Internal Revenue Code § 7609 — Unnoticed Summons — Tax Exceptionalism — Surplusage Canon — Polselli v. IRS

Polselli v. IRS[1] is a tax case.[2] Fear not, keep reading.[3] In fulfilling its duty to collect federal taxes,[4] the IRS has historically received disfavor from many in American society.[5] Labeled "legalized larceny" in President Coolidge's inaugural address,[6] excessive taxation or beliefs thereof even incentivize some to evade these levies.[7] Accordingly, Congress has equipped the IRS with several tools to enforce taxpayers' obligations under the Internal Revenue Code (I.R.C. or the "Code").[8] Last Term, the Supreme Court in *Polselli* interpreted one such provision, I.R.C. § 7609(c)(2)(D)(i), to authorize the unnoticed summonses of bank records concerning a deficient taxpayer's wife and counsel — barring them from judicial review.[9] And despite assurances otherwise from conflicting forms of "tax exceptionalism" in the majority and concurrence,[10] this broadly worded statute worryingly enables the IRS to investigate countless taxpayers without notice or court oversight.

According to a declaration by Revenue Officer Michael Bryant, Remo Polselli underpaid his federal income taxes for multiple years between 2005 and 2017.[11] After investigating, the IRS deemed Mr. Polselli liable for these unpaid amounts (along with trust-fund-recovery penalties[12]) and entered an assessment of over $2 million against him.[13] Tasked with collecting the money, Bryant suspected Mr. Polselli may have had access to the bank accounts of his wife, Hanna Karcho Polselli, which were possibly held in her name to conceal them from the IRS.[14] Bryant further surmised that Mr. Polselli partially owned or controlled

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1 143 S. Ct. 1231 (2023).

2 *See id.* at 1234.

3 *Cf.* Morrissey v. United States, 871 F.3d 1260, 1262 (11th Cir. 2017) ("This is a tax case. Fear not, keep reading.").

4 *See* I.R.C. § 7803(a)(2)(A) (empowering the Commissioner of Internal Revenue to "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws").

5 *See, e.g.*, *The Daily Show with Jon Stewart: IRS — Straight Outta Incompetence*, COMEDY CENT., at 00:28 (television broadcast June 24, 2014) (beginning a satirical news program by joking that "for most of its existence, the IRS was America's favorite government agency").

6 President Calvin Coolidge, Inaugural Address (Mar. 4, 1925), *in* 67 CONG. REC. 5, 6 (1926).

7 The tax gap, or the difference between taxes owed and collected, possibly exceeds $1 trillion. *The 2021 Filing Season and 21st-Century IRS: Hearing Before the S. Comm. on Fin.*, 117th Cong. 7 (2021) (statement of Charles Rettig, Comm'r, IRS).

8 *See Polselli*, 143 S. Ct. at 1234.

9 *See id.* at 1235–37.

10 *See id.* at 1240; *id.* at 1241 (Jackson, J., concurring).

11 Declaration of Michael Bryant ¶¶ 1–2, Polselli v. United States, No. 19-cv-10956 (E.D. Mich. Nov. 16, 2020), ECF No. 6-2.

12 These penalties apply to those who willfully retain withheld income and employment taxes or collected excises owed to the IRS. *See* IRS, INTERNAL REVENUE MANUAL § 5.19.14.1.1(1)–(2) (2018), https://www.irs.gov/irm/part5/irm_05-019-014r [https://perma.cc/TLR4-42C8].

13 Declaration of Michael Bryant, *supra* note 11, ¶ 2.

14 *Id.* ¶ 5.

the funds of Dolce Hotel Management, LLC after he paid $293,763 toward his outstanding liability from an account owned by the company.[15] Additionally, sensing this taxpayer often used other entities to shield assets from the IRS, Bryant thought the financial records of Abraham & Rose, PLC — a law firm of which Mr. Polselli had been a longtime client — might reveal, inter alia, entities owned by (or whose funds were controlled by) Mr. Polselli and bank accounts associated with such entities.[16] Exercising his authority under I.R.C. § 7602(a)(2),[17] Bryant served a summons directly on the firm seeking certain information, including all invoices it had sent to Mr. Polselli.[18] But in a letter responding to the summons, Abraham & Rose invoked attorney-client privilege and stated it "d[id] not retain any of the documents requested."[19] Its representative possessing power of attorney later reasserted the absence of such records, and the firm skipped its required summons interview.[20]

