NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 14-7014

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

LOUIS P. 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

IRVIN B. NATHAN
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

LOREN L. ALIKHAN
Deputy Solicitor General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-6635
Richard.Love@dc.gov

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*.—Plaintiffs appeal from the January 6, 2014 Memorandum Opinion and Order (Huvelle, J.) granting the defendant's motion to dismiss their constitutional and Public Salary Tax Act claims and remanding the remaining unresolved local-law claims to the Superior Court of the District of Columbia. ECF Docket No. 57, 58.

C. *Related cases*.—The dismissal of plaintiffs' constitutional claims was previously affirmed by this Court in *Cannon v. District of Columbia*, 717 F.3d 200 (D.C. Cir. 2013).

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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

Statutes and Regulations

GLOSSARY

FLSA	Fair Labor Standards Act
Home Rule Act	District of Columbia Self-Government and Governmental Reorganization Act
JA	Joint Appendix
Tax Act	Public Salary Tax Act

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367 but, as discussed below, correctly declined in the end to assert supplemental jurisdiction over certain local-law claims. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In a prior appeal, this Court affirmed the dismissal of all of the federal claims raised by six District of Columbia employees that 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. A Fair Labor Standards Act claim brought by these employees was remanded for entry of judgment in favor of three of them and a determination of damages. Consequently, this Court also vacated the district court's decision not to exercise supplemental jurisdiction over the claims brought under District law. Upon remand, the district court duly entered judgment on the Fair Labor Standards Act claim, dismissed the employees' remaining federal claims, and declined to exercise supplemental jurisdiction over their local-law claims. The issues presented in this appeal are:

1. Whether the district court properly refused to reconsider the due process and takings claims that the employees reasserted after this Court affirmed their dismissal?

2. Whether the district court properly dismissed the employees' claim that the offset is a tax on their pension benefits that violates the anti-discrimination clause of the Public Salary Tax Act where the offset to their salaries is not a tax on pension benefits and in any event is not based on the source of the pension's funds?

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 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, pursuant to District law. The employees raised several federal claims—including a statutory claim under the Fair Labor Standards Act ("FLSA") 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. The employees appealed and this Court affirmed the dismissal of all of their federal claims except for the FLSA claim. *Cannon v. District of Columbia*, 717 F.3d 200, 202 (D.C. Cir. 2013). It directed that summary judgment be entered for the employees on that claim and remanded

for a determination of damages. *Id*. at 206. Because it remanded the FLSA claim, the Court also vacated the district court's decision not to exercise supplemental jurisdiction over the employees' local-law claims. *Id*. at 208-09.

Upon remand, the employees filed, on September 24, 2013, a second amended complaint that raised the same claims that they had previously pled, and added a federal claim under the Public Salary Tax Act ("Tax Act"), 4 U.S.C. § 111(a). *Compare* Doc. 50 *with* Joint Appendix ("JA") 27-56 (plaintiffs' first amended and first supplemental complaints). On October 18, the District filed a motion to dismiss all but the FLSA claim. Doc. 51. On January 6, 2014, the district court entered judgment on the FLSA claim, dismissed appellants' constitutional and Tax Act claims, and remanded the District law claims to the Superior Court. JA 103-14. On January 27, the court entered an order and judgment amount in favor of the three employees who had brought claims under the FLSA. JA 115. On February 5, the employees filed an appeal of the court's January 6 order. JA 116.

1. The Employees' Second Amended Complaint.

The six retired Metropolitan Police Department officers who were receiving retirement benefits were re-hired at various points after 2004 by the District's Department of General Services, Protective Services Division. Doc. 50 ¶ 1; JA 73.

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 73. 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. Doc. 50 § 46; JA 73.

In their second amended complaint, they reassert 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. Doc. 50 ¶¶ 5, 7. 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. Doc. 50 ¶¶ 65-181. Again asserting that the reduction in their salaries violated the District Government Reemployed Annuitant Offset Elimination Amendment Act, D.C. Code § 1-611.03,[1] the employees alleged that they were deprived of a property right in violation of the Fifth Amendment's Due Process and Takings Clauses. Doc. 50 ¶ 66. Because the salaries of other officials who had retired from and been rehired by the Metropolitan Police Department itself (rather than by the Department of General Services like the plaintiff employees) were increased to "offset the offset," Doc. 48, they again alleged a violation of the equal protection component of the Fifth Amendment. Doc. 50 ¶¶ 63-64, 91. Three employees alleged that their pay was reduced below the minimum wage mandated by the FLSA, 29 U.S.C. § 201 *et seq*. Doc. 50 ¶¶ 72-75. And all of the employees alleged that the offset is a discriminatory tax on their pension benefits that violates the Tax Act. Doc. 50 ¶¶ 99-106. The employees also reasserted two claims under the First Amendment: that Louis Cannon was terminated and the employees' pay withheld in retaliation for bringing this lawsuit. Doc. 50 ¶¶ 127-37. The local-law claims again included

