SUPREME COURT OF THE UNITED STATES

No. 93–1525

MICHAEL A. LEBRON, PETITIONER *v.* NATIONAL RAILROAD PASSENGER CORPORATION

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

[February 21, 1995]

JUSTICE O'CONNOR, dissenting.

The Court holds that Amtrak is a Government entity and therefore all of its actions are subject to constitutional challenge. Lebron, however, expressly disavowed this argument below, and consideration of this broad and unexpected question is precluded because it was not presented in the petition for certiorari. The question on which we granted certiorari is narrower: Whether the alleged suppression of Lebron's speech by Amtrak, as a concededly private entity, should be imputed to the Government. Because Amtrak's decision to reject Lebron's billboard proposal was a matter of private business judgment and not of Government coercion, I would affirm the judgment below.

This Court's Rule 14.1(a) provides: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." While "[t]he statement of any question presented will be deemed to comprise every subsidiary question," *ibid.*, questions that are merely "related" or "complementary" to the question presented are not "fairly included therein." *Yee* v. *Escondido*, 503 U. S. ___ (1992) (slip op., at 15–16). In *Yee*, we held that a regulatory taking argument, while subsidiary to the umbrella question whether a taking had occurred, was only complementary to the physical taking inquiry set forth in the petition and thus was barred

under Rule 14.1(a). See *id.*, at ___ (slip op., at 14). Here, state action is the umbrella claim. Subsidiary to that claim, but complementary to each other, are two distinct questions: whether Amtrak is a Government entity, and whether Amtrak's conduct as a private actor is nevertheless attributable to the Government.

We granted certiorari on the following question, set forth in the petition:

> "Whether the court of appeals erred in holding that Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action, where:
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> (a) the United States created Amtrak, endowed it with governmental powers, owns all its voting stock, and appoints all the members of its Board;
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> (b) the United States-appointed Board approved the advertising policy challenged here;
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> (c) the United States keeps Amtrak afloat every year by subsidizing its losses; and
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> (d) Pennsylvania Station was purchased for Amtrak by the United States and is shared with several other governmental entities." Pet. for Cert. i.

The question asks whether the challenged policy "was not state action" and therefore may, at first blush, appear to present the umbrella inquiry. *Yee* suggests otherwise. The petition there recited two decisions by the Courts of Appeals and asked: "Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?" Instead of focusing on whether "there was no taking," we read the question as a whole. Since the decisions by the Courts of Appeals and the lower court opinion involved only physical takings, we concluded, "Fairly construed, then, petitioners' question presented is the equivalent of the question, `Did the court below err in finding no physical taking?'" 503 U. S., at ___ (slip op., at 15).

Just so here. The question asks whether the lower court erred and thus directs our attention to the decisions below. The District Court, in its thorough order, explicitly noted Lebron's theory of the case: "Plaintiff does not contend that Amtrak is a governmental

agency. What plaintiff contends is that the federal government is sufficiently intertwined in Amtrak's operations and authority that the particular actions at issue must be deemed governmental action." 811 F. Supp. 993, 999 (SDNY 1993). Before the Court of Appeals, in order to distinguish a long line of cases which held that Amtrak is not a Government agency, Lebron stated: "Since Lebron does not contend that Amtrak is a governmental entity per se, but rather is so interrelated to state entities that it should be treated as a state actor here, these cases are inapposite." Brief for Michael A. Lebron in No. 93–7127 (CA2), p. 30, n. 39.

The Court of Appeals, like the District Court, substantively discussed only the second question that Lebron argues here—whether Amtrak's conduct in this case implicates "the presence of government action in the activities of private entities." 12 F. 3d 388, 390 (CA2 1993). To introduce its analysis, the Court of Appeals did state that "[t]he Rail Passenger Service Act of 1970 . . . created Amtrak as a private, for-profit corporation under the District of Columbia Business Corporation Act," *ibid.*, relying on Congress' characterization of the corporation in 45 U. S. C. §541. In so asserting, the Court of Appeals did not "`pas[s] upon'" the question such that it is now a proper basis for reversal, *ante*, at 4, but rather merely identified the question that the court had to address and focused the inquiry on the precise argument presented by Lebron. This observation by the Court of Appeals is much like—indeed, much less extensive than—our discussion of Amtrak's status as a private corporation in *National Railroad Passenger Corporation* v. *Achison, T. & S. F. R. Co.*, 470 U. S. 451, 453–456 (1985). I agree with the Court that *Achison* does not bind us, *ante*, at 19–20, but by the same token I do not see how the court below could be said to have addressed the issue. A passing observation could not constitute binding precedent; so too it could

not serve as the basis for reversal.