On March 8, 2019, Bryant issued a summons to Wells Fargo requesting various financial records of both Mrs. Polselli and Dolce Hotel Management, including "[c]opies of all bank statements relative to the accounts" of Mr. Polselli since the beginning of 2018.[21] One month later, the officer issued summonses to JPMorgan Chase and Bank of America seeking the same types of documents concerning Mr. Polselli, Abraham & Rose, and Jerry R. Abraham, P.C. (a related entity[22]) since January 1, 2017.[23] While Bryant did not notify any of the parties named in these summonses, the banks independently alerted Mrs. Polselli, Abraham & Rose, and Jerry R. Abraham that the IRS sought their information.[24]

Claiming they never received their IRS-provided third-party notices as allegedly mandated under I.R.C. § 7609(a),[25] Mrs. Polselli and the firms filed a motion to quash these summonses in the Eastern District

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[15] *Id.* ¶ 7.

[16] *Id.* ¶¶ 8–10, 16.

[17] "For . . . determining the liability of any person . . . or collecting any such liability, the Secretary is authorized . . . [t]o summon . . . any person having possession, custody, or care of books of account containing entries relating to the business of the person liable . . . ." I.R.C. § 7602(a).

[18] Declaration of Michael Bryant, *supra* note 11, ¶ 10.

[19] Letter re Abraham & Rose, PLC at 2, *Polselli*, No. 19-cv-10956, ECF No. 6-6.

[20] Declaration of Michael Bryant, *supra* note 11, ¶¶ 12, 15.

[21] Wells Fargo Summons at 2, *Polselli*, No. 19-cv-10956, ECF No. 6-3.

[22] *Polselli*, 2020 WL 12688176, at *1.

[23] JP Morgan Summons at 2, *Polselli*, No. 19-cv-10956, ECF No. 6-4; Bank of America Summons at 2, *Polselli*, No. 19-cv-10956, ECF No. 6-5. These summonses also sought records of an accounting firm at which Mr. Polselli had been a longtime client after the firm responded to its direct summons without "a considerable portion of the expected documentation." Declaration of Michael Bryant, *supra* note 11, ¶¶ 8–9, 13–15. This party did not join the petition to quash summonses. *See* Supplemental Petition to Quash Summonses at 1–2, *Polselli*, No. 19-cv-10956, ECF No. 3.

[24] Polselli v. U.S. Dep't of the Treasury — IRS, 23 F.4th 616, 620 (6th Cir. 2022).

[25] This subsection states that if a summons "requires . . . the production of any portion of records made or kept on or relating to . . . any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified." I.R.C. § 7609(a)(1).

of Michigan.[26] The IRS responded by moving to dismiss the case for lack of subject matter jurisdiction.[27] Writing for the court, Judge Davis analyzed I.R.C. § 7609(c)(2)(D),[28] which provides an exception to the rule of notice in I.R.C. § 7609(a) when a third-party summons is "issued in the aid of the collection of . . . (i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or (ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i)."[29] Noting that a circuit split existed over whether clause (i) required the liable taxpayer to have "some legal interest or title in the object of the summons,"[30] the court opted for its perceived "plain-text reading" of the statute that lacked such a condition.[31] The plaintiffs claimed this interpretation rendered clause (ii) surplusage since summonses of transferees and fiduciaries inherently — absent any legal-interest requirement — aid the IRS's collection of assessments against delinquent taxpayers, but Judge Davis countered that this second provision expanded the notice exception to, for instance, "the unassessed liability of a transferee or fiduciary."[32] The court accordingly wrote that clause (i) excepted notice because Bryant served the summonses to locate assets satisfying the collection of Mr. Polselli's assessment.[33] And since district courts can hear petitions to quash such summonses only if the petitioner is entitled to notice,[34] Judge Davis concluded that the court lacked subject matter jurisdiction.[35]

The Sixth Circuit affirmed.[36] Writing for the divided panel, Judge Moore[37] first noted she must construe waivers of sovereign immunity in the IRS's favor.[38] Similarly rejecting a legal-interest element in clause (i),

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[26] Supplemental Petition to Quash Summonses, *supra* note 23, at 2–5.