[1] 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. Doc. 50 ¶¶ 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).

that the reduction in their pay amounted to "a direct tax upon non-residents of the District of Columbia" in violation of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-201.01 *et seq*. ("Home Rule Act"). Doc. 50 ¶¶ 94-96. Claims for defamation and violations of the District of Columbia Whistleblower Protection Act, D.C. Code § 1-615.51 *et seq*., were also reasserted. Doc. 50 ¶¶ 139-69.

2. The District Court's Decision.

On January 6, 2014, the district court issued a memorandum opinion that addressed the claims that the employees raised in their second amended complaint. JA 98-114. The district court refused to reconsider the employees' constitutional claims, finding that they were the same constitutional claims it had previously considered and dismissed, and that this Court affirmed that dismissal. JA 103-04; *see also Cannon*, 717 F.3d at 206 ("The district court found the plaintiffs' constitutional claims meritless, and we agree."); *id*. at 208 ("We affirm the district court's judgment on the constitutional claims . . . .").

The district court also rejected the employees' contention that the District's offset of their salaries by the amount of their pensions violated the anti-discrimination provision of the Tax Act. JA 105-07. In the employees' view, the offset is a tax on their pensions (funded by the United States Treasury) that those receiving pensions from the "District of Columbia Civil Service Retirement

System" did not incur. Doc. 50 at ¶¶ 99-102. The court found that since the offset is applied to the employees' salary, it cannot be a tax against any pension funds (federally funded or otherwise). JA 106. The district court also held that even if the offsets were considered taxes on the employees' pension benefits, the alleged taxation does not constitute source discrimination because the offset applies to police and firefighters' pension benefits regardless of whether they are paid for by federal funds (as pensions for work done on or before June 30, 1997 are) or by District funds (as pensions for work done on or after July 1, 1997 are). JA 107. The court also found the District liable on the employees' FLSA claim, consistent with this Court's earlier direction, and granted the employees time to respond to the District's proposed calculation of damages. JA 108-09.

Thus, except for the calculation of FLSA damages, only the local-law claims remained. Concluding that it did not have exclusive jurisdiction over any District law claim, the court declined to exercise supplemental jurisdiction and remanded those claims to the Superior Court. JA 110-13.

On January 27, 2014, the court entered judgment on the employees' FLSA claims. JA 115. On February 5, the employees filed a notice of appeal.[2]

---

[2] The employees do not challenge the dismissal of their claims under the equal protection component of the Fifth Amendment (Count III) and the First Amendment (Counts X and XI).

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).

A decision whether to retain jurisdiction over pendent claims after the federal claims are dismissed is reviewed for an abuse of discretion. *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005).

SUMMARY OF ARGUMENT

This Court previously affirmed dismissal of the employees' due process and takings claims and, under both the law-of-the case and law-of-the circuit doctrines, it should decline to reconsider those claims here. The employees merely repeat, often verbatim, their previous arguments, and provide no new evidence, let alone evidence to demonstrate that the Court's prior decision was clearly erroneous and unjust.

The employees fail to state a claim under the Tax Act because the salary offset they complain about was not a tax on their pension benefits and, even if it was, the alleged tax did not discriminate based on the source of their benefits.

Finally, the district court properly remanded the employees' remaining claims to the Superior Court because none conferred exclusive jurisdiction in the district court and there were several bases for refusing to exercise supplemental jurisdiction under 28 U.S.C. § 1367.

ARGUMENT

I. The Employees May Not Seek Reconsideration Of The Due Process And Takings Claims That They Reasserted After This Court Affirmed Their Dismissal.

"'Law-of-the-case doctrine' refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided . . . by that court or a higher one in earlier phases."

