

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 CURTRINA MARTIN, INDIVIDUALLY)
4 AND AS PARENT AND NEXT FRIEND)
5 OF G. W., A MINOR, ET AL.,)
6 Petitioners,)
7 v.) No. 24-362
8 UNITED STATES, ET AL.,)
9 Respondents.)
10 - - - - -

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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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 I understand how you say that this should not be
23 a 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 -- a
12 dialogue about how this would operate.

13 But, to answer your question, no,
14 certainly, my -- the Petitioners in this case do
15 not need this broader rule to be articulated for
16 us 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 they can't be a
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 it --
4 that's what it sounds like to me because, if the
5 other 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, I -- as
15 we articulate in the briefs, we have two
16 separate 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 it -- this is an
16 awkward vehicle to address it given that it --
17 it really wasn't teed up for us that way because
18 of the 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 -- I
25 understand that, but I think it thought a

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

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

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

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

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

24 JUSTICE GORSUCH: No, I -- I would
25 answer both QPs, I think, but I'm -- I'm

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

6 MR. JAICOMO: Well --

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

9 Now, if I can just -- you can respond
10 to that, but I'm --

11 MR. JAICOMO: Sure.

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

14 MR. JAICOMO: Okay.

15 JUSTICE GORSUCH: -- like you all --

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

17 (Laughter.)

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

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

25 MR. JAICOMO: Okay. So --

1 JUSTICE GORSUCH: Your -- your
2 thoughts about that?

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

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

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

24 Now, to answer the second question
25 about why or whether this Court should address

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

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

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

23 JUSTICE JACKSON: So would it be
24 helpful to you that if we were to send it
25 back -- on Justice Gorsuch's suggestion that we

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

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

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

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

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

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

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

25 MR. JAICOMO: So, Your Honor, I

1 wouldn't ask the Court to get into the more
2 enormously complicated aspects of the
3 discretionary-function exception. Again, we're
4 simply saying there's a line where it's
5 obviously not going to touch things like the law
6 enforcement proviso.

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

22 And so the line is being drawn right
23 now by all the circuits. They're just confused
24 about where to draw it. And because of that
25 confusion, the line varies from circuit to

1 circuit. And so, if this Court is going to take
2 this issue up and provide any clarity, it should
3 provide clarity to all the circuits instead of
4 just the Eleventh Circuit.

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

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

24 JUSTICE GORSUCH: It does seem to me
25 that we need to address the Supremacy Clause

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

13 Do -- do you -- do you see it
14 differently, and what -- what are your thoughts
15 about that?

16 MR. JAICOMO: No. No, Your Honor. I
17 think the Court should definitely address the
18 Supremacy Clause bar as the Eleventh Circuit
19 articulated it because that bar, of course, as
20 it's phrased as any -- any actions that are
21 within the nexus of federal officials' acts and
22 within the furthest reaches of the Constitution
23 are going to be provided Supremacy Clause
24 protection basically takes away most of, if not
25 all of, the thrust of the FTCA, which, of

1 course, is why my friend amicus on the other
2 side has said, well, maybe we can just go back
3 to private bills, which is I think the -- the
4 main mischief that Congress was intending to
5 remedy with the FTCA in the same way that the
6 mischief that they were trying to remedy with
7 the proviso are the very sort of intentional
8 torts committed by the FBI agents in this case.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas, anything further?

11 Justice Alito?

12 Justice Kagan?

13 Justice Kavanaugh?

14 Justice Jackson?

15 Thank you, counsel.

16 MR. JAICOMO: Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Mr. Liu.

18 ORAL ARGUMENT OF FREDERICK LIU

19 ON BEHALF OF THE RESPONDENTS

20 MR. LIU: Mr. Chief Justice, and may
21 it please the Court:

22 This Court granted cert on two
23 questions: one about the reach of the proviso
24 in subsection (h) and the other about the
25 Supremacy Clause. To resolve this case, this

1 Court need only decide the question about the
2 proviso, namely, whether the proviso in
3 subsection (h) modifies the
4 discretionary-function exception in subsection
5 (a).

