NOT YET SCHEDULED FOR ORAL ARGUMENT

№ 14-7014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LOUIS P. CANNON, *et al*.

Appellants

v.

DISTRICT OF COLUMBIA

Appellee

OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

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I. Certificate as to Parties, Rulings and Related Cases

There are no corporate parties to this appeal.

The Plaintiffs were represented before the District Court and in the prior Appeal by Matthew LeFande of Arlington, Virginia.

The Defendant District of Columbia was represented by its Attorney General.

The Appellants appeal the District Court's Jan. 6, 2014 dismissal of their claims.

This case was previously heard by this Court in *Cannon v. District of Columbia*, 717 F.3d 200 (D.C. Cir. 2013).

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Cases marked with asterisks are those upon which we chiefly rely.

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1. Introduction.

To the present day, this Court has never given sufficient consideration to statutory enactments by Congress specifically addressing the expenditure of federal funds for these former federal employees. It is profoundly disingenuous to consider the tortured history of public employee pensions in the District of Columbia and then assert that the pensions of these pre-Home Rule employees, indisputably funded and administered by the United States Treasury, do not implicate Federal Question Jurisdiction. This court's prior cursory dismissal of the Appellants' constitutional claims was solely predicated upon D.C. Code § 5-723 (e), but yet the decision wholly ignored the District of Columbia Retirement Protection Act of 1997, PUB. L. 105-33, and the Consolidated Appropriations Act of 2008, PUB. L. 110-161, Sec. 807, both of which superseded § 5-723 (e). *Cannon v. District of Columbia*, 717 F.3d 200, 202-203, 206 (D.C. Cir. 2013). Neither this Court nor the District Court has ever given any consideration to the demonstration that § 5-723 (e) has <u>never</u> applied to the Appellants, all of whom were entitled to pension benefits prior to 1979. See Opening Br. in 12-7064 at 19-21. The Appellants ask that this court now "depart[] from '[l]oose language and a sporadic, ill-considered decision' when asked to resolve [this specific]

question ‘with our eyes wide open and in the light of full consideration’”. *McCutcheon v. FEC*, 12-536 at 13 (U.S. Apr. 2, 2014) (quoting *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 139-140 (1941)). Because these important federal questions have yet to be considered by this Court, summary consideration is inappropriate.

2. This Court has never opined as to whether D.C. Code § 5-723 (e) was applicable to these Appellants where they were entitled to pensions prior to 1979, or as to whether subsequent enactments superseded the offset provision.

> 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. The provisions of this subsection shall not apply to an annuitant employed by the District of Columbia government under the Retired Police Officer Redeployment Amendment Act of 1992 or the Detective Adviser Act of 2004. The provisions of this subsection shall not apply to an annuitant employed by the D.C. Public Schools under the Retired Police Officer Public Schools Security Personnel Deployment Amendment Act of 1994.

D.C. CODE § 5-723 (e).

The “November 17, 1979” language of D.C. Code § 5-723 (e) properly reflects the state of affairs at the time of the enactment of the District of Columbia Retirement Reform Act of 1979, but was apparently

never updated to reflect the change in events which subsequently transpired.[1] As of the enactment of the District of Columbia Retirement Reform Act of 1979, all retirement entitlements were intended to be funded and administered by the District of Columbia, with only additional "Federal payments to these Funds to help finance, in part, the liabilities for retirement benefits incurred by the District of Columbia prior to [Home Rule]". PUB. L. 96-122, Sec. 101 (b)(5). As described above, this was not to be the case and responsibility for all pre-1997[2] entitlements were eventually taken over by the federal government. The District of Columbia today makes no payment and provides no administration of any of the Appellants' retirement entitlements accrued prior to the 1997 enactment.

[1] The language of the 1979 Retirement Reform Act which enacted this section of § 5-723 is particularly important in this regard. It does not state "the salary of any annuitant who first becomes entitled to an annuity under this subchapter, after November 17, 1979…". It states instead, "the salary of any annuitant who first becomes entitled to an annuity under this section ***after the date of the enactment of the District of Columbia Retirement Reform Act***…", the moment at which the federal government first attempted to hand off subsequent retirement liabilities to the Home Rule District of Columbia government. PUB. L. 96-122, Sec. 214 (emphasis added). Of course, it would later turn out that the District of Columbia would not be responsible for pre-1997 liabilities.

