NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 12-7064

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS CANNON, *et al.*,
APPELLANTS,

V.

DISTRICT OF COLUMBIA,
APPELLEE.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE DISTRICT OF COLUMBIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties and amici*.—The plaintiffs below and appellants here are Louis P. Cannon, Stephen R. Watkins, Eric Westbrook Gainey, Gerald G. Neill, Sheila Ford-Haynes, and Harry Louis Weeks, Jr. The defendant below and appellee here is the District of Columbia. There are no amici.

B. *Ruling under review*.—The plaintiffs appeal from the July 6, 2012, Memorandum Opinion and Order (Huvelle, J.) granting, in part, the defendant's motion to dismiss or, in the alternative for summary judgment.

C. *Related cases*.—Undersigned counsel is not aware of any related cases.

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TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Federal Statutes and Regulations

District of Columbia Statutes

GLOSSARY

Br.	appellants' brief
CMPA	Comprehensive Merit Personnel Act, D.C. Code § 1-603.01 *et seq.*
CSR Fund	Civil Service Retirement and Disability Fund
DGS	District of Columbia Department of General Services
DHR	District of Columbia Department of Human Resources
FLSA	Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*.
HRA	District of Columbia Home Rule Act, D.C. Code § 1-201.01 *et seq.*
JA	joint appendix
MPD	District of Columbia Metropolitan Police Department
PFR Fund	District of Columbia Police Officers and Fire Fighters' Retirement Fund

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The district court granted judgment to the District of Columbia on federal claims raised by six current and former District employees who challenged the District's practice of offsetting their salaries by the amounts of the pension payments they were receiving as a result of their earlier retirement from the District's Metropolitan Police Department, then declined to exercise supplemental jurisdiction over their local-law claims. The issues presented are:

1. Whether the district court properly rejected:

A. their statutory claim under the Fair Labor Standards Act where they were exempt executive or administrative employees who received compensation above the Act's minimum;

B. their Fifth Amendment claims under (i) the Due Process Clause, because the offset they challenge is authorized and, indeed, required by law, the employees were given written notice of the impending offset but did not take their opportunity to challenge it administratively, and no greater procedural protection is warranted; (ii) the Takings Clause, because the salary that was not paid due to the offset was not taken for public use, to the extent it could be considered "taken" at all, and the

procedures used to impose the offset did not violate due process; and (iii) equal protection principles, because the employees were not treated differently from others similarly situated and the District's action in offsetting their salaries was not irrational; and

C. their two First Amendment retaliation claims, because (i) the alleged retaliatory termination of one employee was undertaken before the employees filed their lawsuit, and (ii) the other supposed act of retaliation—the delay in issuance of a paycheck, by paper copy rather than electronic transmission—would not deter people of ordinary firmness from exercising their rights?

2. Whether the district court properly did not allow discovery as to the employees' First Amendment retaliation and equal protection claims, because they never requested discovery on their retaliation claims, and it exercised its discretion not to allow discovery on the equal protection claim because they made only conclusory assertions rather than proper discovery requests?

3. Whether the district court acted within its discretion in declining to exercise jurisdiction over the employees' local-law claims after resolving the federal claims?

STATEMENT OF THE CASE

Six retired Metropolitan Police Department ("MPD") officers who had been rehired by a different District agency filed suit against the District after it began reducing their pay by the amount of their pension payments. They raised several

federal claims—including a statutory claim under the Fair Labor Standards Act and constitutional claims under the First and Fifth Amendments—and several local-law claims. The district court granted the District's motion to dismiss or, in the alternative, for summary judgment, on the employees' federal claims and remanded their local-law claims to the Superior Court of the District of Columbia.

STATEMENT OF FACTS

1. The Employees' Complaints.

Six retired MPD officers who were receiving retirement benefits were re-hired by the District's Department of General Services ("DGS"), Protective Services Division. Joint Appendix ("JA") 34 ¶ 1, 70, 167. Among other responsibilities, DGS "manages space in buildings and adjacent areas operated and leased by the District government" including engineering, custodial, and security services. JA 69. Louis Cannon served as the Chief of the DGS, Protective Services Division. JA 82. Stephen Watkins is the Protective Services Manager. JA 86. Eric Gainey and Gerald Neill were Supervisory Protective Services Officers. JA 90, 94. Sheila Ford-Haynes was a Management Analyst, and Harry Weeks a Protective Services Officer. JA 98, 102.

On October 12, 2011, the six employees were notified, in writing, that because they were being paid retirement benefits from the District's Police and Fire Retirement System, D.C. Code § 5-723(e) required that their salaries be offset by the amounts of their respective annuity benefits. JA 106-07. That provision states:

> Notwithstanding any other provision of law, the salary of any annuitant who first becomes entitled to an annuity under this subchapter, after November 17, 1979, and who is subsequently employed by the government of the District of Columbia shall be reduced by such amount as is necessary to provide that the sum of such annuitant's annuity under this subchapter and compensation for such employment is equal to the salary otherwise payable for the position held by such annuitant.

D.C. Code § 5-723(e). The employees were advised that, though they had been receiving excess pay, the District would not seek to apply the offsets retroactively; indeed, offsets were not applied until the first pay period of 2012. JA 43 ¶ 50.

On January 26, 2012, following issuance of the first paychecks that were reduced to reflect their pension payments, the employees sued. JA 9-22. They amended their complaint on February 8. JA 33-53. They alleged that they are seeking to enforce their right to "retirement benefits made by the federal government" and therefore invoked jurisdiction under D.C. Code § 1-815.02(a) in addition to federal question jurisdiction. JA 34-35. In that provision, Congress gave the district court exclusive jurisdiction over "[c]ivil actions brought by participants or beneficiaries pursuant to" Chapter 8 of Title I of the District of Columbia Code, titled "District of Columbia Retirement Funds," or "[a]ny other action arising (in whole or part) under [that chapter] or the contract." D.C. Code § 1-815.02(a).

The employees raised several federal and local claims.[1] JA 37-38. Asserting that the reduction in their salaries violated the District Government Reemployed Annuitant Offset Elimination Amendment Act, D.C. Code § 1-611.03,[2] the employees alleged that they were deprived of a property right in violation of the Fifth Amendment's Due Process and Takings Clauses. JA 44. Because the salaries of other officials who had retired from and been rehired by the MPD itself (rather than DGS like the plaintiff employees) were increased to "offset the offset," JA 43¶ 48, they alleged a violation of the equal protection component of the Fifth Amendment. JA 46-47.[3] Three employees alleged that their pay was reduced below the minimum wage mandated by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq*. JA 44-45. The local-law claims included that the reduction in their pay amounted to "a direct tax upon non-residents of the District of Columbia" in violation of the District

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[1] The employees proposed proceeding not only on their own behalf but that of a purported class, JA 37-38, but as noted in their brief, they "later requested leave to not move for class certification" until after the court decided the parties' dispositive motions. Br. 6.

[2] The employees asserted in particular that the provision states that "no reduction shall be made to the pay of a reemployed individual for any retirement benefits received by the reemployed individual pursuant to 5 U.S.C. § 8331," D.C. Code § 1-611.03(b), and they contended that they were retirees identified in 5 U.S.C. § 8331. JA 41-42 ¶¶ 40-41. 5 U.S.C. § 8331, however, defines the "employee[s]" who are subject to it to exclude those "subject to another retirement system for Government employees." 5 U.S.C. § 8331(1)(ii).

[3] The Equal Protection Clause of the Fourteenth Amendment does not apply directly to the District, though its equal protection component applies through the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.01 *et seq*. ("Home Rule Act" or "HRA"). JA 48-52.