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

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

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

21 But, if this Court rejects that
22 interpretation of the proviso, it should simply
23 affirm on the ground that the
24 discretionary-function exception bars
25 Petitioners' claims without reaching the

1 Supremacy Clause issue.

2 Now Petitioners have injected a third
3 issue into the case, whether their claims
4 satisfy the discretionary-function exception in
5 the first place, in other words, whether they
6 satisfy the two-part test this Court articulated
7 in *United States versus Gaubert*. But that issue
8 isn't fairly encompassed by the questions
9 presented, and it's not independently
10 cert-worthy.

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

15 And I welcome the Court's questions.

16 JUSTICE THOMAS: Do -- can a proviso
17 such as this extend more broadly than -- than
18 your -- than this case?

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

25 We don't think there's any indication

1 here, any basis for finding the presumption that
2 the proviso applies only to the thing it's
3 attached to be rebutted. And so we think the --
4 the general principle that a proviso applies
5 only to the thing it's attached survives and --
6 and applies here.

7 CHIEF JUSTICE ROBERTS: Well, I
8 mean --

9 JUSTICE SOTOMAYOR: Counsel, I'm
10 having a -- I'm sorry.

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

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

1 would have put it in the middle in the -- in
2 (h).

3 CHIEF JUSTICE ROBERTS: No, that's the
4 most logical place to put it, but a heroic
5 assumption to think back to 1974 and put myself
6 in Congress's shoes, but it's also, you know,
7 they've got a lot of things going on, they're
8 very busy, and if it applies logically more
9 generally, I don't know why we wouldn't at least
10 entertain that.

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

1 the proviso which then separates the proviso
2 from every other exception in the statute.

3 It's the fact that -- even my friend
4 concedes -- that it would be implausible for
5 Congress to have wanted the proviso to apply to
6 certain exceptions, especially subsection (k),
7 which is the foreign country exception. No one
8 thought Congress wanted to open the door to the
9 application of substantive foreign law in cases
10 involving police conduct.

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

17 And so I think you have all the
18 relevant text --

19 JUSTICE SOTOMAYOR: So, counsel, what
20 was Congress doing? It passed this proviso
21 because of the Collinsville raids. There,
22 officers, without a warrant, broke into a home.
23 They tied up people. They were as threatening
24 as in the current situation. Why bother if --
25 we accept that they had the discretion to think

1 there was danger. With or without a warrant,
2 the emergency doctrine exception would let them
3 break down a door.

4 So what was Congress thinking?

5 MR. LIU: So I -- I don't think that
6 the conduct in the Collinsville raids falls
7 within the discretionary-function exception.

8 JUSTICE SOTOMAYOR: But why? Only
9 because there was no warrant?

10 MR. LIU: Because their conduct was
11 well beyond the discretion conferred on them
12 because it violated clearly established Fourth
13 Amendment rights.

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

21 That was because, and I'm quoting,
22 "Although driving requires the constant exercise
23 of discretion, the officials' decision in
24 exercising that discretion" negligently -- I'm
25 putting in that word -- "can hardly be said to

1 be grounded in regulatory policy."

2 I mean, I don't see the difference
3 between that and saying that an officer's action
4 in using a GPS to break into the wrong house
5 has -- has any policy related to it. It's like
6 driving negligently. You got to that house by
7 mistake. You drove negligently and hit someone.

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

10 MR. LIU: Well, we understand the
11 discretion here to be the discretion as to how
12 to identify the target of a search warrant.

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

19 I'm talking about a wrong-house raid.
20 He has the right target, the right house, but --
21 but breaks into the wrong one.

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

25 JUSTICE SOTOMAYOR: Well, that's the

1 issue, is that consistent with Gaubert? And I'm
2 asking you to show -- to explain to me how that
3 formulation is consistent with Gaubert.

4 MR. LIU: Well, I -- I -- I would just
5 run the conduct here through Gaubert's two-part
6 test, so step one of the test asks whether there
7 is a federal law, statute, or regulation that
8 specifically prescribes a course of action that
9 the employee needs to follow.

