 Justice Jackson?

10 Thank you, counsel.

11 MR. JAICOMO: Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Mr. Liu.

13 ORAL ARGUMENT OF FREDERICK LIU

14 ON BEHALF OF THE RESPONDENTS

15 MR. LIU: Mr. Chief Justice, and may
16 it please the Court:

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

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

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

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

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

22 Now Petitioners have injected a third
23 issue into the case, whether their claims
24 satisfy the discretionary-function exception in
25 the first place, in other words, whether they

1 satisfy the two-part test this Court articulated
2 in United States versus Gaubert. But that issue
3 isn't fairly encompassed by the questions
4 presented, and it's not independently
5 cert-worthy.

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

10 And I welcome the Court's questions.

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

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

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

1 and applies here.

2 CHIEF JUSTICE ROBERTS: Well, I
3 mean --

4 JUSTICE SOTOMAYOR: Counsel, I'm
5 having a -- I'm sorry.

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

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

22 CHIEF JUSTICE ROBERTS: No, that's the
23 most logical place to put it, but a heroic
24 assumption to think back to 1974 and put myself
25 in Congress's shoes, but it's also, you know,

1 they got a lot of things going on, they're very
2 busy, and if it applies logically more
3 generally, I don't know why we wouldn't at least
4 entertain that.

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

22 It's the fact that -- even my friend
23 concedes -- that it would be implausible for
24 Congress to have wanted the proviso to apply to
25 certain exceptions, especially subsection (k),

1 which is the foreign country exception. No one
2 thought Congress wanted to open the door to the
3 application of substantive foreign law in cases
4 involving police conduct.

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

11 And so I think you have all the
12 relevant text --

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

23 So what was Congress thinking?

24 MR. LIU: So I -- I don't think that
25 the conduct in the Collinsville raids falls

1 within the discretionary-function exception.

2 JUSTICE SOTOMAYOR: But why? Only
3 because there was no warrant?

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

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

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

21 I mean, I don't see the difference
22 between that and saying that an officer's action
23 in using a GPS to break into the wrong house
24 has -- has any policy related to it. It's like
25 driving negligently. You got to that house by

1 mistake. You drove negligently and hit someone.

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

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

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

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

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

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

23 MR. LIU: Well, I would just run the
24 conduct here through Gaubert's two-part test, so
25 step one of the test asks whether there is a

1 federal law, statute, or regulation that
2 specifically prescribes a course of action that
3 the employee needs to follow.

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

8 MR. LIU: Well, no policy says that.
9 What -- what they --

10 JUSTICE SOTOMAYOR: And that is
11 negligent driving.

12 MR. LIU: Well --

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

16 MR. LIU: No, I -- I -- I -- excuse
17 me. Of course --

18 JUSTICE GORSUCH: And don't --
19 don't --

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

21 JUSTICE GORSUCH: -- don't traumatize
22 its occupants? Really?

23 MR. LIU: Of course, it's the -- the
24 United States policy to execute the warrants at
25 the right house, but state --

1 JUSTICE GORSUCH: I should hope so.

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

7 And, as the district court found at
8 52(a), the sort of discretion left to the
9 officers here to determine the right house is
10 filled with policy considerations. The -- the
11 officers here were weighing public safety
12 considerations, efficiency considerations,
13 operational security, the idea that they didn't
14 want to delay the start of the execution of the
15 warrants because they wanted to execute all the
16 warrants simultaneously.

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

24 JUSTICE GORSUCH: Yeah, you might look
25 at the address of the house before you knock

1 down the door.

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

6 JUSTICE GORSUCH: Really?

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

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

13 JUSTICE JACKSON: And how does that --

14 JUSTICE GORSUCH: I mean, just the
15 right street?

16 JUSTICE JACKSON: How -- how --

17 MR. LIU: No. I mean, I -- I was just
18 going to say --

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

22 MR. LIU: What I would say is exactly
23 what the courts below found, which is that the
24 officers here made a reasonable mistake as to
25 where they were.

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

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

18 MR. LIU: Yeah.

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

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

24 JUSTICE JACKSON: And is that the
25 discretionary-function test?

1 MR. LIU: Yes.

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

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

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

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

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

23 If I might just address one -- one
24 point that my friend raised --

25 JUSTICE SOTOMAYOR: I -- I'm sorry,

1 counsel. You're doing exactly what the other
2 side is doing. You are begging the question,
3 which is how far is -- does the discretionary
4 exception go.

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

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

11 JUSTICE SOTOMAYOR: The two of you are
12 going into separate corners.

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

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

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

22 If I may just address my friend's
23 suggestion that the proviso did nothing when
24 Congress enacted it, we don't view that to be
25 the case. Before the proviso was enacted,

1 officers like Guerra had two layers of
2 protection from liability.