[2] For the sake of expediency, the Appellants' use of "pre-1997" or "post-1997" respectively refer to "prior to June 30, 1997" and "June 30, 1997 and after", as applicable to the 1997 Act.

The District of Columbia Retirement Protection Act of 1997 expressly superseded the inconsistent language of the District of Columbia Retirement Reform Act of 1979 found in D.C. Code § 5-723(e).

> This subtitle supersedes any provision of the Reform Act inconsistent with this subtitle and the regulations thereunder.

PUB. L. 105-33, Sec. 11084 (a)(1).

The § 5-723 (e) language is completely inconsistent with the 1997 Act as the § 5-723 (e) language is predicated entirely upon the fact, at the time, that responsibility of funding and administering all District of Columbia annuitants was transferred to the District of Columbia in 1979, a situation which was reversed with the 1997 Act. Any entitlement the District of Columbia had to offset annuity payments the District itself was paying was lost upon the United States Treasury's assumption of such payments in their entirety.

Under D.C. Act 15-489, the District of Columbia government must "treat former District government employees who are federal annuitants the same as former federal government employees who are federal annuitants by eliminating the reduction in pay of a former District government employee who is a reemployed federal annuitant." 51 D.C. REG. 8779 (2004). The Defendant relies solely on a vestige of the District of Columbia Retirement Reform Act of 1979 to offset federal pension payments to the

Plaintiffs from their present salaries, even though the Plaintiffs are indisputably "former District government employees who are federal annuitants".

> Notwithstanding section 8344 (a) of title 5, United States Code, the amendment made by section 2 of the District Government Reemployed Annuitant Offset Elimination Amendment Act of 2004 (D.C. Law 15–207) shall apply with respect to ***any individual*** employed in an appointive or elective position with the District of Columbia government after December 7, 2004.

PUB. L. 110-161, Sec. 807 (emphasis added).

None of this history or the copious conflicting language has ever been discussed or discerned by either this Court or the District Court. Yet, nearly every element originates from Congressional enactments and directly implicates federal funds. Contrary to the District of Columbia's assertion, there is no law of the case doctrine implicated herein. Neither the District Court nor this Court have ever reached the merits of the Appellants' claim that § 5-723 (e) was nullified by subsequent enactments, or was never applicable to them in the first place.

> Significantly, the law of the case doctrine "is discretionary"; "[i]t merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is not] a limit to their power." *Crane v. Crane*, 614 A.2d 935, 939 n.12 (D.C. 1992) (internal quotation marks and citation omitted). Under our case precedent, the third trial judge had the power to consider whether Mr. Graham should be reinstated as a defendant in his individual capacity, and we discern no abuse of discretion.

Nunnally v. Graham, 56 A.3d 130, 142-143 (D.C. 2012)

This Court's dicta relied upon by the District of Columbia to establish law of the case doctrine herein is particularly problematic for that purpose. In affirming the dismissal of the Appellants' constitutional claims, the D.C. Circuit made an unexplained conclusion that D.C. Code § 5-723 (e) is in some way applicable to the Appellants in the present day. This assertion ignored the entire tortured legislative history of public safety pension funding in the District of Columbia and a key point of contention by the Appellants, that the District of Columbia now offsets a pension that the District of Columbia ***does not pay***. In remanding the case to the District Court for further consideration of the Appellants' challenges to § 5-723 (e), this Court left the majority of their theories of relief unaddressed. If any of these theories later proves valid, this Court's premise for dismissing their constitutional claims is also necessarily nullified.

> Generally, "district courts should set out the reasons for their decisions with some specificity." *United States v. Woods*, 885 F.2d 352, 354 (6th Cir. 1989) (noting that "when a motion for summary judgment is granted,[] without any indication as to the specific facts and rules of law supporting the court's decision, it is difficult, except in the simplest of cases, for an appellate court to review such a decision."); see also *Bybee v. City of Paducah*, 22 Fed. Appx. 387 (6th Cir. 2001) (unpublished decision) (concluding that "the district court's order must be vacated. The district court's order is insufficient because it does not provide any indication as to the court's rationale for dismissing [plaintiff's § 1983] complaint …. Thus, a remand is necessary because the district court's order does not provide an

> adequate basis for appellate review"). Given the district court's lack of analysis, and, mere acknowledgment of Defendants' qualified immunity claim on the record during oral arguments, a remand would be more than appropriate.