Simultaneous with the filing of their complaint, the employees moved for a temporary restraining order and preliminary injunction to enjoin any further offsets to their salaries. JA 3. Those motions were denied on January 31. JA 3.

On February 8, Mr. Cannon was terminated for reasons that the employees allege were pretextual. JA 56. On February 10, the employees involved in this lawsuit did not receive their normal direct deposit salary payments. JA 56. That same day, the employees moved to supplement their complaint to add claims based on these two events. JA 4. Their supplemental complaint raised two claims under the First Amendment: that Mr. Cannon was terminated and the employees' pay withheld in retaliation for bringing this lawsuit. JA 57-58. Claims for defamation and violations of the District of Columbia Whistleblower Protection Act, D.C. Code § 1-615.51 *et seq*., were also added. JA 58-62.

Along with their supplemental complaint, the employees filed a second motion for preliminary injunction. JA 4. The motion was denied on March 5. JA 5.

On February 23, the District moved to dismiss the employees' complaint or, in the alternative, to enter summary judgment in its favor.[4] JA 4.

2. Judgment To The District On The Employees' Federal Claims, And Remand Of Local-Law Claims To The Superior Court.

The district court granted the District's motion and entered judgment for the District as to all federal claims and remanded the local-law claims to the Superior Court.

a. The FLSA claims.

Employees performing specified executive and administrative functions who are compensated by a salary of not less than $455 per week are exempt from the FLSA's wage and overtime requirements. 29 U.S.C. §§ 213(a)(1), 541.100, 541.200. The employees do not dispute that they qualify as exempt executive or administrative employees and all receive a total of more than $455 per week. JA 321-22. Nonetheless, they argue that in calculating the minimum salary necessary to be exempt from the FLSA, their pension payments should be excluded. JA 322. The district court rejected this argument: "[they] offer no authority for the proposition that the [c]ourt should ignore the thousands of dollars in pension payments that they receive each month and look only at the money that they receive from their current

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[4] The District's motion was originally for partial dismissal because it did not address one employee's FLSA claim, but the District subsequently moved for summary judgment on that claim as well. Dkt. 33 at 18 n.13.

paychecks. Nor can the [c]ourt find any." JA 322. The employees "receive compensation far in excess of the FLSA threshold" and, indeed, "control whether their earnings come through their pension paycheck because, as the October 12, 2011 letters explain, [the employees] may elect to receive their full salary in their paychecks and suspend the annuity payments instead." JA 323-24. Thus, "their FLSA claims fail [as a] matter of law." JA 324.[5]

b. The Fifth Amendment claims.

1. Procedural due process.

All of the employees complain that their right to procedural due process was violated because they were not given a pre-deprivation opportunity to contest the offset of their salaries. JA 44 ¶¶ 51-53, 325. The court disagreed and held that they received all the process that was due. JA 325. There is no dispute that they were given notice of the impending offset in letters that told them whom to contact with questions. JA 106-07. The employees failed to contact that official or follow the grievance procedures set forth in the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-603.01 *et seq.*,, the exclusive remedy for District employees with a work-related complaint. JA 325-26 (citing D.C. Code § 1-616.53(a) and *Lattisaw v. District of Columbia*, 905 A.2d 790, 794 (D.C. 2006)). No "greater procedural

[5] The district court thus not only ruled for the District, but also denied the employees' cross-motion for partial summary judgment filed as to their FLSA claim only. JA 338-39.

protection was warranted." JA 327 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The risk to their private interest is not great, the risk of error is low, and the District's interest in "ensuring that its employees address personnel matters through the prescribed grievance process" is significant. JA 327.

2. Taking without just compensation.

The employees also contend that the offset is a taking for which they did not receive just compensation. JA 44 ¶ 52. The court concluded that there is no taking where, as here, the government did not seize property for public use but rather simply did not pay wages. JA 328. Further, the District's action could not "'constitute a taking without compensation violative of the Fifth Amendment'" where, as here, the procedures used to impose the offset did not deprive the employees of due process. JA 328 (quoting *Tate v. District of Columbia*, 627 F.3d 904, 909-10 (D.C. Cir. 2010) (the "government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain")).

3. Equal protection.

The employees claim that the District violated their constitutional right to equal protection by "enforcing this offset against [them] . . . but effectively negating the effect of the offset" on three retired and subsequently re-hired MPD officers "by simply giving them more money." JA 47 ¶ 77. The court found that "these officers

are not similarly situated." JA 329. The employees are no longer MPD officers; they work for the DGS, Protective Services Division, and have responsibilities different from those of MPD officers. JA 329. The only way in which the MPD officers and the employees are similar is that they are both subject to the offset, but the district court found that this single similarity does not make them similarly situated. JA 330 (citing *Noble v. U.S. Parole Comm'n*, 194 F.3d 152, 155 (D.C. Cir. 1999)).

Even if the employees were similarly situated, they did not show that the District's action was irrational. JA 331. "[A]s numerous courts have recognized, the decision to apply the offset to plaintiffs' salaries is rationally related to legitimate government interests." JA 331 (citing, *e.g.*, *Haworth v. Office of Personnel Mgmt.*, 112 Fed. Appx. 406, 408 (6th Cir. 2004) ("Protecting the public fisc by enacting laws against double-dipping by retired employees is a rational legislative decision")). Moreover, "it does not violate equal protection to give raises to some employees and not to other ones." JA 331 (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 605 (2008) ("[t]o treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship")).

c. The First Amendment claims.

The employees "contend that Cannon's termination and [the employees'] receipt of paper paychecks rather than direct deposit payments were acts of retaliation designed to intimidate [them] . . . from challenging the offset." JA 332.

1. Mr. Cannon's termination.

The court found that the retaliation claim based upon Mr. Cannon's termination is "deficient in several respects." JA 333. First, "Cannon cannot establish causation, for he cannot show that the initiation of the instant suit 'was a substantial or motivating factor in prompting [his firing].'" JA 333 (quoting *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007)). The District had submitted documents demonstrating that it had legitimate reasons for terminating Mr. Cannon, more than two months before suit was filed. JA 65-68, 145-47. An October 26, 2011, investigation "revealed that [he had] failed to properly interview the on-scene supervisors . . . before generating an investigative report which contained false information . . . ." JA 65. On January 17, 2012, Charles Tucker, the General Counsel for the District's Department of Human Resources ("DHR"), prepared a "Decision Form" recommending Mr. Cannon's termination, which he submitted for the DHR director's approval. JA 68, 146. The recommendation was approved by the director on January 18, more than a week before this lawsuit was filed. JA 68. Mr. Tucker submitted a declaration attesting to the truth and accuracy of the Decision Form he

prepared on January 17, including the authenticity of the director's signature, with which he was personally familiar. JA 146. On February 8, Mr. Cannon, who was an at-will employee, was informed in writing that he would be terminated effective February 24. JA 65-67.

The court thus found that the "evidence makes clear that the disciplinary action that resulted in his firing was undertaken months before the lawsuit was filed." JA 333. Moreover, the recommendation that Mr. Cannon be fired was made on January 17 and approved the next day, "over a week before [the employees] filed their initial complaint." JA 334. "Thus, as [the employees] concede, when the District made the decision to fire Cannon, it had no reason to retaliate against him." JA 334 (citation omitted).