The question set forth in the petition focused on the specific action by Amtrak, not on the general nature of the corporation as a private or public entity. Lebron asked whether "Amtrak's asserted policy barring the display of political advertising messages in Pennsylvania Station, New York, was not state action." The list that follows this question, while partially concerning Amtrak's nature as an entity, went to support the thrust of the query, which is whether these enumerated attributes render Amtrak's advertising policy state action. Lebron's emphasis on the specific action challenged is the crucial difference between his alternative arguments for state action. The first inquiry—whether Amtrak is a Government entity—focuses on whether Amtrak is so controlled by the Government that it should be treated as a Government agency, and all of its decisions considered state action. The second inquiry takes Lebron at his word that Amtrak is *not* a Government entity and instead focuses on the State's influence on particular actions by Amtrak as a private actor.

Fairly construed, the question presented is whether the Court of Appeals erred in holding that the advertising policy of Amtrak, as a private entity, is not attributable to the Federal Government despite the corporation's links thereto. This question is closely related and complementary to, but certainly not inclusive of, the question answered by the Court today, which is whether those links render Amtrak the functional equivalent of a Government agency. In my view, the latter question is barred by Rule 14.1(a).

Relying on *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. ___ (1993), the Court argues that it properly addresses whether Amtrak is a Government entity because that inquiry is "prior to the clearly presented question," namely, whether

Amtrak's decision is attributable to the Government. *Ante*, at 7. *Independent Insurance Agents*, however, held only that the Court of Appeals had authority to consider a waived claim *sua sponte* and did not abuse its discretion in doing so.[1] That is quite different from the purpose for which the Court now marshals the case, which is to justify its consideration of a waived question in the first instance. As explained below, I do not question the Court's authority, only its prudence. In any event, the dispute in *Independent Insurance Agents* centered on the interpretation of a statute that may not have existed, and, as the Court recognizes, *ante*, at 9, n. 3, the decision simply applied the traditional principle that "[t]here can be no estoppel in the way of ascertaining the existence of a law." *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 267 (1877). Here, one need not assume the existence of any predicate legal rule to accept Lebron's word that Amtrak is a private entity.

The mere fact that one question must be answered before another does not insulate the former from Rule 14.1(a) and other waiver rules. In *Stone* v. *Powell*, 428 U. S. 465 (1976), we held that Fourth Amendment claims are not ordinarily cognizable in federal habeas proceedings and distinguished several cases by noting that "the issue of the substantive scope of the writ was not presented in the petition[s]

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[1]The Court would read more into the decision, because we "decline[d] even to brush aside the Court of Appeals' (questionable) contention that there was `a "duty" to address section 92,' saying only that `[w]e need not decide' that question." *Ante*, at 8, n. 3. But by (prudently) reserving the question, the Court could not have implied its answer. And our "complicit[y] in the [Court of Appeals'] enterprise," *ibid.*, exists only if one indulges in the unlikely inference that we held more than what we said we did.

for certiorari." *Id.*, at 481, n. 15. We thus recognized that those decisions properly avoided the question of cognizability, which question, of course, is logically anterior to the merits of the Fourth Amendment claims presented. In *Steagald* v. *United States*, 451 U. S. 204, 211 (1981), we held that the Government had conceded that the petitioner had a Fourth Amendment interest in the searched home, an inquiry that precedes the question that was preserved, whether the search was reasonable. In *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 97, n. 4 (1991), because the question was neither litigated below nor included in the petition, we assumed the existence of a cause of action under §20(a) of the Investment Company Act of 1940 before addressing the requirements of such an action. See also *Burks* v. *Lasker*, 441 U. S. 471, 476 (1979) (assuming same). Finally, in *McCormick* v. *United States*, 500 U. S. 257 (1991), the Court held that a state legislator did not violate the anti-extortion Hobbs Act, 18 U. S. C. §1951, by accepting campaign contributions without an explicit exchange of improper promises. The Court reached this question only after declining to consider whether the Act applies to local officials at all, because that question was neither argued below nor included in the petition for certiorari. *McCormick*, 500 U. S., at 268, n. 6; see also *id.*, at 280 (SCALIA, J., concurring) (accepting the assumption, because the argument was waived, that the Hobbs Act is a "federal `payment for official action' statute" even though "I think it well to bear in mind that the statute may not exist").