10 JUSTICE SOTOMAYOR: Go -- there is.
11 Go get a search warrant for a drug dealer's
12 house. Now what policy says now go search a
13 house that's not the drug dealer's house?

14 MR. LIU: Well, no policy says that.
15 What -- what they --

16 JUSTICE SOTOMAYOR: And that is
17 negligent driving.

18 MR. LIU: Well --

19 JUSTICE GORSUCH: No -- no policy says
20 don't break down the wrong house, the door of a
21 house?

22 MR. LIU: No, I -- I -- I -- excuse
23 me. Of course --

24 JUSTICE GORSUCH: And don't --
25 don't --

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

2 JUSTICE GORSUCH: -- don't traumatize
3 its occupants? Really?

4 MR. LIU: Of course, it's the -- the
5 United States' policy to execute the warrants at
6 the right house, but state --

7 JUSTICE GORSUCH: I should hope so.

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

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

23 Those are precisely the sorts of
24 policy tradeoffs that an officer makes in
25 determining, well, should I take one more extra

1 precaution to make sure I'm at the right house.
2 Here, Petitioner suggests, for example, that the
3 officer should have checked the house number on
4 the mailbox.

5 JUSTICE GORSUCH: Yeah, you might look
6 at the address of the house before you knock
7 down the door.

8 MR. LIU: Yes. And -- and, as the
9 district court found at 52(a), that sort of
10 decision is filled with policy tradeoffs because
11 checking the house --

12 JUSTICE GORSUCH: Really?

13 MR. LIU: -- number at the end of the
14 driveway means exposing the agents to potential
15 lines of fire from the windows --

16 JUSTICE GORSUCH: How about making
17 sure you're on the right street? Is that -- is
18 that --

19 JUSTICE JACKSON: And how does that --

20 JUSTICE GORSUCH: I mean, just the
21 right street?

22 JUSTICE JACKSON: How -- how --

23 MR. LIU: No. I mean, I -- I was just
24 going to say --

25 JUSTICE GORSUCH: Checking the street

1 sign, is that -- is that, you know, asking too
2 much?

3 MR. LIU: It -- what I would say is
4 exactly what the courts below found, which is
5 that the officers here made a reasonable mistake
6 as to where they were.

7 The allegation from Petitioners'
8 claims is that they should have done more. They
9 should have stopped and got out of the caravan
10 of vehicles and checked the street sign. They
11 should have --

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

24 MR. LIU: Yeah.

25 JUSTICE JACKSON: -- which is the

1 question you say we're not allowed to answer.

2 MR. LIU: The -- the conduct is
3 Collinsville flunks the first step of the
4 Gaubert two-part test. The first --

5 JUSTICE JACKSON: And is that the
6 discretionary-function test?

7 MR. LIU: Yes.

8 JUSTICE JACKSON: All right. So then
9 we are having to assess the scope of the
10 discretionary function in this conduct -- in --
11 in this context. I don't see --

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

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

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

23 Now the only out that Petitioners have
24 left then is to say that the proviso
25 nevertheless removes those claims from the scope

1 of (a). That's what I took to be the threshold
2 statutory question that this Court granted cert
3 to decide.

4 If I might just address one -- one
5 point that my friend raised --

6 JUSTICE SOTOMAYOR: I -- I'm sorry,
7 counsel. You're doing exactly what the other
8 side is doing. You are begging the question,
9 which is how far is -- does the discretionary
10 exception goes.

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

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

17 JUSTICE SOTOMAYOR: The two of you are
18 going into separate corners.

19 MR. LIU: I -- I'm not asking for an
20 absolute rule. I'm asking for the Court to just
21 stick with the test in Gaubert --

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

24 MR. LIU: It -- it -- sometimes that
25 test will result in the United States being

1 exposed to liability. Sometimes it won't. It's
2 not an absolute test.