Second, Mr. Cannon failed to rebut "the District's legitimate—and well substantiated—reason for its decision." JA 334. It rejected the employees' argument that retaliation should be inferred because Mr. Cannon's termination was a "disproportionate penalty" that was "inconsistent with the District's other disciplinary policies." JA 334. Such policies, however, were not applicable to Mr. Cannon, who was an at-will employee "who occupied a high-level position . . . and was found to have committed a breach of trust." JA 334.

2. The paycheck issue.

The court similarly recognized that the employees' claim of retaliation based on the supposed withholding of paychecks was "seriously flawed." JA 335. "[I]t would not be cognizable under the First Amendment because it would not deter a person of ordinary firmness from exercising his or her rights." JA 335. (Nor here did it dampen "their zeal for litigation." JA 336.) Furthermore, the employees were not the only ones affected by the clerical error, which was explained to each of the affected employees and has not recurred. JA 337. Thus, "[u]ltimately, there is *no* indication that retaliation had anything to do with this clerical error." JA 337.

d. Remand to the Superior Court.

Having dismissed all of the federal claims, the district court declined to exercise supplemental jurisdiction over the employees' remaining, local-law claims. JA 337. It rejected their contention that it has exclusive jurisdiction over this case, finding that they "misread" D.C. Code § 1-815.02(a), which vests exclusive jurisdiction in the district court "over cases related to the payment of federal pensions." JA 338. "However, [the employees] make no claim regarding their pensions, nor could they, since their pensions have not been affected. Rather, they contest the fact that their salary is being reduced by their pension payments. Therefore, D.C. Code § 1-815.02(a) is irrelevant." JA 338.

STANDARD OF REVIEW

The dismissal of a claim under Rule 12(b)(6) is reviewed *de novo*. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). While a complaint does not need detailed factual assertions, the "factual allegations must be enough to raise a right to relief above the speculative level. [A complaint] still requires a showing, rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012). A court need not accept "a legal conclusion couched as a factual allegation," or "naked assertion[s] [of unlawful misconduct] devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

Grants of summary judgment are also reviewed *de novo*. *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). A party is entitled to summary judgment if the record, viewed in the light most favorable to the non-moving party, establishes that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). There is a

"genuine issue" of material fact if a "reasonable jury could return a verdict for the nonmoving party." *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1031 (D.C. Cir. 2007) (quoting *Anderson*, 477 U.S. at 248). Accordingly, a moving party is entitled to summary judgment against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Waterhouse v. District of Columbia*, 298 F.3d 989, 992 (D.C. Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). In response to a summary judgment motion, a nonmoving party may not "rest upon its pleadings" but its "opposition must, by affidavits or otherwise, 'set forth specific facts showing that there is a genuine issue for trial.'" *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003) (quoting Fed. R. Civ. P. 56(e)).

The denial of a request for discovery under Fed. R. Civ. P. 56(d) is reviewed for abuse of discretion. *Convertino v. U.S. Dep't. of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012). A decision whether to retain jurisdiction over pendent claims after the federal claims are dismissed is also reviewed for an abuse of discretion. *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005).

SUMMARY OF ARGUMENT

1. The district court properly dismissed or granted the District summary judgment on all of the employees' federal claims.

A. Three employees' FLSA claims fail. In determining that these three were not paid less than the minimum wage required by the FLSA, the district court properly included their pension payments. It correctly focused on the amount they actually received, regardless of whether it came from their pension or pay checks. The offset is not an unlawful deduction that reduced their salary below minimum wage. To the contrary, as the district court recognized and the employees do not dispute, they could have received their full salaries if they suspended their pension payments, but they chose not to do so. Given that they had the choice to receive a salary that undisputedly exceeded the FLSA minimum, there was no FLSA violation.

B. The employees' various Fifth Amendment claims fail.

i. The employees were not denied due process when their District salaries were reduced by their pension payments. The employees are all retired MPD officers receiving annuities from the Police Officers and Fire Fighters Retirement Fund. As such, they are not subject to D.C. Code § 1-611.03(b), which exempts annuitants in the separate Civil Service Retirement and Disability Fund, but rather are subject to the offset required by D.C. Code § 5-723(e). Because District law requires the offset to their salaries, the employees do not have a legitimate entitlement to both a full salary and full annuity. Therefore, they could not have been denied due process.

Moreover, even assuming they had a protected property interest, the employees received notice of the impending offset and the applicable grievance procedures.

These well-established procedures under District law satisfy the requirements of due process even though the employees failed to avail themselves of them.

ii. The employees' takings claim also fails. The employees' property was not taken for public use; rather, the government determined that certain wages were not due. Under binding precedent, the claim that the government's determination was erroneous does not sound under the Takings Clause. Moreover, there is no viable takings claim where as here such a determination is made consistent with the Due Process Clause.

iii. The employees were not denied equal protection of the law because other retired annuitants, annuitants who had been rehired by the MPD, were given raises in anticipation of the offset. Employed by a different District agency and performing different functions, the employees are not similarly situated to the MPD officers. Equal protection is not implicated when the salaries of some District employees but not others who are not similarly situated are increased. Moreover, the District may rationally have a greater need to retain experienced officers at the MPD than at other agencies. Preventing double dipping is also a legitimate interest to which the offset is rationally related.

C. The district court properly dismissed the employees' First Amendment retaliation claims, correctly finding that they could not establish that their lawsuit was a substantial and motivating cause for Mr. Cannon's termination and that the delayed

receipt of a single paycheck by paper copy rather than electronic transmission would not deter an employee of ordinary firmness from exercising First Amendment rights.

2. The employees' separate argument that they were wrongfully denied discovery is forfeited in part and meritless in whole. The employees forfeited any argument that they were entitled to discovery on their First Amendment claims and the district court properly exercised its discretion to deny discovery on the equal protection clause regarding the MPD officers who received raises. The employees never filed any discovery request and never moved to defer the court's ruling on the District's motion and allow them time to conduct discovery. They never identified the facts they sought to discover, let alone why they were essential to their opposition and could not be presented without discovery. The employees provided no basis for believing they were similarly situated, and so have no basis now to claim the district court abused its discretion.

3. The remaining non-federal claims were properly remanded to the Superior Court because they raise novel issues concerning District law. The district court did not abuse its discretion in declining to exercise supplemental jurisdiction. And the employees' argument that it lacked discretion because a statute placed exclusive jurisdiction in the district is based on a misreading of that statute.

ARGUMENT

I. The District Court Properly Rejected The Employees' Federal Claims.

A. The district court properly rejected the employees' claim under the FLSA because they are exempt executive or administrative employees who received compensation above the Act's minimum.

The FLSA requires, *inter alia*, that employers generally must pay their employees a mandated minimum wage of $7.25 per hour and time-and-a-half for overtime work. *See* 29 U.S.C. §§ 206, 207; *see generally Kinney v. District of Columbia*, 994 F.2d 6, 8-9 (D.C. Cir. 1993). However, Section 213(a)(1) of the FLSA exempts from these requirements workers "employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). To be exempt, an "executive" or "administrative" employee must be "[c]ompensated on a salary basis at a rate of not less than $455 per week." 29 C.F.R. § 541.100. To be paid on a "salary basis" means that an employee "regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.R.F. § 541.602(a).

Three employees, Ms. Ford-Haynes, Mr. Neill, and Mr. Weeks, claim that they were paid less than the threshold salary required by the FLSA. JA 45. They did not dispute before the district court and do not challenge here that "they perform the management-related duties" of an executive or administrative employee. JA 321.

Rather, they argue that they were paid less than $455 per week for relevant purposes. Br. 10-17.