[27] Motion to Dismiss Petitions for Lack of Jurisdiction at 4, 7, *Polselli*, No. 19-cv-10956, ECF No. 6.

[28] *Polselli*, 2020 WL 12688176, at *2.

[29] I.R.C. § 7609(c)(2)(D).

[30] *Polselli*, 2020 WL 12688176, at *3 (quoting Viewtech, Inc. v. United States, 653 F.3d 1102, 1105 (9th Cir. 2011), *abrogated by Polselli*, 143 S. Ct. 1231). *Compare* Barmes v. United States, 199 F.3d 386, 390 (7th Cir. 1999) (stating exception applies "as long as the third-party summons is issued to aid in the collection of any assessed tax liability"), *and* Davidson v. United States, 149 F.3d 1190, 1998 WL 339541, at *2 (10th Cir. June 9, 1998) (unpublished table decision) (emphasizing provision refers to "*any* person" (quoting I.R.C. § 7609(c)(2)(D)(ii))), *with* Ip v. United States, 205 F.3d 1168, 1176 (9th Cir. 2000) (concluding exception applies "only where the assessed taxpayer 'has a recognizable [legal] interest in the records summoned'" (quoting Robertson v. United States, 843 F. Supp. 705, 706 (S.D. Fla. 1993) (alteration in original))), *abrogated by Polselli*, 143 S. Ct. 1231.

[31] *Polselli*, 2020 WL 12688176, at *2–3.

[32] *Id.* at *4.

[33] *Id.*; *see also* Declaration of Michael Bryant, *supra* note 11, ¶ 4 ("The summonses were issued to aid in the collection of the assessed tax liabilities . . . .").

[34] *See* I.R.C. § 7609(h)(1) (providing district courts jurisdiction "to hear and determine any proceeding brought under subsection (b)(2)"); I.R.C. § 7609(b)(2)(A) ("[A]ny person who is entitled to notice of a summons . . . shall have the right to begin a proceeding to quash such summons . . . .").

[35] *Polselli*, 2020 WL 12688176, at *5.

[36] Polselli v. U.S. Dep't of the Treasury — IRS, 23 F.4th 616, 619 (6th Cir. 2022).

[37] Judge Moore was joined by Judge Donald.

[38] *Polselli*, 23 F.4th at 622.

the majority argued this reading did not create surplusage because clause (ii) implicated state law and could exempt notice for summonses "only obliquely related to the underlying taxpayer."[39] Judge Moore then reiterated that the IRS must generally provide notice for summonses concerning noncollection activities and that legislative history (alongside being irrelevant when reading unambiguous text with nonabsurd results) bolstered her conclusion.[40] Finally, she noted that taxpayers enjoy privacy protections elsewhere[41] — including the ability to challenge summonses upon "suspecting that the IRS harbors ulterior motives."[42]

Judge Kethledge dissented.[43] After stressing that the petitioners merely sought judicial review, he labeled these summonses "a significant intrusion" on privacy and the "archetype of what the Founding generation would have called 'inquisitorial process.'"[44] Judge Kethledge argued the majority's interpretation rendered clause (ii) "superfluous" because the liability of a transferee or fiduciary is "entirely derivative" of assessments.[45] Consequently, he endorsed the "least bad interpretation" of a legal-interest condition since it gave "concrete meaning" to both clauses and avoided "vitiati[ng]" the general policy of notice in I.R.C. § 7609.[46]