Derfiny v. Pontiac Osteopathic Hosp., 106 Fed. Appx. 929, 936 (6th Cir. 2004) (unpublished). Accord, *Bowie v. Maddox*, 642 F.3d 1122, 1132 (D.C. Cir. 2011) ("Because the district court suggested no viable rationale for its order, we vacate the dismissal"); *Couveau v. American Airlines, Inc.*, 218 F.3d 1078, 1081 (9th Cir. 2000); *Vadino v. A. Valey Engineers*, 903 F.2d 253, 257-259 (3d Cir. 1990) (distinguishing FED. R. CIV. P. 52(a)).

> [T]he Court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle... The effort now made is, to apply the conclusion to which the Court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

Cohens v. Virginia, 19 U.S. 264, 401 (1821).

> If the District Court dismisses the case based on an incorrect reading of [*Mertens v. Hewitt Associates*, 508 U.S. 248 (1993)], the Second Circuit can correct its error, and if the Second Circuit does not do so this Court can grant certiorari. The Court's discussion of the relief available under § 502 (a)(3) and *Mertens* is purely dicta, binding upon neither us nor the District Court. The District Court need not read any of it--and, indeed, if it takes our suggestions to heart, we may very well reverse.

CIGNA Corp. v. Amara, 131 S. Ct. 1866, 1884 (2011) (SCALIA, J, concurring).

3. There is indisputable Federal Question jurisdiction herein.

The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 *et seq.*), prohibits the District of Columbia government from imposing "any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District". D.C. CODE § 1-206.02. The United States Code defines an income tax as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. § 110 (c).

The offset imposed against the Appellants is imposed at a direct 100% ratio against their pension payments, that the money is returned to the District's general fund and it is not used for some narrow specific purpose. "It is a question of federal law whether a municipal charge constitutes a tax." *Qwest Communs. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001) (citing *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000); *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992)). Herein, "immunity from state taxation is asserted on the basis

of federal law with respect to persons or entities in which the United States has a real and significant interest." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 471 (1976) (quoting *Confederated Salish & Kootenai Tribes etc. v. Moe*, 392 F. Supp. 1297, 1303 (D. Mont. 1974)).

The Appellants challenge an unnamed tax imposed upon them in violation of D.C. Code § 1-206.02 (a)(5). See *Banner v. United States*, 428 F.3d 303, 305 (D.C. Cir. 2005) ("[t]he local government of the District of Columbia is prohibited by Congress from imposing a 'commuter tax' -- from taxing the personal income of those who work in the District but reside elsewhere"). The concept that the interplay between the Federal Government and the home rule District of Columbia is not a federal question is simply unsupportable. "The Constitution gives Congress exclusive legislative authority in all matters pertaining to the District of Columbia." *Id*. (citing U.S. CONST. art. I, § 8, cl. 17). "Congress has delegated to the District the authority to tax the personal income of District residents; it has withheld such authority to tax non-residents who work in the District." *Id*. at 306-307.

> The Home Rule Act is thus a hybrid statute. Its impact extends beyond the narrow sphere of the District of Columbia to various federal employees and to the actual structure of the Department of Labor. In *Key v. Doyle*, 434 U.S. 59 (1977), the Supreme Court

> equated exclusively local provisions of the D.C. Code to laws "enacted by state and local governments having plenary power to legislate for the general welfare of their citizens." Section 204 of the Home Rule Act is not such a provision. A state or local statute cannot direct the federal government to affect transfers or to abolish positions altering its structure in the manner required by section 204.

Thomas v. Barry, 729 F.2d 1469, 1471 (D.C. Cir. 1984) (parallel citations, footnote omitted).

The District of Columbia Retirement Protection Act of 1997 provides that the "United States District Court for the District of Columbia shall have exclusive jurisdiction and venue, regardless of the amount in controversy… (1) Civil actions brought by participants or beneficiaries [to federal benefit payments under District of Columbia retirement programs], and (2) Any other action otherwise arising (in whole or part) under this chapter or the contract. D.C. Code § 1-815.02 (a). Even setting aside this express provision of federal venue within D.C. Code § 1-815.02 (a), the very nature of the federal legislation and the federal funds implicated mandate Federal Question Jurisdiction herein.