It is undisputed, however, that each of these employees "receives a total of more than $455 per week." JA 322. What is in dispute is whether their pension payments "should be included in the calculation of the minimum salary basis necessary to be exempt from the FLSA." JA 322. The district court properly found that the employees' salary for purposes of determining whether it meets the FLSA's minimum is the amount that the employees were paid before the offset required by D.C. Code § 5-723(e). JA 322-23. That view is supported by "the Department of Labor's related administrative interpretations" and "relevant case law." JA 322-23. The court focused on the pay the employees actually received and found that they "receive compensation far in excess of the FLSA threshold." JA 323 (citing *Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012)). "Regardless of whether it comes in their paychecks or in their pension checks, they earn *and* receive between $22.09 and $43.50 per hour," and between $883.52 and $1897.71 per week, "which far exceeds the cut-off for coverage under the FLSA." JA 324; *see* JA 321-22.

The employees argue that their pension payments should not be included in calculating the FLSA threshold because they "aren't payments for work at all" and that it was intended that such payments "be received whether they work or not." Br. 15. District law provides otherwise. It requires that if annuitants, like these

employees, are re-hired by the District, their salary must be offset by their pension payments; in effect, those payments are included as salary "as is necessary" to ensure that their annuity and compensation for the re-hired position "is equal to the salary otherwise payable" for that position. D.C. Code § 5-723(e). Thus here, as the district court recognized, the employees "may elect to receive their full salary in their paychecks and suspend the annuity payments instead." JA 323-24.

The employees criticize the court's citation to *Federal Air Marshals v. United States*, 84 Fed. Cl. 585, 596, 597 (2008), arguing that the availability pay at issue there was pay for work performed in a manner that their pension payments are not. Br. 16. However, the facts of that case bear no resemblance to the claims raised here and the employees miss the point of the district court's citation—that ignoring "the thousands of dollars in pension payments that [the employees] receive each month" would have the effect of allowing a windfall similar to the one which the *Federal Air Marshals* court refused to allow. JA 322-23. The employees also take issue with the district court's observation that they "in fact control whether their earnings come through their paychecks or their pension checks." JA 323-24. Pulling a phrase out of a case that also bears no factual similarity, the employees claim that this choice was a "*de facto* deduction." Br. 13. In *Gaxiola v. Williams Seafood of Arapahoe, Inc.*, 776 F. Supp.2d 117 (E.D. N.C. 2011), the case they quote, the court found that the employer's failure to reimburse temporary guestworkers for expenses incurred for the employer's

benefits, such as visa, transportation, and border crossing expenses, was a *de facto* deduction that reduced their wages below the FLSA threshold. *Id.* at 125. That holding has no application here. Instead, the district court correctly found that the offset was not an unlawful deduction and that the employees "continue to be compensated at their regular rates which are 'not subject to reduction because of variations in the quality or quantity of the work performed.'" JA 323 (quoting 29 C.F.R. § 541.602(a)).

For all these reasons, the district court correctly concluded that the FLSA claims fail as a "matter of law" because it is undisputed that Ms. Ford-Haynes, Mr. Neill, and Mr. Weeks "meet the FLSA exemption's threshold salary requirement, and . . . qualify as exempt executive or administrative employees." JA 324.

B. The employees' Fifth Amendment claims fail because they cannot show that the statutorily required offset was applied without due process, that it constituted a taking without just compensation, or that its imposition denied them equal protection.

1. The employees' due process claim fails because the offset is required by law, they were given written notice of the impending offset but did not take their opportunity to challenge it administratively, and no greater procedural protection is warranted.

a. The employees have no protected property interest because the offset was lawfully obtained.

Due process requires "notice, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an

opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The first step in any due process analysis is "to determine whether constitutional safeguards apply at all, *i.e.*, whether a private party has a property or liberty interest that triggers Fifth Amendment due process protection." *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985)). Due process "protect[s] a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983).

Here the district court did not address whether the employees had a protected property interest. They do not; they simply are not entitled to simultaneously collect a full annuity and a full salary from the District. The law requires the District to offset the salaries of reemployed District police, firefighters, and teachers. D.C. Code § 5-723(e). Thus, the employees do not have a property interest in such double payments and, therefore, they could not have been denied due process by the offset to their District salaries.

The employees argue that the District lacks authority to offset their retirement benefits. Br. 19-23. However, they cannot cite any provision of law prohibiting what the District has done. Instead, they argue that D.C. Code § 5-723(e) "was apparently never updated to reflect the change" by which the federal government assumed responsibility for the costs associated with the pension plans for District police

officers, firefighters, and teachers who retired prior to June 30, 1997. Br. 20-21; *see e.g.*, D.C. Code § 1-803.01. They contend that the offset exemption provided in D.C. Code § 1-611.03(b) reflects "this turn of events" and must be applicable to them because nothing in its language excludes that result. Br. 23.

The employees' argument is predicated upon their misunderstanding of D.C. Code § 1-611.03(b), which eliminates the reduction in pay for individuals reemployed by the District who are receiving retirement benefits pursuant to 5 U.S.C. § 8331.[6] That provision is part of Subchapter III, "Civil Service Retirement," which regulates retirement benefits under "the Civil Service Retirement and Disability Fund" ("CSR Fund"). 5 U.S.C. § 8331(1)(ii), (5). The CSR Fund is separate and distinct from the Police Officers and Fire Fighters Retirement Fund ("PFR Fund"). *See* D.C. Code § 5-706 (authorizing deductions from October 26, 1970 to be paid to "the District of Columbia Police Officers and Fire Fighters' Retirement Fund established by [D.C. Code] § 1-712"). The employees here are all retired MPD officers receiving annuities from the PFR Fund, not from the CSR Fund. JA 8 ¶ 36. Because the employees are

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[6] Although D.C. Code § 1-611.03(b) indicates in addition that "no reduction shall be made to the pay of a reemployed individual for any retirement benefits received by the reemployed individual pursuant to . . . § 5-723(e)," D.C. Code § 1-611.03(b), the employees have never argued that their benefits are received "pursuant to" D.C. Code § 5-723(e). The reference is to a different part of that provision that excludes from its operation annuitants employed under certain statutes not at issue here. D.C. Code § 5-723(e) (last two sentences).

subject to another retirement system, the exemption in D.C. Code § 1-611.03(b) does not apply to them. Instead, D.C. Code § 5-723(e), a section of chapter 7 of D.C. Code title 5, which is entitled "Police and Firefighters Retirement and Disability," requires the offset applied here.[7]

The employees simply provide no support for their contention that shifting responsibility for the payment of their benefit costs to the United States Treasury "supersedes the inconsistent language" in D.C. Code § 5-723(e).[8] Br. 22. As much as

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[7] Indeed, the Council of the District of Columbia was aware that the amendment of D.C. Code § 1-611.03(b) via D.C. Law 15-207 would not change the offset applicable to retired police officers through § 5-723(e). As the relevant committee report notes, the DHR director at the time testified: "There are also several employees . . . as well as law enforcement personnel and teachers who would remain subject to the offset." Council of the District of Columbia, Committee on Government Operations, Report on Bill 15-567, District Government Reemployed Annuitant Offset Elimination Amendment Act of 2004, at 3 (June 22, 2004).