3 If I may just address my friend's
4 suggestion that the proviso did nothing when
5 Congress enacted it, we don't view that to be
6 the case. Before the proviso was enacted,
7 officers like Guerra had two layers of
8 protection from liability. They had the
9 discretionary-function exception and then they
10 had an extra special layer of protection
11 provided by subsection (h), which gave the
12 United States blanket immunity for any claim
13 based on a particular type of tort.

14 What the proviso did was remove that
15 special layer of protection, but it left in
16 place --

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

25 I gave you discretion in Collinsville.

1 The officers are permitted to break into a home
2 if they think an emergency existed. That's why
3 those officers did that.

4 MR. LIU: Yeah. And -- and --

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

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

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

20 And so, by removing the proviso --

21 JUSTICE SOTOMAYOR: They'll flunk
22 the -- that's right, flunking. All right.
23 Thank you.

24 MR. LIU: So, by removing the proviso,
25 it exposes -- it -- it requires the

1 United States to hash it out under the
2 discretionary-function exception. As I -- as I
3 say, there are plenty of cases that are going to
4 fall outside that discretionary-function
5 exception.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. Is there anything else you wanted to
8 add to that point?

9 MR. LIU: No. Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you.
11 Justice Thomas?

12 Justice Alito? No?

13 Justice Kagan? No?

14 JUSTICE KAVANAUGH: Just so I'm --

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

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

25 MR. LIU: That's right. I would say

1 that the courts below already did that analysis,
2 and so a remand --

3 JUSTICE KAVANAUGH: But, if so, they
4 can say that?

5 MR. LIU: They can say that again on
6 remand.

7 JUSTICE KAVANAUGH: Thank you.

8 MR. LIU: Thanks.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 Justice Jackson?

12 JUSTICE JACKSON: Can I just -- before
13 you leave the podium --

14 MR. LIU: Sorry. Sorry.

15 JUSTICE JACKSON: Can I just ask you
16 about your point that we should not reach the
17 Supremacy Clause question?

18 I guess I have a concern about our
19 jurisdiction in this particular set of -- this
20 particular situation because I'm looking at 28
21 U.S.C. 1254, which outlines our certiorari
22 jurisdiction. It allows us to hear appeals from
23 lower courts by writ of certiorari granted upon
24 the petition of any party.

25 And the only question that we're

1 looking at now that was put to us by petition is
2 the Supremacy Clause question. The government
3 in this case asked us in the bio to add the
4 third the -- what we now call the second
5 question.

6 MR. LIU: Mm-hmm.

7 JUSTICE JACKSON: And so I guess I
8 don't understand that -- you know, I appreciate
9 that we could also hear that question, but I'm a
10 little worried about suggesting that we can
11 exercise jurisdiction to resolve a question that
12 never appeared -- only a question that never
13 appeared any -- in any cert petition before us.

14 MR. LIU: Yeah, I -- I don't think
15 that's quite right. I -- I understand the
16 granting of the petition to be necessary for
17 this Court to exercise its power but that once
18 it's granted the petition --

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

21 MR. LIU: I do think --

22 JUSTICE JACKSON: That weren't there?

23 MR. LIU: I do think it's within this
24 Court's discretion at that point to decide for
25 reasons of prudence or otherwise exactly what

1 questions it wishes to -- to decide in reviewing
2 the judgment below because that's ultimately
3 what's -- what's being reviewed, is the
4 judgment.

5 JUSTICE JACKSON: Okay.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Mills.

9 ORAL ARGUMENT OF CHRISTOPHER E. MILLS,
10 COURT-APPOINTED AMICUS CURIAE
11 IN SUPPORT OF THE JUDGMENT BELOW ON
12 QUESTION 1

13 MR. MILLS: Mr. Chief Justice, and may
14 it please the Court:

15 The FTCA does not make the United
16 States liable for lawful acts of its agents.
17 That is true for three reasons.

18 First, Section 2674 makes the
19 government liable only to the same extent as a
20 private person in like circumstances under state
21 law, and a private person cannot face state
22 liability that conflicts with federal law.