The Supreme Court affirmed.[47] Writing for the unanimous majority, Chief Justice Roberts emphasized clause (i) lacked language mentioning a taxpayer's legal interest, and he distinguished this absence from the concurrently enacted subsequent section that contained a "proprietary interest" requirement.[48] Rejecting the petitioners' argument that I.R.C. § 7609(c)(2)(D) should apply only to inquiries "directly advanc[ing]" collection,[49] the Court wrote that summonses may still help the IRS find collectible assets — satisfying the plain text of "in aid of the collection" — even if they do not themselves reveal such property.[50]

Chief Justice Roberts next refuted surplusage concerns with two counterarguments: First, clause (i) requires an assessment whereas clause (ii) applies to liabilities, an earlier stage in collection.[51] Second, like other Code provisions, these clauses differentiate taxpayers from their fiduciaries and transferees, creating situations wherein clause (ii)

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[39] *Id.* at 624–26.
[40] *Id.* at 627.
[41] *Id.* at 628 (discussing, inter alia, the general confidentiality of returns provided in I.R.C § 6103).
[42] *Id.* at 629.
[43] *Id.* at 630 (Kethledge, J., dissenting).
[44] *Id.* at 631. Judge Kethledge also made a fleeting reference to the Fourth Amendment. *Id.*
[45] *Id.* at 631–32.
[46] *Id.* at 632–33.
[47] *Polselli*, 143 S. Ct. at 1240.
[48] *Id.* at 1237; *see also* I.R.C. § 7610(b) ("No payment may be made . . . if . . . the person with respect to whose liability the summons is issued has a *proprietary interest* in the books, papers, records or other data required to be produced . . . ." (emphasis added)).
[49] *See* Brief for Petitioners at 21–22, *Polselli*, 143 S. Ct. 1231 (No. 21-1599).
[50] *Polselli*, 143 S. Ct. at 1238 (quoting I.R.C. § 7609(c)(2)(D)(ii)).
[51] *Id.* at 1239.

might uniquely permit unnoticed summonses.[52] For instance, taxpayers may discharge tax liabilities under certain conditions via bankruptcy,[53] which would seemingly block direct collection efforts (but not collections against any fiduciaries or transferees) and thereby render clause (i) ineligible.[54] Finally, while the Court acknowledged its reading raised privacy concerns and could facilitate abuse, it declined to define "in aid of the collection" since the parties did not litigate this phrase's contours.[55]

Justice Jackson concurred.[56] Endorsing clause (i)'s lack of a legal-interest condition, she wrote that the IRS must generally provide notice of its summonses to balance efficient tax administration with allowing judicial review and preventing agency overreach.[57] But recognizing that notice would sometimes frustrate the IRS's objectives, Justice Jackson emphasized clause (i) mitigates scenarios wherein taxpayers might move or hide assets upon discovering a summons.[58] However, she explained that courts must still respect this statutory "calibration" and not read clause (i) to confer the IRS with "boundless authority" over unnoticed investigations.[59] The concurrence then argued Congress must have envisioned some restraint since, if read too broadly, this clause "would presumably permit the IRS to summon *anyone's* records without notice . . . so long as the agency thinks doing so would provide a clue"; for instance, the legislature likely would not have intended to authorize the unnoticed summons of a dry cleaner's financial records simply due to the IRS's suspicion that a tax-delinquent customer used credit cards with different names.[60] Justice Jackson accordingly underscored the need for "careful fact-based inquiry" in assessing exceptions to notice.[61]

Although the Court correctly held that clause (i)'s sweeping language decided this case, it failed to supply a satisfying description of the purported bounds on unnoticed summonses. Instead, modeling forms of "tax exceptionalism," the majority found comfort in the provision's theoretical gaps to dispel practical superfluity whereas the concurrence emphasized an unspecified restraint on the IRS detached from any support. Contrary to its assurances of the Service's circumscribed power, the Court should have conceded that clause (i) allows overbroad summonses without notice and opportunity to quash for those named in the order. And given the unavailability of nonstatutory limits, this provision grants the IRS largely unchecked investigative ability once it reaches collection.

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52 *Id.*

53 *See* 11 COLLIER ON BANKRUPTCY ¶ TX4.02[1][d], at TX4-12 (Alan N. Resnick et al. eds., 16th ed. 2016) (explaining that tax liabilities must pass two "dischargeability tests").