[8] Indeed, contrary to the employees' assertion, Br. 22, the District of Columbia Retirement Board ("DCRB") continues to bear administrative responsibility for the PFR Fund:

> DCRB is an independent agency of the District of Columbia government that was created by Congress in 1979 under the Retirement Reform Act (Reform Act). DCRB has exclusive authority and discretion to manage the assets of the District of Columbia Teacher's Retirement Plan and the District of Columbia Police Officers and Firefighters' Retirement Plan (collectively referred to as the Plans) and to provide participants with retirement services.
>
> [I]n 1997, with the passage of the National Capital Revitalization and Self-Government Improvement Act (the Revitalization Act), the Federal Government assumed responsibility for the unfunded pension liabilities for retirement benefits earned as of June 30, 1997.

they would like to avoid the express language of D.C. Code §§ 1-611.03 and 5-723(e), this language, and not what the employees believe the Council of the District of Columbia and Congress intended these statutes to say, controls. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) ("Statutory construction must begin with the language employed . . . and the assumption that the ordinary meaning of that language expresses the legislative purpose"). The employees fail to identify any language in D.C. Code § 1-611.03, or elsewhere, that expressly or even impliedly supersedes or repeals D.C. Code § 5-723(e). Rather, D.C. Code § 1-611.03(b) regulates the pay of individuals receiving an annuity "under any District government civilian retirement system." *Id*. The key is thus the pension system, not the source of funding. Because the employees receive their pension benefits from a

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> With the passage of the District's Office of Financial Operations and Systems Reorganization Act of 2004, DCRB assumed certain benefits administration responsibilities for the Plans from the District's Office of Pay and Retirement Services (OPRS). Those responsibilities included recordkeeping, related administrative tasks, and the payment of benefits for participants hired on or after July 1, 1997, who earned benefits under the District Plans. *DCRB also assumed the same administrative responsibilities for participants hired prior to July 1, 1997 and whose benefit costs are the responsibility of the U.S. Department of the Treasury* (Treasury).

District of Columbia Retirement Board, *Comprehensive Annual Financial Report for the Fiscal Year Ended September 30, 2011*, at 7 (emphasis added) (available online at http://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/publication/attachments/FY%202011%20DCRB%20CAFR.pdf (last visited Nov. 27, 2012)).

District retirement system, they are subject to the offset mandated by D.C. Code § 5-723(e).

b. Even if the employees have a protected property interest, the District did not violate their right to due process.

In any event, as the district court concluded, the employees "were provided all that due process requires (*i.e.*, notice and a forum to challenge the impending offset)." JA 325. To determine whether a procedural due process violation has occurred, "it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

Here, the employees "received notice of the offset months before it became effective" and were told whom to contact with questions, but they failed to do so. JA 106-07, 325. "Instead, they waited until the offset was applied to their paychecks and raised the issue by filing for emergency relief in federal court." JA 325. They also failed to file a grievance under the CMPA, which "provide[s] 'the exclusive remedy for a District of Columbia public employee who has a work-related complaint of any kind.'" *Lattisaw*, 905 A.2d at 794 (quoting *Robinson v. District of Columbia*, 748 A.2d 409, 411 (D.C. 2000)). "Having chosen not to avail themselves of the available

process," the employees "cannot now complain that they did not have the opportunity 'to be heard at a meaningful time and in a meaningful manner.'" JA 326 (quoting *Mathews*, 424 U.S. at 333).

No greater procedural protection is warranted. In *Mathews*, the Court specified three distinct factors to be considered in evaluating what procedural protections are required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. Here, the risk to the employees' private interests is not great; they "risk only temporary deprivation of the offset amounts." JA 327. "[T]here is a low risk of error here where the District's decision is based on statutory interpretation and does not require a factual determination." JA 327. And the District's interest in its employees addressing "personnel matters through the prescribed grievance process" is significant. JA 327.

The employees erroneously contend that the district court required them to exhaust administrative remedies under the CMPA, Br. 26-32, but the district court rejected their claim because they "were provided all that due process requires," not for their failure to exhaust, JA 325. The CMPA provides for a system to expeditiously adjust employee grievances and complaints. D.C. Code § 1-616.53; *see also* 6 DCMR

§§ 1636.2, 1635.1. Grievance is defined as "any matter under the control of the District government which impairs or adversely affects the interest, concern, or welfare of employees, but does not include adverse actions resulting in removals, suspension of 10 days or more, or reductions in grade, reductions in force or classification matters." D.C. Code § 1-603.01(10). Challenges to the legality of the offsets at issue here would qualify as grievances. *See D.C. Metro. Police Dep't. v. Fraternal Order of Police/Metro. Police Dep't Labor Comm.*, 997 A.2d 65, 68-69 (D.C. 2010) (officers filed a grievance with the MPD Chief of Police that they were assigned the duties of detective sergeant without receiving the associated pay); *Bufford v. D.C. Public Schools*, 611 A.2d 519 (D.C. 1992) (employee's claim that he was denied a promised promotion to a higher salary dismissed for his failure to initiate the grievance process). However, the employees never alleged that they filed an administrative grievance, as the CMPA provides, or responded in any way short of filing a federal lawsuit. JA 33-53. Although they chose not to avail themselves of the CMPA's grievance procedures, those procedures do exist and satisfy the requirement of due process. *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants").

The employees also argue that the district court erred in finding the CMPA applicable to them. JA 30-32. They contend that the court ignored the fact that they

were first hired prior to October 1, 1987 "and that their claims herein related directly to their retirement benefits from that employment." JA 31. However, the court properly found that the employees "make no claim regarding their pensions, nor could they, since their pensions have not been affected. Rather, they contest the fact that their salary is being reduced by their pension payments." JA 338. These salaries were for the District positions they were hired for after 2004, "and, as a result, their complaints are covered by the CMPA." JA 326. Moreover, while the employees urge that "the applicability of the CMPA to [them] cannot be construed so broadly as to defeat the evident grandfather provisions afforded pre-Home Rule employees," they never identify what the "evident grandfather provisions" are. Br. 31. They also fail to explain how, applying the three *Mathews* factors, process beyond that available under the CMPA is warranted. Accordingly, even if the employees are exempt from the offset, which they are not, the District has not violated their right to due process.

2. The employees' takings claim fails because property was not taken for public use and the procedures used to impose the offset did not violate due process.

The district court also properly rejected the employees' claim that the offset constituted a taking without just compensation, observing that they "appear to have 'confuse[d] a property right cognizable under the Takings Clause . . . with a due process right to payment of a monetary entitlement under a compensation statute.'" JA 327 (quoting *Adams v. United States*, 391 F.3d 1212, 1220 (Fed. Cir. 2004), *aff'g*

No. 00-447 C, 2003 U.S. Claims LEXIS 238 (Aug. 11, 2003)). In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), an oil company sought to enjoin a state cap on the rent it could charge to dealers leasing company-owned service stations. *Id.* at 533. Similar to the oil company's claim there, the employees here "plainly [do] not seek compensation for a taking of [their] property for a legitimate public use, but rather an injunction against" and reimbursement of an offset that they allege to be illegal. *Id.* at 544. "Whatever the merits of that claim, it does not sound under the Takings Clause." *Id*. In *Adams*, the court rejected a similar claim for unpaid overtime, explaining:

> This is either a standard claim for money . . . or a due process claim . . . However, it is not a Takings Claim . . . for even if an obligation to pay money can be considered property, no property was here seized for public use. . . . [A]t best, [wages] simply were not paid. Accordingly, the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs . . . overtime because it believed plaintiffs[] exempt . . . .

2003 U.S. Claims LEXIS 238 at *29-30.

In addition, the district court concluded that the District's action in imposing the offset did not constitute a taking since it had already found that the employees were provided the process they were due. JA 328 (citing *Tate*, 627 F.3d at 909-10). The employees fail to set forth any ground to challenge this finding; they merely repeat their conclusory assertion that their "property interests were taken absent any due process or compensation." Br. 24.