The factual allegations herein are inextricably intertwined with the Appellants' federal claims. "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or

controversy…" 28 U.S.C. § 1367 (a) (emphasis added). "[I]t is clear that section 1367 (a) authorizes a district court to exercise its supplemental jurisdiction in mandatory language." *Lindsay v. Gov't Employees. Ins. Co.*, 448 F.3d 416, 421 (D.C. Cir. 2006) (citing *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1509 (3d Cir. 1996) ("By its language § 1367 (a) confers jurisdiction in mandatory terms to include those cases 'which form part of the same case or controversy under Article III of the United States Constitution" (except as expressly excluded by statute or as provided for in subsections (b) and (c)); *McCoy v. Webster*, 47 F.3d 404, 406 n.3 (11th Cir. 1995) ("Section 1367(a) *requires* the district court to exercise supplemental jurisdiction over claims which are closely related to claims over which the district court has original jurisdiction." (emphasis added)); *Executive Software N. Am. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1555 (9th Cir. 1994) ("By use of the word 'shall,' the statute makes clear that if power is conferred under section 1367 (a), and its exercise is not prohibited by section 1367 (b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367 (c) applies.")).

"A federal claim and a state law claim form part of the same Article III case or controversy if the two claims derive from a common nucleus of

operative fact such that the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case." *Lindsay*, 448 F.3d at 423-424 (quoting *Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-165 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)) (additional quotation marks omitted, alteration in original))). "Nonfederal claims are part of the same 'case' as federal claims when they… are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 855-856 (9th Cir. 2004) (quoting *Trs. of the Constr. Indus. & Laborers Health & Welfare v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir. 2003) (internal quotation marks omitted)). See also *Osborn v. Haley*, 549 U.S. 225, 245 (2007) (quoting *Mine Workers*, *supra*).

The District of Columbia failed to *even plead* any of the four categories enumerated in section 1367 (c) and instead relied solely upon the unsupportable proposition that once the Appellants' FLSA claim was fully adjudicated, the District Court could simply eschew supplemental jurisdiction. The District of Columbia now offers no additional argument herein and simply adopts the District Court's unfounded position.

> It is indeed unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable

> promptness the cases properly filed in or removed to that court in accordance with the applicable statutes. But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.

Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 344-345 (1976) (citing *McClellan v. Carland*, 217 U.S. 268 (1910); *Chicot County v. Sherwood*, 148 U.S. 529 (1893); *Hyde v. Stone*, 61 U.S. 170 (1858)).

> Considering *Thermtron* together with [*Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)] and [*Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)], we conclude the district court lacked the power to remand this case. The district court relied neither on a ground specified in § 1447 nor on any ground upon which it might instead have dismissed the case. Rather, the district court remanded the case simply because Barksdale's counsel said Superior Court would be a more congenial forum for him, much as the district court in *Thermtron* had remanded that case merely "because the district court consider[ed] itself too busy to try it." 423 U.S. at 344. Hence, we hold the district court erred in remanding Barksdale's case to Superior Court.

Barksdale v. Wash. Metro. Area Transit Auth., 512 F.3d 712, 716 (D.C. Cir. 2008).

"[T]he discretion to decline supplemental jurisdiction is available only if founded upon an enumerated category of [28 U.S.C. § 1367 (c)].'" *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685, 701 (2d Cir. 2012) (quoting *Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir. 2002) (quoting *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d

442, 448 (2d Cir. 1998) (alteration in *Treglia*))). That the Appellants have prevailed upon one of their federal claims forming part of the same case and controversy herein is not an enumerated cause to dismiss what are questionably state claims under § 1367 (c). Therefore, it could not form the basis for dismissal as demanded by the District of Columbia.

4. The District's offset violates the Public Salary Tax Act.

The District Court cursorily dismissed the Appellants' assertion that the offset imposed upon them is not a tax on pension benefits, nearly parroting its failed argument that such offset did not violate the Fair Labor Standards Act by blurring the distinction between salaries for work performed and existing entitlements.

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111 (a).

> Plaintiffs explicitly recognize as much in their Opposition when they state that the District has no means of actually taxing plaintiffs' annuity benefits, "since such benefits are paid directly by the United States Treasury." (Opp. at 17.) This conclusion is further supported by the fact that plaintiffs are entitled to one hundred percent of their pension benefits regardless of whether they are rehired by the District. To be sure, the question of whether the District is entitled to withhold parts of plaintiffs' DGS salaries is important for the adjudication of

> plaintiffs' other legal claims, however, because plaintiffs' pension benefits were never reduced, they cannot constitute a tax in violation of the Public Tax Act.