The Court does not take issue with these cases but argues further that, because the question whether Amtrak is a government entity is "dependent upon many of the same factual inquiries [as the clearly presented question], refusing to regard it as embraced within the petition may force us to assume what the facts will show to be ridiculous, a risk which

ought to be avoided." *Ante*, at 7. A certain circularity inheres in this logic, because the Court must first answer the omitted question in order to determine whether its answer turns on "the same factual inquiries" as the clearly presented question. As for the facts, the record is shaped by the parties' arguments below. Perhaps serendipity has given the Court a factual record adequate to decide a question other than that advanced below, but there is no guarantee of such convergence. It is rather unfair to hold a party to a record that it may have developed differently in response to a different theory of the case. It is this risk of unfairness, rather than the fear of seeming "ridiculous," that we should avoid.

Rule 14.1(a), of course, imposes only a prudential limitation, but one that we disregard "only in the most exceptional cases." *Stone* v. *Powell*, 428 U. S., at 481, n. 15; see also *United States* v. *Mendenhall*, 446 U. S. 544, 551, n. 5 (1980). This is not one of them. As noted before, not only did Lebron disavow the argument that Amtrak is a Government entity below, he did so in order to distinguish troublesome cases. Lebron's post-petition attempt to resuscitate the claim that he himself put to rest is precisely the kind of bait-and-switch strategy that waiver rules, prudential or otherwise, are supposed to protect against. In *Steagald,* 451 U. S., at 211, for example, we stated unequivocally that "the Government, through its assertions, concessions, and acquiescence, has lost its right to challenge petitioner's assertion that he possessed a legitimate expectation of privacy in the searched home." I see no difference here.

The Rule's prudential limitation on our power of review serves two important purposes, both of which the Court disserves by deciding that Amtrak is a Government entity. First, the Rule provides notice and enables the respondent to sharpen its arguments in opposition to certiorari. "By forcing the petitioner

to choose his question at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions." *Yee*, 503 U. S., at ___ (slip op., at 14). Lebron argues that Amtrak has waived its Rule 14.1(a) argument by failing to object in the brief in opposition to certiorari. But that is exactly the point: The question set forth did not fairly include an argument that Amtrak is a Government agency, and, indeed, the petition was devoted to whether Amtrak's private decision should be imputed to the State. Even at pages 16–18, the petition did not "fairly embrace[] the argument that Lebron now advances," *ante*, at 5, but rather argued that the composition of Amtrak's board "renders *an otherwise private entity* a state actor," Pet. for Cert. 16 (emphasis added)—thus specifically repeating the concession he now wishes to withdraw. Amtrak could not respond to a point not argued and did not waive an argument that was not at issue. Not until the merits brief did Amtrak have notice that Lebron would contradict his persistent assertion that the corporation was a private entity.

Second, the Rule assists the management of our cases. "Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources." *Yee*, 503 U. S., at ___ (slip op., at 15). We normally grant only petitions that present an important question of law on which the lower courts are in conflict. Here, the lower courts have generally held that Amtrak is not a Government entity, see, *e. g.*, *Anderson* v. *National Railroad Passenger Corporation*, 754 F. 2d 202, 204 (CA7 1985); *Ehm* v. *National Railroad Passenger Corporation*, 732 F. 2d 1250, 1255 (CA5), cert. denied, 469 U. S. 982 (1984), and none of our cases suggests otherwise. Even where the lower courts are in clear conflict, we often defer consideration of novel questions of law to

permit further development. Despite the prevalence of publicly owned corporations, whether they are Government agencies is a question seldom answered, and then only for limited purposes. See *Cherry Cotton Mills* v. *United States*, 327 U. S. 536, 539 (1946); *National Railroad Passenger Corporation* v. *Atchison, T. & S. F. R. Co.*, 470 U. S., at 471. Answering this question today merely opens the back door to premature adjudication of similarly broad and novel theories in the future.