54 *Polselli*, 143 S. Ct. at 1239–40.

55 *Id.* at 1240.

56 *Id.* at 1241 (Jackson, J., concurring). Justice Jackson was joined by Justice Gorsuch.

57 *Id.*

58 *Id.*

59 *Id.* at 1241–42.

60 *Id.* at 1242.

61 *Id.*

In its scrutiny of the Code, *Polselli* supplies another data point for the decades-long debate over so-called "tax exceptionalism"[62]: whether tax law is (or should be) analyzed in a more purposivist lens compared to other statutes given, inter alia, its complexity, specialized nature, and detailed legislative history.[63] Consistent with this hypothesis, the Court often exhibited abnormal receptiveness to purposivism in its older tax precedent.[64] However, such "exceptionalism" likely stemmed from Justice Blackmun's tendency to write opinions in tax cases and cite legislative history regardless of subject.[65] Following its textualist shift,[66] the Court grew reluctant to reference legislative history in tax majorities.[67] And in 2011, it evinced open hostility to tax exceptionalism by extending *Chevron*[68] to a Treasury regulation instead of preserving a stricter standard of judicial deference the Court had formerly cited for tax rules[69] — a case causing many to pronounce the end of this theory altogether.[70]

But the concurrence embraced this jurisprudential relic. Claiming clause (i) must contain some limit to maintain Congress's tradeoff between tax administration, notice, and court oversight,[71] Justice Jackson discussed neither the source of such restraint nor the degree to which it curbs IRS authority;[72] instead, she centered her opinion on the hypothetical unnoticed summons of a dry cleaner's bank records to pursue a

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[62] *Compare* Michael S. Livingston, *Congress, The Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 822 (1991) ("[U]nique characteristics of tax law render generalized theories of interpretation inadequate for tax cases."), *with* Paul L. Caron, *Tax Myopia, Or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 518 (1994) ("[T]ax law too often is mistakenly viewed . . . as a self-contained body of law.").

[63] *See, e.g.*, Bradford L. Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 806–07 (1989). This definition concerns exceptionalism in statutory interpretation rather than, say, administrative law. *See* Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 245 n.251 (2020).

[64] James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1243, 1270–75 (2009); *see also* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1308 (2018) (stating that legislative history is "the easiest-to-identify signal[] of a . . . purposivist approach").

[65] Brudney & Ditslear, *supra* note 64, at 1270–75.

[66] John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 30 (2014) (describing this "fundamental shift . . . toward textualism").

[67] Brudney & Ditslear, *supra* note 64, at 1274.

[68] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[69] *See* Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 54–55 (2011) ("Although we have not thus far distinguished between *National Muffler* and *Chevron* . . . [, t]he principles underlying our decision in *Chevron* apply with full force in the tax context."); *see also* Nat'l Muffler Dealers Ass'n v. United States, 440 U.S. 472, 477–84 (1979) (analyzing whether disputed Treasury regulation "harmonizes with the plain language of the statute, its origin, and its purpose").

[70] James M. Puckett, *Structural Tax Exceptionalism*, 49 GA. L. REV. 1067, 1068 n.3 (2015).

[71] *Polselli*, 143 S. Ct. at 1241 (Jackson, J., concurring). This alleged balancing is flawed: The concurrence asserted clause (i) exists because "upon receiving notice that the IRS has served a summons, interested persons might move or hide collectable assets." *Id.* But if such parties still receive notice from private entities, immunity from judicial review remains as the IRS's only valid interest.