Cannon v. Dist. of Columbia, 12-CV-0133 ESH at 15 (D.D.C. Jan. 6, 2014).

The District Court's distinction between taxes directly upon pensions and taxes upon salaries because of pensions has been categorically refuted by the Supreme Court.

> The dissent argues that this tax is nondiscriminatory, and thus constitutional, because it "draws no distinction between the federal employees or retirees and the vast majority of voters in the State." *Post*, at 823. In [*Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376 (1960)], however, we faced that precise situation: an equal tax burden was imposed on lessees of private, tax-exempt property and lessees of federal property, while lessees of state property paid a lesser tax, or in some circumstances none at all. Although we concluded that "[u]nder these circumstances, there appears to be no discrimination between the Government's lessees and lessees of private property," 361 U.S., at 381, we nonetheless invalidated the State's tax. This result is consistent with the underlying rationale for the doctrine of intergovernmental tax immunity. The danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it. As we observed in *Phillips Chemical Co.*, "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." *Id*., at 385.
>
> We also take issue with the dissent's assertion that "it is peculiarly inappropriate to focus solely on the treatment of state governmental employees" because "[t]he State may always compensate in pay or salary for what it assesses in taxes." *Post*, at 824. In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would

> result in higher federal income tax payments in some circumstances. This fact serves to illustrate the impact on the Federal Government of the State's discriminatory tax exemption for state retirees. Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 815 n.4 (1989).

The District Court makes no attempt to meaningfully distinguish *Davis*, and instead cites *Davis* for a proposition inapposite to which it stands. *Cannon*, Op. at 15-16 n.5 (D.D.C. Jan. 6, 2014) (citing *Davis*, 489 U.S. at 817). *Davis* makes no distinction whatsoever as to the mechanism of taxation, only the end result. "[T]he Michigan Income Tax Act violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." *Id*.

> "Discrimination" is the "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." BLACK'S LAW DICTIONARY 534 (9th ed. 2009); accord, *id*., at 420 (5th ed. 1979); see also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 648 (1976) ("discriminates" means "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit"). To charge one group of taxpayers a 2% rate and another group a 4% rate, if the groups are the same in all relevant respects, is to discriminate against the latter.

CSX Transp., Inc. v. Ala. Dep't of Revenue, 131 S. Ct. 1101, 1108 (2011).

Whether a state's "tax fits within the Public Salary Tax Act's allowance is a question of federal law. The practical impact, not the State's name tag, determines the answer to that question." *Jefferson County v.*

Acker, 527 U.S. 423, 439 (1999) (applying Buck Act definition of tax, 4 U.S.C. § 110, to § 111, citing *Detroit v. Murray Corp. of America*, 355 U.S. 489, 492 (1958) ("In determining whether the tax violates the Government's constitutional immunity we must look through form and behind labels to substance.")) "[I]rrespective of what the tax is called, if its purpose is to produce revenue, it is an income or a receipts tax under the Buck Act." *Humble Oil & Refining Co. v. Calvert*, 464 S.W.2d 170, 175-176 (Tex. Civ. App. 1971). Accord, *United States v. Lewisburg Area School Dist.*, 539 F.2d 301, 309 (3d Cir. 1976) (citing *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953)); *Portsmouth v. Fred C. Gardner Co.*, 215 Va. 491, 494 (1975) ("It does not require that the tax be denominated an income tax or that it conform to the federal income tax. If the tax in question is based upon income and is measured by that income in money or money's worth, as a net income tax, gross income tax, or gross receipts tax, it is an income tax", citing *Humble Oil & Refining Co. v. Calvert*, 478 S.W.2d 926, 930 (Tex. 1972)).