Weeding out such endeavors, Rule 14.1(a), like other waiver rules, rests firmly upon a limited view of our judicial power. See, *e. g.*, *Carducci* v. *Regan*, 714 F. 2d 171, 177 (CADC 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them"). "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 183 (1982). Whether the result of today's decision is desirable I do not decide. But I think it clear that the Court has exhibited little patience in reaching that result.

Accepting Lebron's concession that Amtrak is a private entity, I must "traverse th[e] difficult terrain," *ante*, at 3, that the Court sees fit to avoid, and answer the question that is properly presented to us: whether Amtrak's decision to ban Lebron's speech, although made by a concededly private entity, is nevertheless attributable to the Government and therefore considered state action for constitutional purposes. Reflecting the discontinuity that marks the law in this area, we have variously characterized the inquiry as whether "there is a sufficiently close nexus

between the State and the challenged action," *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1974); whether the state, by encouraging the challenged conduct, could be thought "*responsible* for those actions," *Blum* v. *Yaretsky*, 457 U. S. 991, 1005 (1982); and whether "the alleged infringement of federal rights [is] `fairly attributable to the State,'" *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 838 (1982), quoting *Lugar* v. *Edmonson Oil Co.*, 457 U. S. 922, 937 (1982). Whatever the semantic formulation, I remain of the view that the conduct of a private actor is not subject to constitutional challenge if such conduct is "fundamentally a matter of private choice and not state action." *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 632 (1991) (O'CONNOR, J., dissenting).

Lebron relies heavily on *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). There, the Court perceived a symbiotic relationship between a racially segregated restaurant and a state agency from which the restaurant leased public space. Noting that the State stood to profit from the discrimination, the Court held that the Government had "so far insinuated itself into a position of interdependence with" the private restaurant that it was in effect "a joint participant in the challenged activity." *Id.*, at 725. Focusing on this language, Lebron argues that various features of Amtrak's structure and management—its statutory genesis, the heavy reliance on federal subsidies, and a board appointed by the President—places it in a symbiotic relationship with the Government such that the decision to ban Lebron's speech should be imputed to the State.

Our decision in *Burton*, however, was quite narrow. We recognized "the limits of our inquiry" and emphasized that our decision depended on the "peculiar facts [and] circumstances present." *Id.*, at 726. We have since noted that *Burton* limited its "actual

holding to lessees of public property," *Jackson* v. *Metropolitan Edison Co.*, 419 U. S., at 358, and our recent decisions in this area have led commentators to doubt its continuing vitality, see, *e. g.*, L. Tribe, American Constitutional Law §18–3, p. 1701, n. 13 (2d ed. 1988) ("The only surviving explanation of the result in *Burton* may be that found in Justice Stewart's concurrence").

In *Jackson*, we held that a private utility's termination of service to a customer is not subject to due process challenge, even though the termination was made pursuant to a state law. In doing so, we made clear that the question turns on whether the challenged conduct results from private choice: "Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so `state action' for the purposes of the Fourteenth Amendment." 419 U. S., at 357 (footnote omitted). The rule applies even where the private entity makes its decision in an environment heavily regulated by the Government. *Rendell-Baker*, *supra*, involved a private school for troubled students who were transferred there by authority of a state law, and for whose education the state paid the school. Public funds comprised 90% to 99% of the school budget. The school fired petitioners, and a state grievance board reviewed that personnel action. Despite the school's pervasive ties to the State, we held that the discharge decisions were not subject to constitutional challenge because those actions "were not compelled or even influenced by any state regulation." *Id.*, at 841. We noted that "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." *Ibid.* Likewise, in *Blum* v. *Yaretsky, supra*, we held that the decisions of a regulated hospital to discharge its patients were not subject to constitutional challenge. Although various

Medicaid regulations and benefit adjustment procedures may have encouraged the hospital's decisions to discharge its patients early, we held that the State was not "*responsible* for those actions" because such actions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.*, at 1005, 1008. See also *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U. S. 522, 547 (1987) ("There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right [to deny use of its copyright]").