[72] Justice Jackson cited one case and few provisions — all of which concerned "the default rule" of notice rather than the specific exception in clause (i). *See id.* at 1241–42 (emphasis omitted).

tax-deficient patron.[73] And despite Justice Jackson's speculation that Congress would not have intended to bar judicial review in such a scenario,[74] her stylized narrative shared many similarities with the facts of *Polselli*: both involved the IRS summoning firms' financial information without notice to advance its collection of a tax-deficient client. Of course, the extent to which Mr. Polselli communicated with his lawyers presumably exceeded interactions between a typical dry-cleaning business and even frequent customers. Yet this variation bears little connection to the summonses' underlying goal; just as Bryant reasonably suspected the law firms' bank records could reveal Mr. Polselli's other entities,[75] another sensible agent might believe a dry cleaner's financial data would shed light on a regular's credit cards held in different names. If anything, Justice Jackson's hypothetical depicted a narrower exercise of IRS authority as it lacked the same undertones of attorney-client privilege present with investigating taxpayers via their counsel.[76] Forgoing these concerns, however, the concurrence concluded clause (i) confers merely cabined summoning power based on vague notions of imputed legislative intent — contradicting reports of tax exceptionalism's death.

The majority also did not fully join this academic procession; rather, it displayed a milder, textualist-friendly iteration of tax exceptionalism. While Chief Justice Roberts still briefly discussed legislative history to refute the petitioners' claim that clause (i)'s enactment supported their reading,[77] he spent the bulk of his argument reconciling this provision's expansiveness with the rule against surplusage.[78] Premised on the belief that Congress drafts legal language with care and cohesion,[79] this canon intuitively holds greater merit for statutory schemes demanding particularly precise readings of interrelated provisions, such as the Code.[80] Indeed, empirical evidence suggests that, compared to Article III district courts, the Tax Court disproportionately favors "holistic-textual" canons (involving "inferences from the whole act or even other statutes"[81]) over

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[73] *See id.* at 1242.

[74] *Id.*

[75] *See* Declaration of Michael Bryant, *supra* note 11, ¶ 16.

[76] The Ninth Circuit stated a lawyer's billing records and invoices "were potentially covered by the attorney-client privilege" when the IRS sought such materials. J.B. v. United States, 916 F.3d 1161, 1174 (9th Cir. 2019).

[77] *See Polselli*, 143 S. Ct. at 1240; *see also* Brief for Petitioners, *supra* note 49, at 31–33.

[78] *See Polselli*, 143 S. Ct. at 1238–40.

[79] *See* Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) (asserting the rule assumes "legislative omniscience").

[80] *See* Ryan v. Bureau of Alcohol, Tobacco & Firearms, 715 F.2d 644, 651 (D.C. Cir. 1983) (Wald, J., dissenting) (describing the Code as containing "intricate interrelationships of words and phrases"); Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 675 (1969) (stating the characteristics of the "modern income tax" require "definition and detail which are bound to produce complexities").

[81] Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 56 (2018). Examples include the surplusage canon and the rule of consistent usage and material variation. *Id.* at 56–57.

"language" canons[82] (involving "familiar rules of word association and grammar"[83]). As a result, the majority's obedience to the rule against surplusage, and resulting understatement of clause (i)'s breadth, potentially embodied underlying notions of the Code's distinct structure and purpose.[84] Although *Polselli* largely contradicted the traditional, purposivism-based conception of tax exceptionalism, it simultaneously supported a second, textualist-grounded model that excessively stresses holistic-textual canons over other methods of statutory interpretation.

After his straightforward reading of clause (i)'s expansive text, Chief Justice Roberts first distinguished clause (ii) by noting its unique application to "liabilit[ies]."[85] However, this administrative subtlety fails to meaningfully refute the provision's superfluity since the IRS renders assessments by merely "recording the liability of the taxpayer in the office of the Secretary";[86] indeed, the government (quoting Justice Marshall) repeatedly referred to the assessment label as "essentially a bookkeeping notation" during litigation.[87] And while small-scale distinctions suffice for the rule against surplusage,[88] such nuances require some real-world substance — beyond an agency's unilateral change in designation — to materially retain the canon's goal of avoiding statutory redundancies.[89]

Regarding the Court's comparison between I.R.C. § 7609(c)(2)(D) and other provisions "differentiat[ing] between taxpayers and their fiduciaries or transferees,"[90] Chief Justice Roberts next failed to adequately explain how such consistency pertains to the rule against surplusage. Even though the Code elsewhere maintains such an explicit separation when Congress seeks to bifurcate its treatment of these parties,[91] these other provisions shed no light on the extent to which I.R.C. § 7609(c)(2)(D), on its own, creates superfluity.[92] If anything, this

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[82] Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363, 369 (2020).