> Section 111 was enacted as part of the Public Salary Tax Act of 1939, the primary purpose of which was to impose federal income tax on the salaries of all state and local government employees. Prior to adoption of the Act, salaries of most government employees, both state and federal, generally were thought to be exempt from taxation by another sovereign under the doctrine of intergovernmental tax immunity. This doctrine had its genesis in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), which held that the State of Maryland could not

> impose a discriminatory tax on the Bank of the United States. Chief Justice Marshall's opinion for the Court reasoned that the Bank was an instrumentality of the Federal Government used to carry into effect the Government's delegated powers, and taxation by the State would unconstitutionally interfere with the exercise of those powers. *Id*., at 425-437.
>
> For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another. *See Collector v. Day*, 11 Wall. 113, 124-128 (1871) (invalidating federal income tax on salary of state judge); *Dobbins v. Commissioners of Erie County*, 16 Pet. 435 (1842) (invalidating state tax on federal officer). This rule "was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract." *South Carolina v. Baker*, 485 U.S. 505, 518 (1988).

Davis, 489 U.S. at 810-811.

> As a threshold matter, the State argues that § 111 applies only to current employees of the Federal Government, not to retirees such as appellant. In our view, however, the plain language of the statute dictates the opposite conclusion. Section 111 by its terms applies to "the taxation of pay *or compensation for personal services as an officer or employee* of the United States." (Emphasis added). While retirement pay is not actually disbursed during the time an individual is working for the Government, the amount of benefits to be received in retirement is based and computed upon the individual's salary and years of service. 5 U.S.C. § 8339 (a). We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the Government. See, *e. g., Zucker v. United States*, 758 F.2d 637, 639 (CA Fed.), *cert. denied*, 474 U.S. 842 (1985); *Kizas v. Webster*, 227 U. S. App. D. C. 327, 339, 707 F. 2d 524, 536, (1983), *cert. denied*, 464 U.S. 1042 (1984); *Clark v. United States*, 691 F. 2d 837, 842 (CA7 1982). And because these benefits accrue to employees on account of their service to the Government, they fall squarely within the category of compensation for services rendered "as an officer or employee of the United States." Appellant's federal retirement benefits are deferred

> compensation earned "as" a federal employee, and so are subject to § 111.

Id. at 808 (footnote omitted).

> Any other interpretation of the nondiscrimination clause would be implausible at best. It is difficult to imagine that Congress consented to discriminatory taxation of the pensions of retired federal civil servants while refusing to permit such taxation of current employees, and nothing in the statutory language or even in the legislative history suggests this result. While Congress could perhaps have used more precise language, the overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of the compensation.

Id. at 810.

The District of Columbia offsets the Appellants' salaries at a 100% ratio to their pensions funded and administered by the United States Treasury. The offsets benefit the District of Columbia by returning the funds to the general fund and detriment the United States Government by impacting a federal benefit promised to the Appellants.[3] The offset, regardless of the mechanism, is discriminatory and therefore violates the Public Salary Tax Act. Equally so here, if § 5-723 (e) is now found to violate the Public Salary Tax Act, the prior dismissal of the Appellants'

[3] Contrary to the false assertion of the District of Columbia, Mot. at 6, the very language of D.C. Code § 1-611.03 demonstrates it discriminatorily does not offset pensions from certain other sources.

constitutional claims are again invalidated. Any "novel issue" regarding the Appellants' offsets is profoundly interrelated to the history of Home Rule. If these issues are not entirely federal, they are indisputably "hybrid" under *Thomas, supra*, thus invoking the District Court's subject matter jurisdiction.

VI. Conclusion

There remain numerous complicated questions of federal law remaining unanswered or unexplained in the present case. The District of Columbia having failed to make meaningful argument in the District Court and the District Court having failed to rebut the Appellants' competent authorities to the contrary, the District is now in no way entitled to summary affirmance on any point herein. The District of Columbia's Motion should be DENIED.

Respectfully submitted, this seventh day of April, 2014,

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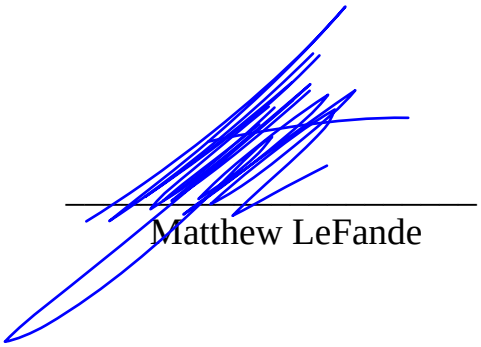
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Opposition were served via Appellate ECF and via United States Postal Service Priority Mail, postage prepaid, to the District of Columbia Solicitor General, this seventh day of April, 2014.



Matthew LeFande