23 Second, Section 2674 reserves any
24 other defenses, including those only available
25 to government agents. Government agents are not

1 liable for acts within their federal duties.

2 Third, a federal court in an FTCA case
3 stands in state court shoes, which means it must
4 consider applicable federal law. Otherwise, the
5 United States would be liable where a private
6 person and a government agent would not,
7 contradicting the statute.

8 Thus, the United States can have a
9 Supremacy Clause defense in FTCA cases.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: The -- I -- I don't
12 quite understand your argument. I think you
13 suggest that you can raise sovereign immunity as
14 a defense, a private individual?

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

18 JUSTICE THOMAS: Okay.

19 MR. MILLS: -- to state tort
20 liability.

21 JUSTICE THOMAS: Okay.

22 MR. MILLS: And -- and they have in
23 this Court's case law. So Hunter versus Wood
24 involves the government -- the -- this Court
25 giving a Supremacy Clause defense to a private

1 railroad ticket agent who was following federal
2 law.

3 JUSTICE THOMAS: Do you think that a
4 private individual can enforce federal law?

5 MR. MILLS: Yes, Your Honor. So I
6 think Hunter is -- is a perfect example of that.
7 There, the railroad agent was following a
8 federal court order. Here, you have something
9 similar with the agents following the warrant.
10 You also have that sort of flavor in other
11 cases. For example, when an airline denies
12 boarding to someone who, under FAA regulations,
13 doesn't show the proper ID, that's another
14 example of a federal law duty.

15 JUSTICE THOMAS: Why do you think the
16 Eleventh Circuit took this tack of sovereign
17 immunity?

18 MR. MILLS: So I -- I -- I don't
19 dispute the -- the parties' contention that
20 there seems to be a concern based on the
21 Eleventh Circuit precedent sort of -- and -- and
22 its interpretation of the intentional tort
23 proviso. But, more importantly, I think the
24 Eleventh Circuit was right. I think their
25 position follows from Section 2674.

1 JUSTICE KAGAN: But I -- I guess,
2 Mr. Mills -- I -- I mean, you're -- you're --
3 you're quite right, of course, that private
4 parties can raise preemption arguments and that
5 the United States could raise the same sort of
6 preemption arguments.

7 But I guess the question that I have
8 is, how is that really relevant to this case?
9 Because that's not the nature of the immunity
10 defense that the Eleventh Circuit applied here.
11 It wasn't a statutory preemption sort of
12 argument. It was a, you know, basic sovereign
13 immunity kind of argument.

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

1 other statutory preemption cases.

2 And -- and I think the private
3 person -- you know, the -- the key there is that
4 it's in like circumstances. So, you know, as an
5 example, I would point the Court to 28 U.S.C.
6 530B, which says federal government attorneys
7 are subject to state rules of professional
8 conduct "to the same extent as other attorneys
9 in that state."

10 And the lower courts and the federal
11 government have read that language -- look at
12 their BIO in 1613-23 -- to mean that a
13 preemption defense is available even though the
14 federal statute references or incorporates the
15 state rules. The -- the government says no
16 attorney can be subject to a state rule that
17 conflicts with federal law, and because
18 government attorneys are -- are subject to them
19 only to the same extent, therefore, neither --
20 neither can the government attorneys.

21 And that's the exact same point I'm
22 making here. No private person can face state
23 liability that conflicts with and thus is
24 preempted by federal law. And so, within the
25 scope of 2674, neither can the United States.

1 But, even if you set -- set aside the
2 private individual aspect, you still have the --
3 the third paragraph in Section 2674, which --
4 which provides any other defenses, including
5 defenses available -- available to government
6 agents.

7 On the Petitioners' theory, Neagle, in
8 the famous case where he protected Justice
9 Field, escapes liability because he had a
10 federal duty. But, on the Petitioners' theory,
11 today, he could turn around -- the --
12 Mrs. Terry, the wife of the assailant, could
13 turn around and sue the United States for
14 damages, and the United States would be civilly
15 liable even though Neagle was performing his
16 federal duties.