These cases differ markedly from the "interdependence" or "joint participation" analysis of *Burton* and stand for the principle that, unless the Government affirmatively influenced or coerced the private party to undertake the challenged action, such conduct is not state action for constitutional purposes. *Edmonson* v. *Leesville Concrete Co.*, *supra*, is not to the contrary. In that case, the Court held that a private attorney's exercise of a peremptory challenge is attributable to the Government and therefore subject to constitutional inquiry. Although the opinion cited *Burton*, see 500 U. S., at 621, 624, it emphasized that a private party exercising a peremptory challenge enjoys the "overt, significant assistance of the court," *id.*, at 624. The decision therefore is an application of *Shelley* v. *Kraemer*, 334 U. S. 1, 19 (1948), which focused on the use of the State's coercive power, through its courts, to effect the litigant's allegedly unconstitutional choice. Moreover, *Edmonson* stressed that a litigant exercising a peremptory challenge performs a "traditional function of government," 500 U. S., at 624, a theory of state action established by *Marsh* v. *Alabama*, 326 U. S. 501 (1946), that is independent from *Burton* and not relevant to this case.

Relying thus on *Shelley* and *Marsh*, *Edmonson* did

not necessarily extend the "interdependence" rationale of *Burton* beyond the limited facts of that case. Given the pervasive role of Government in our society, a test of state action predicated upon public and private "interdependence" sweeps much too broadly and would subject to constitutional challenge the most pedestrian of everyday activities, a problem that the Court recognized in *Burton* itself, see 365 U. S., at 725–726. A more refined inquiry is that established by *Jackson*, *Rendell-Baker*, *Blum*, and *San Francisco Arts & Athletics:* The conduct of a private entity is not subject to constitutional scrutiny if the challenged action results from the exercise of private choice and not from state influence or coercion.

Applying this principle to the facts before us, I see no basis to impute to the Government Amtrak's decision to disapprove Lebron's advertisement. Although a number of factors indicate the Government's pervasive influence in Amtrak's management and operation, none suggest that the Government had any effect on Amtrak's decision to turn down Lebron's proposal. The advertising policy that allegedly violates the First Amendment originated with a predecessor to Amtrak, the wholly private Pennsylvania Railroad Company. A 1967 lease by that company, for example, prohibited "any advertisement which in the judgement of Licensor is or might be deemed to be slanderous, libelous, unlawful, immoral, [or] offensive to good taste . . . ." App. 326, ¶19. Amtrak simply continued this policy after it took over. The specific decision to disapprove Lebron's advertising was made by Amtrak's Vice President of Real Estate and Operations Development, who, as a corporate officer, was neither appointed by the President nor directed by the President-appointed board to disapprove Lebron's proposal.

Lebron nevertheless contends that the board, through its approval of the advertising policy,

controlled the adverse action against him. This contention rests on the faulty premise that Amtrak's directors are state actors simply because they were appointed by the President; it assumes that the board members sit as public officials and not as business directors, thus begging the question whether Amtrak is a Government agency or a private entity. In any event, even accepting Lebron's premise that the board's approval has constitutional significance, the factual record belies his contention. The particular lease which permitted Amtrak to disallow Lebron's billboard was neither reviewed nor approved directly by the board. In fact, minutes of meetings dating back to 1985 showed that the board approved only one contract between Amtrak and Transportation Displays, Incorporated, the billboard leasing company that served as Amtrak's agent, and even then it is not clear whether the board approved the contract or merely delegated authority to execute the licensing agreement. App. 402. In short, nothing in this case suggests that the Government controlled, coerced, or even influenced Amtrak's decision, made pursuant to corporate policy and private business judgment, to disapprove the advertisement proposed by Lebron.

Presented with this question, the Court of Appeals properly applied our precedents and did not impute Amtrak's decision to the Government. I would affirm on this basis and not reverse the Court of Appeals based on a theory that is foreign to this case. Respectfully, I dissent.