3. The employees' equal protection claim fails because they were not treated differently from others similarly situated and the District's action in offsetting their salaries was not irrational.

The employees complain that the District violated their constitutional right to equal protection by "enforcing this offset against [them] . . . but effectively negating the effect of the offset on other persons by simply giving them more money." JA 47 ¶ 77. Because they do not assert a fundamental right or claim to be members of a suspect class, their "as applied" equal protection challenge requires them to first establish that similarly situated individuals were treated differently. *Women's Prisoners of D.C. Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996).

Even if they make this showing, "the government may avoid violating equal protection principles if it can demonstrate that its reasons for treating an individual differently bear some rational relationship to a legitimate state purpose." *Brandon v. D.C. Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987). Under rational basis review, a legislature is not obligated to articulate the basis or bases for any classification. *Heller v. Doe*, 509 U.S. 312, 320 (1993). Instead, a classification "is accorded a strong presumption of validity" and "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id*. at 319; *FCC v. Beach Commc'ns, Inc*., 508 U.S. 307, 313 (1993); *accord Hodel v. Indiana*, 452 U.S. 314, 332-33 (1998)

(legislation has a "presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality"). "A state" thus "has no obligation to produce evidence to sustain the rationality of a statutory classification" and "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Heller*, 509 U.S. at 320. "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotation marks omitted).

Here, the district court properly found that the employees had alleged no facts that, if true, would show that they are similarly situated to the current MPD employees they claim were provided salary increases in anticipation of the offset, nor could they establish this threshold element of their equal protection claim on this record. JA 329-30. Furthermore, the court found that the employees could not establish that the District's action in imposing the offset was irrational and that "it does not violate equal protection to give raises to some employees and not to other ones." JA 331 (citing *Engquist*, 553 U.S. at 605).

The employees contend that the "only factors relevant to [their] equal protection claims are those factors which determine whether the D.C. Code § 5-723(e) offset is applicable to either [them] or the MPD reemployed federal annuitants." Br. 34. They appear to argue that their allegations that both they and the current MPD officers were

first employed by the MPD prior to October 1, 1987 and that each was subsequently rehired by the District subsequent to their retirements and after December 7, 2004, establish that each is subject to the offset required by D.C. Code § 5-723(e) and that alone is sufficient to create a disputed issue of fact as to whether they are similarly situated. Br. 33-34. The district court properly rejected this argument.

The employees here work for the DGS, not the MPD; they provide neither routine street patrol duties nor the primary criminal response to the general public that the MPD does. JA 329-30. The employees have not alleged and cannot establish that they perform the same functions, have the same duties and responsibilities, or the same background or experience as the MPD officers. Given these differences, the single similarity—that they are both subject to the offset—is insufficient to establish "that 'all of the relevant aspects of [their] employment were nearly identical to those of [the MPD officers].'" JA 330 (quoting *Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 145 (D.C. Cir. 2008) (internal quotation marks omitted). The employees' contention that they enjoy "a constitutional right to equal treatment under law by the government, even where that treatment is imposed by two different agencies" is "groundless." *Noble*, 194 F.3d at 155; *see also Tumminello v. United States*, 14 Cl. Ct. 693, 697 (1988) ("[F]actual distinctions between employees in different categories and in different federal agencies preclude[d] a finding that they are all similarly situated . . . .").

The employees also argue that while both they and the MPD officers are subject to the offset, the District negated "the effect of the law solely upon the MPD employees" without rational basis." Br. 34; *see also* Br. 36. They argue they "are entitled to a jury trial to determine this issue, not a summary conclusion by the District Court without the benefit of discovery.[9] Br. 34-35.

The district court found that "the offset has also been applied to the MPD officers." JA 329 n.10 (citing JA 43 ¶ 48, JA 46 ¶ 68, JA 47 ¶¶ 72, 76). "In effect, [the employees] challenge the fact that the District gave raises to some District employees, but not to them." JA 329. The district court correctly concluded that "even if the District did raise the MPD officers' pay to offset the offset, that would not raise equal protection concerns." JA 331. The MPD has the authority to decide how to compensate its employees, without affecting the rights of non-MPD District employees. Mayor's Order 97-88 ("the Chief of Police is delegated personnel and rulemaking authority vested in the Mayor over the [MPD] under sections 404 and 406 of the [CMPA], D.C. Code §§ 1-604.4 and 1-604.6"). And the District may increase the salaries of some of its employees but not others who are not similarly situated without implicating the constitutional right to equal protection. *Engquist*, 553 U.S. at

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[9] The employees' conclusory claim that they were entitled to discovery is fully addressed below in section II. However, as set forth in this section, their equal protection claim fails even accepting as true their allegation that the MPD officers were granted raises to negate the effect of the offset.

605 ("[We] have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner"); *Vandermark v. City of N.Y.*, 391 Fed. Appx. 957, 959 (2d Cir. 2010) ("There are numerous reasonable bases on which the City of New York might decide that the NYPD officers and [Environmental Police Officers] should receive different compensation and benefits, including the danger associated with the positions, [and] the physical strain of the job . . . ."). Given their differing responsibilities, the District may have a greater need and/or desire to re-hire and retain experienced officers for the MPD than it does for the Protective Services Division at DGS and, therefore, may offer salary increases to attract and retain the former and not the latter. Thus, "even if [the employees] could be considered to be similarly situated to the MPD officers, which they cannot, their equal protection claim would still fail because they have not shown that the District's action was irrational." JA 330.

The employees also challenge the district court's finding that preventing double dipping is a legitimate government interest to which the decision to offset their salaries is rationally related. JA 331-32 (citing, among other cases, *Haworth*, 112 Fed. Appx. at 408) (preventing double dipping is a "rational legislative decision"). The rational basis inquiry is "highly deferential," *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000), and "is not a license for courts to judge the wisdom,

fairness, or logic of legislative choices," *Heller*, U.S. at 320. The employees argue that the offset required here cannot be protecting the public fisc because their pension payments, unlike their salaries, come from the United States Treasury. Br. 37. Regardless of the current source from which the employees' pension is paid, their retirement benefits are based and computed upon their District salary and years of District service. Moreover, the fact that the federal government has agreed to subsidize the District's pension liability does not make irrational the "'policy of preventing receipt of a public pension while also receiving a public salary.'" JA 331 (quoting *Connolly v. McCall*, 254 F.3d 36, 43 (2d Cir. 2001) ("The default policy of preventing receipt of a public pension while also receiving a public salary reflects the notion that such simultaneous income streams could constitute an abuse of the public fisc . . . [W]hether sound policy or not, there is nothing irrational about [it]" (internal quotation marks omitted)). This is particularly so here, where the District's budget must be approved by Congress, which is "closely involved in the management of the District's finances" and subsidizes certain District's operations, including pension liabilities, to compensate for some of the costly state-like functions the District performs. D.C. Code § 1-204.46; *Banner v. United States*, 428 F.3d 303, 305-06 (D.C. Cir. 2005).

C. The employees' First Amendment claims fail because the alleged retaliatory termination was undertaken before their lawsuit was filed and the delay in receiving a single paycheck, by paper copy rather than electronic transmission, would not deter employees of ordinary firmness from filing suit.