Crocker v. Piedmont Aviation Inc., 49 F.3d 735, 739 (D.C. Cir. 1995). The doctrine applies to questions that are decided "explicitly or by necessary implication." *Id*. Where, as here, there are multiple appeals taken within a single case, "law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *Id*. While it is not a jurisdictional doctrine, lower courts should be "loathe" to revisit an issue that has already been decided "in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1983) (internal quotation marks and citation omitted).

Similarly, "the law-of-the circuit doctrine" provides that "the same issue presented in a later case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). Unlike law-of-the case, which "is a prudential creation of the courts, the law-of-the-circuit doctrine is derived from legislation and from the structure of the federal courts of appeals" which "sit in panels" of judges where one-three judge panel is precluded from overruling "another three-judge panel of the court." *Id*. at 1395.

This Court previously affirmed the dismissal of the due process and takings claims that the employees reasserted on remand, Doc. 50 ¶¶ 65-67, the dismissal of which they, again, challenge here (Br. 21-33). In the prior appeal, this Court found

that the employees "have no entitlement to *both* full salary *and* their annuities" and, consequently, "their due process and takings claims fail." *Cannon*, 717 F.3d at 207. Accordingly, the district court correctly rejected as "unjustified," the employees' attempt to relitigate these claims, observing that when an issue has been affirmatively decided on appeal, "the trial court is generally precluded from reconsidering that issue." JA 104 (citing *Crocker*, 49 F.3d at 739).

The employees argue that this Court never addressed the merits of their claim that D.C. Code § 5-723(e) "was nullified by subsequent enactments" and they contend that this Court remanded "for further consideration of [their] challenges to [D.C. Code] § 5-723(e)," leaving "the majority of their theories of relief unaddressed." Br. 19-20. Neither assertion is correct.

First, this Court rejected the employees' contention that D.C. Code § 5-723(e) is inapplicable to them because "it has been superseded by amendments" to D.C. Code § 1-611.03(b). *Cannon*, 717 F.3d at 206. While that section prohibits reducing the pay of a reemployed individual for any retirement benefits he or she receives "pursuant to 5 U.S.C. § 8331," the Court found that the employees "do not receive pension benefits under 5 U.S.C. § 8331." *Id*. (internal quotation marks and citation omitted). That provision is part of Subchapter III, "Civil Service Retirement," which regulates retirement benefits under "the Civil Service Retirement and Disability Fund." 5 U.S.C. § 8331(1)(L)(ii), (5). That fund is

separate and distinct from the Police Officers and Fire Fighters Retirement 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 Metropolitan Police Department officers receiving annuities from the Police Officers and Fire Fighters' Retirement Fund, not from the Civil Service Retirement and Disability Fund. *Cannon*, 717 F.3d at 202; JA 98; Doc. 50 ¶ 101. As this Court previously found, because the employees are subject to another retirement system, the exemption in D.C. Code § 1-611.03(b) does not apply to them. 717 F.3d at 206. 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.

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). Br. 23. And they 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." The key is thus the pension system, not the source of funding. Because the employees receive their pension

benefits from a District retirement system, they are subject to the offset mandated by D.C. Code § 5-723(e). Thus, as this Court previously found, the employees "have no entitlement to *both* full salary *and* their annuities," 717 F.3d at 207, a finding that "explicitly or by necessary implication" rejected all of the employees' theories of relief relative to their due process and takings claims. *Crocker*, 49 F.3d at 739.

Next, this Court did not remand any of the employees' constitutional claims for further consideration. It held that all of the employees' "federal challenges" to the offset of their salaries were "meritless," except for the FLSA claim brought by three employees. *Cannon*, 717 F.3d at 202; *see also id*. at 206 ("The district court found the plaintiffs' constitutional claims meritless, and we agree."). The Court "affirm[ed] the district court's judgment on the constitutional claims," and remanded only "the claim under the FLSA." *Id*. at 208. The district court, taking this Court's mandate seriously, proceeded on the FLSA claims and dismissed the constitutional claims. JA 103-4, 108-09.

On appeal now, the employees do not even attempt to explain why their constitutional claims are not barred by the law-of-the case and law-of-the circuit doctrines. Instead, the employees' brief provides a verbatim reiteration of the due process and takings arguments raised in their prior brief. *Compare* Br. 21-33 *with* Appellants' Br. in No. 12-7064. They fail to cite any intervening change in the law

or any other evidence not previously provided that demonstrates that the Court's prior decision was clearly erroneous and manifestly unjust. While the law-of-the case doctrine is not jurisdictional, it is designed to prevent counsel from repeatedly litigating issues that have already been decided in a prior iteration of the case, which is precisely what the employees are doing here. Moreover, when, as here, "both [the law-of-the case and law-of-the circuit] doctrines are at work, the law-of-the-circuit doctrine should increase a panel's reluctance to reconsider a decision made in an earlier appeal in the same case." *LaShawn A.*, 87 F.3d at 1395. This Court should not exercise its discretion to revisit issues it already decided on the employees' first visit to this Court, simply because they have elected to make the trip again.

