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

THE DISTRICT OF COLUMBIA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY AFFIRMANCE

On March 24, 2014, the District of Columbia moved for summary affirmance of the district court's order that dismissed appellants' constitutional and Public Tax Act claims and remanded their remaining claims to the Superior Court of the District of Columbia. Appellants filed an opposition to the motion for summary affirmance on April 7. The District of Columbia submits this brief reply to address those few issues raised in appellants' opposition that were not already addressed in the District's motion for summary affirmance.

I. The Court Should Not Exercise Its Discretion To Reconsider Claims On Which It Has Already Affirmed.

The dismissal of appellants' constitutional claims was previously affirmed by this Court in *Cannon v. District of Columbia*, 717 F.3d 200, 206, 208 (D.C. Cir.), and the doctrine of law of the case precludes appellants from reasserting them. Appellants argue that the law of the case doctrine is inapplicable because it is a discretionary doctrine and that in previously affirming the dismissal of their constitutional claims, the Court "ignored . . . a key point of contention." Opposition 6. They mistakenly rely upon a case that is not binding on this Court, *Nunnally v. Graham*, 56 A.3d 130 (D.C. 2012), which in any event concerned appellate review of interlocutory orders from the trial court, not a prior appellate court decision that affirmed, in relevant part, a final district court order, as occurred here. Moreover, appellants' opposition merely repeats the arguments they raised in their prior appeal; they fail to cite any intervening change in the law or any other evidence not previously argued that demonstrates that the Court's prior decision was clearly erroneous and results in manifest injustice. 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 appellants are doing here. This Court should not exercise its discretion to revisit issues it already decided on appellants' first visit to this

Court, simply because appellants have elected to make the trip again. *Crocker v. Piedmont Aviation Inc.*, 49 F.3d 735, 739-40 (D.C. Cir. 1995).

II. Appellants' Claim That The Offset Is An Illegal Tax On Non-District Residents Does Not Confer Federal Question Jurisdiction.

In their opposition, appellants contend that federal question jurisdiction is conferred by virtue of their claim that the offset, which is applicable to any District employee receiving a retirement annuity from the District of Columbia Police Officers and Fire Fighters' Retirement Fund, 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. Opposition 8-10. They contend that whether the offset is a "tax" is a question of federal law. Opposition 8. 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.

Appellants' 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*. ("'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))).

Furthermore, even if the offset is a tax, the district court would still lack jurisdiction over appellants' tax claims. This Court has held that the Superior Court has exclusive jurisdiction over challenges involving District of Columbia taxes, even where federal or constitutional issues are raised. *Jenkins v. Wash. 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.").

CONCLUSION

The Court should summarily affirm the order of the district court.

Respectfully submitted,

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April 2014

CERTIFICATE OF SERVICE

I certify that on April 14, 2014, an electronic copy of this reply was served through the Court's ECF system, to:

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