The employees raise two First Amendment retaliation claims: that Mr. Cannon was terminated and their pay withheld for one pay period in retaliation for filing their lawsuit. JA 58-59. In order for government employees to state a First Amendment retaliation claim, five elements must be met. First, the employee must have spoken out on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Second, the court must consider whether the government's interest in achieving efficiency through its personnel outweighs the employee's interest as a citizen to speak on matters of public concern. *O'Donnell v. Barry*, 148 F.3d 1126, 1133 (D.C. Cir. 1988). Third, the employee must demonstrate that the protected speech was a substantial and motivating factor in the allegedly retaliatory act. *Wilburn*, 480 F.3d at 1149. Fourth, the employee must be able to "refute the government employer's showing, if made, that it would have reached the same decision in the absence of the protected speech." *Id.* Lastly, to be actionable, the alleged retaliation must be "likely to deter a person of ordinary firmness from th[e] exercise [of protected activity]." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576 (D.C. Cir. 2002).

1. Mr. Cannon's termination.

The district court properly found that the employees cannot show that Mr. Cannon's termination was prompted by the initiation of their suit. JA 333.

> The evidence makes clear that the disciplinary action that resulted in his firing was undertaken months before the lawsuit was filed or even contemplated ([JA 65-66]), and the recommendation that he be fired, dated January 17, 2012, was also made well before there was any reason for litigation. ([JA 68].) On that date, Charles Tucker, General Counsel for the [DHR], formally recommended that Cannon, as well as another individual, be fired for the reasons stated in the termination letter. ([JA 65-66].) Tucker's recommendation was approved on January 18, 2011 ([JA 68]), which was over a week before [the employees] filed their initial complaint.

JA 333-34. It also found, alternatively, that the documents the employees submitted to demonstrate that termination was so disproportionate a penalty that retaliation must be inferred failed to rebut the "District's legitimate—and well substantiated—reason for its decision." JA 334. Those documents related only to career service and/or MPD employees, and Mr. Cannon was neither. JA. 334-35.[10]

The employees were required but failed to present specific facts that could enable a jury to find in its favor. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). "[T] here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."

[10] Section II below discusses the employees' complaint that the district court refused to allow discovery on this issue as well.

Anderson, 477 U.S. at 249-50 (internal citations omitted). The court properly rejected the employees' "unfounded allegations that defendant's attorneys fabricated evidence of the decision to terminate Cannon," conclusory assertions that could not establish a disputed issue of fact as to causation. JA 334 n.12.[11] Instead, the court properly found based on the actual evidence of record that the District established "that it not only would have reached the same decision in the absence of protected speech, but also that it *did* reach that decision before the arguably protected activity occurred." JA 335 (internal citation and quotation marks omitted).

2. The delayed issuance of a paycheck, by paper copy rather than electronic transmission.

The employees also claim that a check for one pay period was withheld in retaliation for their lawsuit. JA 58. There is no dispute that the check was provided after a delay, by paper copy rather than electronic transmission. The District submitted a declaration from Denise Portis, the DGS employee responsible for "processing the paperwork and handling personnel matters involving DGS employees, such as payroll, hiring and termination, and employee benefits." JA 149. Ms. Portis explained that "because of a staff mistake, the [employees] were issued paper checks

[11] The only evidence the employees submitted in support of their argument that termination was a disproportionate penalty was a 71-page "Reference Guide" from the DHR (JA 185-255), which applies only to "Career Service" employees (JA 190), not to at-will employees like Mr. Cannon, and MPD General Order 120.21 (JA 257-83), which is also immaterial because Mr. Cannon was not an employee of the MPD at the time of his termination.

instead of direct deposits for the pay for the period January 16 to 28, 2012." JA 150. Moreover, she attested to the fact that "at least one other District employee . . . received a paper check due to [this] staff mistake." JA 150. In his declaration, Scott Burrell, the chief operating officer for the DGS, explained that the employees did not go unpaid; rather, they were "issued live, paper checks, instead of direct deposits." JA 70. Furthermore, DGS "contacted all of the affected employees and explained the problem, and they have all retrieved their checks." JA 70. Thus, the issuance of paper checks for a single payment cycle was the result of a simple processing error, which was expeditiously remedied.

The district court found that these events "would not deter a person of ordinary firmness from exercising his or her rights" and did not deter these employees "since they responded to this incident by filing a supplemental complaint, renewing their motion for a preliminary injunction, and filing a cross-motion for summary judgment." JA 336. "Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech." *Curley v. Vill. Of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001). The district court also found that the employees did not rebut the documentary evidence explaining "that the issuance of paper checks was the result of a clerical error," that at least one person other than these employees was "affected by this same error," they were all paid and the error, which has not recurred, was explained to them. JA 336-37 (citing JA 69-70, 149-50).

The employees argue that only after their supplemental complaint was filed "was the story of the clerical error concocted" by the District and the paper checks discovered.[12] Br. 42. They, again, argue that this allegation is sufficient to create a disputed issue of fact "for a jury's consideration and not the District Court's picking and choosing as to which story facilitates a quicker dismissal of the case." Br. 42. Here too, an allegation is insufficient. The employees were required but failed to present specific facts sufficient to permit a jury to find in their favor. *Anderson*, 477 U.S. at 249-50.

II. The Employees Forfeited Their Argument That They Are Entitled To Discovery On Their Retaliatory Termination Claim And, In Any Event, The District Court Did Not Abuse Its Discretion In Denying Discovery That Was Never Properly Sought And Could Only Have Been Based Upon Conclusory Assertions That Lack Any Record Support.

There is no merit to the employees' contention that were improperly denied discovery on their equal protection claim and their First Amendment claim based on Mr. Cannon's termination. Br. 33-40. The employees argue that they were entitled to but denied discovery based on their belief that the documents supporting Mr. Cannon's termination were "likely fraudulent" and their self-serving statements that no police administrator would be terminated for the reasons stated by the District. Br.

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[12] This is hardly extraordinary since the employees moved to file their supplemental complaint on the same day they did not receive their direct deposit paychecks. JA 4, 56.

38-40. They forfeited this issue by failing to request discovery on the termination issue, and they show no abuse of discretion in any event.

First, it is too late for the employees to argue that they were entitled to discovery because they alleged that the documents supporting Mr. Cannon's termination "were likely fraudulent" and that the "justification" provided "bordered on the bizarre." Br. 38-41. Before the district court, the employees did not argue that they were entitled to discovery. What they argued there was that they had "sufficiently pled a *prima facie* case of retaliation." Dkt. 30 at 30. According to them, having demonstrated that the "cause for Cannon's termination certainly is phony," the employees "have made a *prima facie* case" and have a right to have the factual issues decided "by a jury, including the authenticity of the [District's] claimed documents in support." Dkt 30 at 30. Thus, they cannot argue for the first time here that they were entitled to discovery on this issue. *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984) ("It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal").

Second, they could show no abuse of discretion in any event. In addition to other problems, the employees never complied with Fed. R. Civ. P. 56(d); they failed

to present an affidavit or otherwise explain in any detail why they needed discovery to oppose the District's motion.[13]

This Court's recent decision in *Convertino*, on which the employees mistakenly rely, does not excuse this failure. While observing that a Rule 56(d) motion should generally be granted, this Court indicated that to "obtain Rule 56([d]) relief, the movant must submit an affidavit which 'state[s] with sufficient particularity . . . why [additional] discovery [is] necessary." 684 F.3d at 99 (quoting *Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1045 (D.C. Cir. 2008)). The Court noted three criteria that must be satisfied by the affidavit. "First, it must outline the particular facts he intends to discover and describe why those facts are necessary to the litigation." *Id*. Second, the movant must "explain why he could not produce the facts in opposition to the motion." *Id*. at 99-100 (internal quotations, brackets, and citation omitted). "Third, it must show the information is in fact discoverable." *Id*. at 100. The employees failed to satisfy any of these criteria.