17 Same thing in this case. If the
18 agents had gone to the right house, under their
19 theory, and state tort liability would have
20 applied under whatever the state law happens to
21 be, the United States would be civil -- civilly
22 liable for money damages for going to the right
23 house.

24 So I think that that underscores that
25 there has to be a Supremacy Clause defense

1 available when the federal agent was -- was
2 acting within their federal duties.

3 And -- and then the last -- last
4 aspect I would point to is this Court's
5 decisions in Richards and Hess, where -- where
6 the Court said you have to consider applicable
7 federal law. Again, the Court said that's the
8 only way to make sure that the statute doesn't
9 extend more liability to the United States than
10 that faced by private individuals or -- or the
11 government agents.

12 Here, applicable federal law includes
13 superseding federal duties, and -- and -- and
14 that follows directly from this Court's decision
15 in Neagle and the rest of the Supremacy Clause
16 defense cases we cite.

17 JUSTICE JACKSON: Mr. Mills, to be
18 clear, the Eleventh Circuit is the only circuit
19 that has adopted this particular line of
20 thinking with respect to these kinds of cases,
21 is that right?

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

24 JUSTICE JACKSON: And how long? Do
25 you know how long this has been the precedent in

1 the Eleventh Circuit, the application of the
2 Supremacy Clause in this way?

3 MR. MILLS: Since 2009.

4 JUSTICE JACKSON: Thank you.

5 MR. MILLS: And -- and in the -- in
6 that 15 years, there have only been three cases
7 before the Eleventh Circuit. The Supremacy
8 Clause defense more broadly, the Cobb article we
9 cite in the brief says that since 1787, there
10 have only been 59 cases involving a Supremacy
11 Clause defense.

12 So, contrary to the Petitioners'
13 argument, this is not a defense that would swamp
14 the FTCA. It simply means that when the federal
15 agents are performing their federal duties, the
16 United States can't be liable in money damages.

17 CHIEF JUSTICE ROBERTS: Anything
18 further? Justice Alito?

19 Justice Sotomayor?

20 Justice Barrett?

21 Thank you, counsel.

22 Rebuttal?

23 REBUTTAL ARGUMENT OF PATRICK M. JAICOMO

24 ON BEHALF OF THE PETITIONERS

25 MR. JAICOMO: Thank you, Your Honor.

1 I'd like to respond to a few of the
2 questions that came up when my friend from the
3 government was discussing things with -- with
4 the Court.

5 The first thing I'd like to point out
6 along the lines of what Justice Sotomayor was
7 asking is that the government's position in this
8 case and the Eleventh Circuit's decision below,
9 their understanding of the
10 discretionary-function exception would do two
11 things. One, it would eat up almost all of the
12 entire FTCA, but, two, more importantly, it
13 would certainly eat up all the claims that the
14 proviso was enacted to provide liability for.

15 And, here, the language of the proviso
16 itself is very direct. But the Senate report
17 backs that language up, and, there, the Senate
18 talked about the fact that what they were doing
19 was removing a barrier to liability, not just a
20 barrier so the rest of the FTCA could then still
21 get in the way, even though the officers had
22 violated the proviso.

23 And so to say that subsection (a)
24 still applies to bar almost all of, unless you
25 take the government's qualified immunity

1 application, the claims that the proviso raises
2 would mean that Congress has enacted a
3 completely useless law in 1974.

4 That simply can't be the case. Even
5 addressing it to the circumstances of
6 Collinsville, as Justice Jackson asked questions
7 about, or this case, Gaubert doesn't apply.

8 The government gets around this by
9 taking the position that the Eleventh Circuit
10 has taken, which is to say, unless there is
11 something telling you you can't do this, and the
12 something either has to be a statute or a
13 clearly established law, you have discretion.

14 That's not what Gaubert says. There's
15 a whole step two to the analysis, which none of
16 the courts in the Eleventh Circuit or elsewhere
17 that take a broader approach considered.