[83] Bruhl, *supra* note 81, at 56. Examples include *ejusdem generis* and *noscitur a sociis*. *Id.*

[84] Chief Justice Roberts also briefly invoked the whole act rule — another holistic-textual canon, Choi, *supra* note 82, at 422 — when distinguishing I.R.C. § 7610's lack of legal-interest language from the "proprietary interest" requirement. *See Polselli*, 143 S. Ct. at 1237.

[85] *Polselli*, 143 S. Ct. at 1239.

[86] I.R.C. § 6203.

[87] *See, e.g.*, Brief for the Respondent at 17, *Polselli*, No. 21-1599 (quoting Laing v. United States, 423 U.S. 161, 170 n.13 (1976)).

[88] *See* Gutierrez v. Ada, 528 U.S. 250, 258 (2000) (concluding statutory language satisfied the rule against surplusage despite lacking "very heavy work for the phrase to perform").

[89] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 179 (2012) (describing the canon's alignment with careful statutory drafting).

[90] *Polselli*, 143 S. Ct. at 1239.

[91] *See, e.g.*, I.R.C. § 7602(a) (separating them in conferring the IRS with authority to summons).

[92] For instance, the Court cited I.R.C. § 6901 as a provision that "separately empowers the IRS to collect outstanding tax liabilities from taxpayers, on the one hand, and from transferees or fiduciaries, on the other." *Polselli*, 143 S. Ct. at 1239. But this division exists because I.R.C. § 6901 limits collection against transferees (except in liquidation or reorganization, *see* I.R.C. § 6901(a)(2)),

forked approach justifies the occasional presence of surplusage since Congress plausibly drafts some fiduciary-and-transferee-specific provisions with substantive redundancies just to parallel the two-track system in other Code sections.

Concluding this surplusage analysis, the majority mirrored its defective liability/assessment distinction with remarks on bankruptcy that overlooked practical concerns. Beyond the strict conditions required to discharge tax liabilities in general,[93] taxpayers outright cannot discharge obligations "with respect to which the debtor . . . willfully attempted in any manner to evade or defeat such tax."[94] And as the IRS expressed during oral argument, "the only time . . . [I.R.C. § 7609(c)(2)(D)] comes into play is when there is someone who has adjudicated or assessed liability and he's refusing to pay that liability and *likely deliberately evading tax collection*."[95] In other words, the same circumstances justifying unnoticed summonses also render tax liabilities nondischargeable — enabling the IRS to, in practice, leverage clause (i) after opportunistic declarations of bankruptcy. But rather than accept this reality, the Court again embraced formalistic distinctions to contort its statutory reading into compliance with the rule against surplusage.

In short, neither opinion delivered a compelling rationale to circumscribe IRS authority under clause (i), let alone a principled framework for handling future disputes. After taking solace in the provision's theoretical restraints to shoehorn compliance with the rule against surplusage, the majority deferred establishing any test that would delineate permissible unnoticed summonses.[96] Similarly, for all of its promises that clause (i) must contain some restriction, the concurrence reserved specifying its contours for another day.[97] But even setting aside the rarity of Supreme Court tax cases,[98] clause (i)'s language leaves no opportunity for comforting constraints on the IRS. Rather, so long as an unnoticed summons is amorphously "issued in aid of the collection of" a deficient taxpayer's assessment,[99] the Service should encounter no judicial blockade. And this case exemplified the range of such authority:

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and fiduciaries to income, estate, and gift taxes — not, say, employment taxes. I.R.C. § 6901(a)(1)(A) (authorizing collection against transferees and fiduciaries "in respect of the tax imposed by subtitle A or B"); *see also* I.R.C. §§ 3101–3512 (situating employment taxes in subtitle C).

93 *See* Grogan v. Garner, 498 U.S. 279, 287 (1991) (noting general nondischargeability of taxes).