The employees' reliance on their bald assertion that they are entitled to discovery on these issues is misplaced. Before the district court, as in their brief here, the employees never identify, let alone with particularity, the facts that they seek to

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[13] In 2010, Rule 56(f) became Rule 56(d). It provides that: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . (2) allow time to obtain affidavits or declarations or to take discovery . . . ."

discover, the relationship of those facts to the litigation, why they are essential to their opposition and cannot be presented without discovery, and how the facts are discoverable. Instead, they offered only a conclusory statement that they needed discovery and that Rule 56 disposition was inappropriate prior to discovery. *See, e.g.*, Dkt. 30 at 16, 19, 31. They never filed any discovery request and never filed an affidavit or otherwise moved the district court to allow time for them to conduct discovery, let alone provide an appropriate basis for doing so.

Given the employees' isolated conclusory statements and absent the information required by Rule 56(d), the district court identified a request to conduct discovery only on one issue. As to that issue, the district court correctly found that the employees were not entitled to discovery because they provided no "basis to believe that they are similarly situated to the MPD officers who received a raise." JA 332 n.11 (citing *Dunning v. Quander*, 508 F.3d 8 (D.C. Cir. 2007)). In *Dunning*, this Court found no abuse of discretion where the "plaintiff failed to provide reasons why discovery was necessary. Without some reason to question the veracity of affiants . . . [plaintiff]'s desire to test and elaborate affiants' testimony falls short; her plea is too vague to *require* the district court to defer or deny dispositive action." *Id.* at 10 (internal quotation marks and citation omitted). That reasoning applies here.

Although the employees on appeal now say they wish discovery also as to the reasons why the MPD officers' salaries were raised, Br. 36-37, the district court did

not find that the employees had made a request for discovery on that issue. In any event, for the reasons set forth above in section I.B.3, even accepting as true their allegation that the MPD officers were granted raises to negate the effect of the offset, their equal protection claim fails. Thus, even if they had properly requested discovery on this issue, which they did not, the district court would not have abused its discretion in denying it, and further any error would have been harmless.

The district court also did not find that the employees had made a request for discovery as to the authenticity of the supporting documents or stated cause for Mr. Cannon's termination. Nor could it have, since the employees argued that they had "pled a *prima facie* case of retaliation" and had a "Seventh Amendment right" to have that issue decided by a jury." Dkt. 30 at 30. Even if they had requested discovery, the employees provided no basis, other than their own unsupported conspiracy accusations, to question the declaration of the DHR General Counsel, who attested to the authenticity and accuracy of the reasons, signatures, and dates on which Mr. Cannon's termination was recommended and approved, all of which pre-date the filing of the employees' lawsuit. JA 145-47. (The personnel policies the employees submitted to question the stated cause for Mr. Cannon's termination do "not even apply to him since he was an at will employee who occupied a high-level position within DGS and was found to have committed a breach of trust." JA 334.)

Thus, even if the employees had not forfeited this argument and even if discovery on these issues had been requested, and it was not, this Court could not "find an abuse of discretion" because the employees have "offered only a conclusory assertion without any supporting facts to justify the proposition that the discovery sought will produce the evidence required." *Convertino*, 684 F.3d at 100 (quoting *Messina v. Krakower*, 439 F.3d 755, 762 (D.C. Cir. 2006)); *see also Dunning*, 508 F.3d at 10.

III. The District Court Did Not Abuse Its Discretion In Declining To Exercise Jurisdiction Over The Employees' Remaining Claims.

Having dismissed all of the employees' federal claims, the district court properly exercised its discretion and declined to consider their remaining claims. JA 337-38. Indeed, it found that "[r]emand to Superior Court is particularly appropriate here because [the employees'] remaining claims raise novel and complex issues of District law." JA 337 (internal quotation marks and brackets omitted). The employees' argument that the district court abused its discretion in this regard is meritless.

First, the employees argue that the district court erred in remanding to the Superior Court their claim that the offset, which is applicable to any District employee receiving a retirement annuity from the PFR fund, among other funds, is a "tax" upon non-residents in violation of D.C. Code § 1-206.02(5), the HRA provision that prohibits the Council of the District of Columbia from imposing any tax on the

personal income of non-residents. Br. 43. They contend that whether the offset is a "tax" and whether that "tax" discriminates based on the source of the retirement benefits are questions of federal law. Br. 43-49. But the District plainly is not "taxing" any retirement benefits at all, merely offsetting its employees' salaries. And even were that not so, the offset is neither based on an annuitant's residency nor applicable solely to non-residents.[14]

The employees' insistence that the offset is a "tax" is incorrect for yet another reason. A government exaction is a tax "only when its primary purpose judged in legal context is raising revenue." *Rural Tel. Coal. v. FCC*, 838 F.2d 1307, 1314 (D.C. Cir. 1988). The employees' salaries are offset here not to raise revenue, but to protect the public fisc from double dipping; any saving that may result is merely incidental. *Cf. id*. ("'[t]he definition of 'tax' in the abstract is a metaphysical exercise in which

[14] In addition, the employees' reliance on the Public Salary Tax Act ("PSTA") is misplaced. "The [PSTA] allows a State and its taxing authorities to tax the pay federal [and District] employees receive 'if the taxation does not discriminate against the [federal] [or District] employee because of the source of the pay or compensation.'" *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 436 (1999) (quoting 4 U.S.C. § 111) (middle bracket in original). The PSTA is not the source of the District's taxing authority; the Home Rule Act is. *Banner*, 428 F.3d at 306-07. In any event, there is no discrimination based on the source of the annuity payment, since federal funds support both the CSR Fund and the PFR Fund (for District retirees hired prior to July 1, 1997). Again, imposition of or exemption from the offset is based upon the pension system, not the source of funding.

courts do not have occasion to engage.'") (quoting *Brock v. WMATA*, 796 F.2d 481, 489 (D.C. Cir. 1986)).

Furthermore, even if the offset is a tax, the district court would lack jurisdiction over the employees' tax claims. This Court has held that the District of Columbia Superior Court has exclusive jurisdiction over tax challenges, even where federal or constitutional issues are raised. *Jenkins v. Washington Convention Ctr.*, 236 F.3d 6, 11 (D.C. Cir. 2001) ("Congress unambiguously intended to vest in the District of Columbia courts exclusive challenges to District of Columbia taxes including those involving federal statutory or constitutional claims in lieu of (rather than concurrently with) jurisdiction in federal courts.").

Second, the employees insist that D.C. Code § 1-815.02(a) provides the district court with exclusive jurisdiction, and thus that it lacked discretion to decline jurisdiction. Br. 49-51. That provision, however, applies only to "[c]ivil actions brought by participants or beneficiaries pursuant to" Chapter 8 of Title I of the District of Columbia Code, titled "District of Columbia Retirement Funds," or "[a]ny other action arising (in whole or part) under [that chapter] or the contract." D.C. Code § 1-815.02(a). The employees, however, did not allege that the District's action affected their retirement benefits. Instead, they alleged that the District "reduced the pay of each of their respective first pay periods of 2012 by such amount to offset such annuitant's annuity from the salary otherwise payable for their positions." JA 43.

Their salary, not their pension, was reduced. No person's pension benefits (federal, District, or otherwise) are affected at all here. Thus, this action was not "pursuant to" or "arising . . . under" Chapter 8, and so D.C. Code § 1-815.02(a) is, as the district court found, irrelevant.

CONCLUSION

This Court should affirm the order of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 10, 2012, an electronic copy of this brief was served through the Court's ECF system, to:

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CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 12,431 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

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