18 Of course, there's discretion in the
19 colloquial sense when police are raiding a
20 house. But that discretion is not legislative
21 or administrative decision-making grounded in
22 social or economic policy. It's the same
23 discretion we see with driving a car or flying a
24 plane or seizing horses in the Hadley case.

25 And so it simply can't be the case

1 that what Congress did when it enacted the
2 proviso was to say: Even though the officers in
3 this case had a warrant commanding them to go to
4 one address, there was discretion for them to go
5 to another. So they should lose on step one.

6 If we get to step two, there's no
7 question that there was no policy here. As my
8 friend said, the government's policy is to raid
9 the right house. They didn't do that. The
10 preparation is kind of immaterial to the
11 ultimate result here.

12 If you really, really meant to drop
13 the pizza off at the right address, it doesn't
14 matter, you still need to give a refund if you
15 drop it off at the wrong address.

16 Even then, if we look just to the
17 concept of the conflict of the language, we
18 assume that there's a conflict, which, again, we
19 do not think the Court should do and the Court
20 does not need to do.

21 The decision in Alaska is on point
22 with this case. We talk about colons and
23 periods and indentations and -- and the
24 preamble. All of that stuff was available in
25 Alaska. The government was on the wrong side of

1 that case, and it made the arguments we are now
2 making, and those arguments prevailed. And, in
3 fact, even the dissenting justices cited things
4 that now support us here.

5 Unlike in Alaska, where the proviso
6 was limited to such claims, here, we have an
7 affirmative freestanding rule, as Justice Scalia
8 requested. And unlike in Alaska, here, it
9 doesn't -- it doesn't matter that this was in
10 the middle of the -- the set of exceptions,
11 because Alaska was the same way. The Submerged
12 Lands provision was (m), this other provision
13 was (e). None of that mattered.

14 What's very clear here from the
15 language Congress enacted and from the fact that
16 it took the time to add this amendment was that
17 they wanted the claims if they satisfied the
18 proviso to move forward.

19 And it's crucial to keep in mind that
20 if Petitioners win on this issue, they don't win
21 this case. We're fighting to get a day in court
22 where then we can duke it out over the elements
23 of torts and defenses in the Georgia -- under
24 the Georgia elements standard.

25 So it's not as if this case being

1 decided by this Court will even render the
2 government liable. We still have more steps to
3 take, but we want to be able to take those
4 steps. And through the law enforcement proviso,
5 Congress -- Congress said that we should be able
6 to take those steps.

7 Now, on the question about the -- the
8 second question presented in jurisdiction, I
9 can't say whether there's a jurisdictional
10 problem, but what I can tell you is that when we
11 wrote our QP and then saw the government's
12 suggested language for narrowing it, we
13 understood that to mean our QP but narrowed. If
14 it was a completely separate issue that assumed
15 the scope covered our -- our -- our claims, we
16 would have objected that that was an in --
17 inappropriate conditional cross-petition.

18 But we didn't, and we rightly
19 understood then that when this Court did that,
20 it was narrowing our question to the specifics
21 that the government offered, as the government
22 says at page 22 of its BIO.

23 That narrowing still requires the
24 Court to consider to some extent the scope of
25 the discretionary-function exception, and if it

1 doesn't, the government's theory, which has
2 prevailed across most of the circuits, that
3 anything that has any element of judgment or
4 choice is good enough to get you into that
5 exception means that the FTCA will become
6 largely a nullity.

7 This covers cases like the law
8 enforcement proviso cases, but it also covers
9 the more run-of-the-mill cases like VA
10 malpractice, where, obviously, a doctor has as
11 much discretion to decide which artery to close
12 off than a police officer does which door to go
13 to, or it will cover --

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. Thank you.

16 MR. JAICOMO: Thank you.

17 CHIEF JUSTICE ROBERTS: Mr. Mills,
18 this Court appointed you to brief and argue this
19 case as an amicus curiae in support of the
20 judgment below. You have ably discharged that
21 responsibility, for which we are grateful.

22 The case is submitted.

23 (Whereupon, at 11:01 a.m., the case
24 was submitted.)

25

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