3 They had the discretionary-function
4 exception and then they had an extra special
5 layer of protection provided by subsection (h),
6 which gave the United States blanket immunity
7 for any claim based on a particular type of
8 tort.

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

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

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

24 MR. LIU: Yeah. And --

25 JUSTICE SOTOMAYOR: They may have been

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

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

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

15 And so, by removing the proviso --

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. Is there anything else you wanted to
2 add to that point?

3 MR. LIU: No. Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 Justice Thomas?

6 Justice Alito? No?

7 Justice Kagan? No?

8 JUSTICE KAVANAUGH: Just so I'm --

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

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

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

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

24 MR. LIU: They can say that again on
25 remand.

1 JUSTICE KAVANAUGH: Thank you.

2 MR. LIU: Thanks.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 Justice Jackson?

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

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

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

22 MR. LIU: Mm-hmm.

23 JUSTICE JACKSON: And so I guess I
24 don't understand that -- you know, I appreciate
25 that we could also hear that question, but I'm a

1 little worried about suggesting that we can
2 exercise jurisdiction to resolve a question that
3 never appeared -- only a question that never
4 appeared any -- in any cert petition before us.

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

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

12 MR. LIU: I do think --

13 JUSTICE JACKSON: That weren't there?

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

21 JUSTICE JACKSON: Okay.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Mills.

25

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

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

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

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

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

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

24 Thus, the United States can have a
25 Supremacy Clause defense in FTCA cases.

1 I welcome the Court's questions.

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

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

9 JUSTICE THOMAS: Okay.

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

12 JUSTICE THOMAS: Okay.

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

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

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

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

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

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

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

23 But I guess the question that I have
24 is, how is that really relevant to this case?
25 Because that's not the nature of the immunity

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

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

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

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

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

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

23 On the Petitioners' theory, Neagle, in
24 the famous case where he protected Justice
25 Field, escapes liability because he had a

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

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

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

18 And -- and then the last -- last
19 aspect I would point to is this Court's
20 decisions in Richards and Hess, where -- where
21 the Court said you have to consider applicable
22 federal law. Again, the Court said that's the
23 only way to make sure that the statute doesn't
24 extend more liability to the United States than
25 that faced by private individuals or -- or the

1 government agents.

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

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

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

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

18 MR. MILLS: Since 2009.

19 JUSTICE JACKSON: Thank you.

20 MR. MILLS: And -- and in the -- in
21 that 15 years, there have only been three cases
22 before the Eleventh Circuit. The Supremacy
23 Clause defense more broadly, the Cobb article we
24 cite in the brief says that since 1787, there
25 have only been 59 cases involving a Supremacy

1 Clause defense.

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

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

14 REBUTTAL ARGUMENT OF PATRICK M. JAICOMO
15 ON BEHALF OF THE PETITIONERS

16 MR. JAICOMO: Thank you, Your Honor.
17 I'd like to respond to a few of the
18 questions that came up when my friend from the
19 government was discussing things with -- with
20 the Court.

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

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

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

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

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

24 The government gets around this by
25 taking the position that the Eleventh Circuit

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

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

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

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

22 If we get to step two, there's no
23 question that there was no policy here. As my
24 friend said, the government's policy is to raid
25 the right house. They didn't do that. The

1 preparation is kind of immaterial to the
2 ultimate result here.

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

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

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

21 Unlike in Alaska, where the proviso
22 was limited to such claims, here, we have an
23 affirmative freestanding rule, as Justice Scalia
24 requested. And unlike in Alaska, here, it
25 doesn't -- it doesn't matter that this was in

1 the middle of the -- the set of exceptions,
2 because Alaska was the same way. The Submerged
3 Lands provision was (m), this other provision
4 was (e). None of that mattered.

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

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

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

23 Now, on the question about the -- the
24 second question presented in jurisdiction, I
25 can't say whether there's a jurisdictional

1 problem, but what I can tell you is that when we
2 wrote our QP and then saw the government's
3 suggested language for narrowing it, we
4 understood that to mean our QP but narrowed. If
5 it was a completely separate issue that assumed
6 the scope covered our -- our claims, we would
7 have objected that that was an inappropriate
8 conditional cross-petition.

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

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

23 This covers cases like the law
24 enforcement proviso cases, but it also covers
25 the more run-of-the-mill cases like VA

1 malpractice, where, obviously, a doctor has as
2 much discretion to decide which artery to close
3 off than a police officer does which door to go
4 to, or it will cover --

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

7 MR. JAICOMO: Thank you.

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

13 The case is submitted.

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