94 11 U.S.C. § 523(a)(1)(C).

95 Transcript of Oral Argument at 39, *Polselli*, 143 S. Ct. 1231 (No. 21-1599) (emphasis added), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1599_21p3.pdf [https://perma.cc/KF7Y-WAWM].

96 *Polselli*, 143 S. Ct. at 1240.

97 *See id.* at 1242 (Jackson, J., concurring).

98 *See* Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REG. 818, 846 (2021) (labeling a tax case "rare"); Paul M. Barrett, *Independent Justice: David Souter Emerges as Reflective Moderate on the Supreme Court*, WALL ST. J., Feb. 2, 1993, at A1 ("Asked why he sings along . . . at Mr. Rehnquist's annual Christmas carol party, [Justice Souter] replies: 'I have to. Otherwise I get all the tax cases.'").

99 I.R.C. § 7609(c)(2)(D)(i).

since Bryant did not know the identities of Mr. Polselli's suspected other entities,[100] he summoned financial data on law firms without any condition that such records concern their tax-deficient client,[101] presumably capturing unrelated information about other people. Although the Court reached the correct result, it should have recognized the breadth of clause (i) and accepted its troubling yet statutorily permissible consequences. This altered reading renders clause (ii) superfluous, but the rule against surplusage need not always dictate statutory interpretation[102] — especially since "redundancy abounds in . . . the Tax Code."[103]

Besides clause (i)'s broad allowance of unnoticed summonses, other sources of IRS curtailment remain improbable or inefficient. First, Congress's failure to amend a statute on tax-collection process seems as certain as taxes[104] given the current political climate.[105] Further, while financial institutions could contractually promise to challenge summonses of their customers' records,[106] deposit account agreements generally do not even require that banks provide notice of IRS investigations[107] — an assumedly far less burdensome task than litigation. And should taxpayers somehow commit counterparties to seek judicial review of summonses on their behalf, such a covenant would be unwieldy since the underlying targets likely hold more knowledge of the investigation's context.[108] Particularly considering President Biden's openness to robust IRS enforcement,[109] the Court could have better served the public by — in the style of President Coolidge[110] — recognizing that clause (i) permits legalized espionage.

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100 *See* Declaration of Michael Bryant, *supra* note 11, ¶ 16.

101 *See* Transcript of Oral Argument, *supra* note 95, at 14, 57. Judge Moore stated Bryant sought only information concerning Mr. Polselli, Polselli v. U.S. Dep't of the Treasury — IRS, 23 F.4th 616, 620 (6th Cir. 2022), but such language does not appear in the summonses. *See* JP Morgan Summons, *supra* note 23, at 2; Bank of America Summons, *supra* note 23, at 2.

102 SCALIA & GARNER, *supra* note 89, at 176 ("Sometimes drafters *do* repeat themselves . . . .").

103 Marinello v. United States, 138 S. Ct. 1101, 1114–15 (2018) (Thomas, J., dissenting).

104 *Cf.* Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), *in* 12 THE WORKS OF BENJAMIN FRANKLIN 160, 161 (John Bigelow ed., federal ed. 1904).

105 *See* Drew DeSilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades [https://perma.cc/NU2D-ADWK].

106 *See* Transcript of Oral Argument, *supra* note 95, at 29.

107 *See, e.g.*, WELLS FARGO, DEPOSIT ACCOUNT AGREEMENT 38 (2023), https://www.wellsfargo.com/fetch-pdf?formNumber=CCB2018C&subProductCode=ANY [https://perma.cc/Y2T8-B2Z7] ("[Wells Fargo] may, but [is] not required to, provide notice of legal process relating to [depositors'] accounts.").

108 *Cf.* Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 84 (1975) (noting that, in tort law, loss bearers must better understand risks).

109 *See* President Joseph Biden, State of the Union Address (Feb. 7, 2023), *in* 169 CONG. REC. S257, S259 (daily ed. Feb. 7, 2023) (stating that "cracking down on wealthy tax cheats" is "being fiscally responsible").

110 *See* Coolidge, *supra* note 6.