II. The District Court Properly Dismissed The Employees' Tax Act Claim Because The Offset To Their Salaries Is Not A Tax On Pension Benefits And In Any Event Is Not Based On The Source Of The Pension's Funds.

The Tax Act, in relevant part, provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . 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. In *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), the Court found that this 1939 statute "waives whatever immunity past and

present federal employees would otherwise enjoy from state taxation of salaries, [or] retirement benefits . . . 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." 489 U.S. at 810. There the Court considered a Michigan tax scheme that "exempt[ed] from taxation all retirement benefits paid by the State or its political subdivisions, but levie[d] an income tax on retirement benefits paid by . . . the Federal Government." *Id*. at 805. It found it "undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees." *Id*. at 814.

Here the employees complain that the District's offset of their salaries by the amount of their pensions violated the anti-discrimination provision of the Tax Act. Doc. 50 ¶¶ 98-106. In their view, the offset is a "tax" on their pension benefits. Doc. 50 ¶ 105. This "tax," they say, violates the anti-discrimination clause of the Tax Act because the District immunizes from offset the pensions of "participants in the [District's] Civil Service Retirement System," which, they allege, is funded by the District, but does not grant the same immunity to participants in the Police Officers and Fire Fighters Retirement Fund, which, they allege, is "funded by the U.S. Treasury Trust Fund." Doc. 50 ¶¶ 99-105. The district court correctly found that the employees fail to state a claim under the Act. JA 106-08.

First, the offset required by D.C. Code § 5-723(e) is not a tax on the employees' pension benefits. It is not a tax at all. 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. *Cannon*, 717 F.3d at 202 ("The District enforced a law aimed at curbing double-dipping against the six plaintiffs . . . ."); *cf. Rural Tel. Coal.*, 838 F.2d at 1314 ("'The definition of 'tax' in the abstract is a metaphysical exercise in which courts do not have occasion to engage.'" (quoting *Brock v. WMATA*, 796 F.2d 481, 489 (D.C. Cir. 1986)).

And even assuming the offset was a tax, at most it would be a tax on the salaries they received for their post-retirement employment with the Department of General Services. Since the offset is applied to salary, it cannot be a tax against any pension funds (federally funded or otherwise). JA 106 ("[B]ecause plaintiffs' pension benefits were never reduced, they cannot constitute a tax in violation of the Public [Salary] Tax Act.").

Second, even if the offsets were considered taxes on the employees' pension benefits, the alleged taxation does not constitute source discrimination because the offset applies to police and firefighters' pension benefits regardless of whether they are paid for by federal funds (as pensions for work done on or before June 30, 1997

are) or by District funds (as pensions for work done on or after July 1, 1997 are). JA 107 (explaining that the offset required by D.C. Code § 5-723 "does not differentiate between pre-and post-1997 benefits"). Thus "even under [appellants'] view, non-federal pension benefits—benefits paid for work done after 1997 by the District—are taxed and the alleged discrimination is not based on the federal or non-federal source of the funds." JA 107-08.

The employees fail even to address this second point, arguing instead that the offset is a tax and that whether it is imposed on their salaries or their pension benefits is a meaningless distinction. Br. 10-15. Not so. As the district court noted, even if the offset is a tax, the salient question is "what income is being taxed"? JA 106 n.4. There can be no source discrimination if it is their District-paid salaries and not their federally funded pensions that are taxed. And the district court correctly found that it was their District salaries, a conclusion supported—if not compelled—by this Court's holding in the previous appeal that the offset applied to their new salaries for purposes of determining their compensation. *Cannon*, 717 F.3d at 205. And while the employees try, they cannot have it both ways. JA 107 ("For purposes of the FLSA, [appellants] argued (and the Court of Appeals agreed) that the offset applied to their new salaries such that they were not paid the minimum wage to which they were entitled. . . . [P]laintiffs cannot now claim that the offset constitutes a tax on their pension benefits and not a reduction

of their [new District] salaries."). The fact that the employees' "state wages are reduced and not their pension benefits . . . also distinguishes the present case from *Davis*." JA 106 n.5.

In any event, there is no discrimination based on the source of the annuity payment even if the offsets were considered taxes on the employees' pension benefits. The statute requires an offset to "the salary of *any* annuitant who first became entitled to an annuity" under the Police Officers and Fire Fighters Retirement Fund "after November 17, 1979, and who is subsequently employed" by the District. D.C. Code § 5-723(e) (emphasis added). Thus, as the district court found, "D.C. Code § 5-723 does not differentiate between pre-and post-1997 benefits." JA 107. However, the U.S. "Treasury Department is responsible for paying [retirement] benefits attributable to police officer or firefighter service performed on or before June 30, 1997" while the District's Retirement Board "is responsible for paying benefits attributable to" service performed after that date. *See* District of Columbia Retirement Board, District of Columbia Police Officers' and Firefighters' Retirement Plan, Summary Plan Description-2012, at 1-2;[3] *see also Rivera v. Lew*, No. 14-SP-117, 2014 WL 4450507, slip op. at 3-4 (D.C. Sept.

[3] In its prior decision, this Court took judicial notice of the Summary Plan Description. *Cannon*, 717 F.3d at 205 n.2. It is available at http://dcrb.dc.gov/publication/police-officers-and-firefighters-summary-plan-description.

11, 2014). Accordingly, the offset cannot violate the Tax Act's anti-discrimination clause because it applies to police and firefighters' pension benefits regardless of whether they are paid by federal or District funds. Furthermore, it also does not violate the Act's anti-discrimination clause because, as explained above, imposition of or exemption from the offset is based upon the pension system, not the source of funding.

Based on any of these independent grounds, the district court correctly concluded that the employees failed to state a claim under the Tax Act.

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 110-14. The district court correctly rejected the employees' argument that it has exclusive jurisdiction over some of their claims and properly exercised its discretion under 28 U.S.C. § 1367 to refuse to exercise supplemental jurisdiction. JA 110-13. 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 Police Officers and Firefighters' Retirement Fund, among other funds, is a "tax" upon non-residents in violation of

D.C. Code § 1-206.02(5), the Home Rule Act provision that prohibits the Council of the District of Columbia from imposing any tax on the personal income of non-residents. Br. 33-35. 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. 34-35.

Even if the offset were a tax, however, the district court would lack jurisdiction over the employees' tax claims. This Court has held that the Superior Court has exclusive jurisdiction over challenges to District taxes, 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. 34. 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." Doc. 50 ¶ 50. Their salary, not their pension, was reduced. No person's pension benefits (federal, District, or otherwise) are affected at all here. *Cannon*, 717 F.3d at 206 ("§ 5-723(e) surely does not allow the District to interfere with [the employees'] pensions."). Thus, this action was not "pursuant to" or "arising . . . under" Chapter 8, and so D.C. Code § 1-815.02(a) is irrelevant, as the district court originally found and refused to reconsider on remand. JA 95, 111.

Finally, the employees' argument that their local-law and federal claims are inter-related, Br. 36-39, is irrelevant because the district court's dismissal of "all claims over which it has original jurisdiction" is a recognized exception to exercising supplemental jurisdiction under 28 U.S.C. § 1367. 28 U.S.C. § 1367(c)(3).[4]

[4] The district court also correctly found that the employees' "remaining claims raise novel issues of D.C. law" and "substantially predominate[]" over the claims for which, at the time, it had original jurisdiction, two other recognized exceptions to exercising supplemental jurisdiction under 28 U.S.C. § 1367. *See* 28 U.S.C. § 1367(c)(1) & (2); JA 112-13.

CONCLUSION

This Court should affirm the order of the district court.

Respectfully submitted,

IRVIN B. NATHAN
Attorney General for the District of Columbia

TODD S. KIM
Solicitor General

LOREN L. ALIKHAN
Deputy Solicitor General

/s/ RICHARD S. LOVE
RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
(202) 724-6635

September 2014

CERTIFICATE OF SERVICE

I certify that on September 26, 2014, an electronic copy of this brief was served through the Court's ECF system, to:

Matthew August LeFande
4585 North 25th Road
Arlington, VA 22207

/s/ RICHARD S. LOVE
RICHARD S. LOVE

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 5,094 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.

/s/ RICHARD S. LOVE
RICHARD S. LOVE