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

APPELLANTS' REPLY BRIEF

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

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II. Summary of the Argument.

The District of Columbia has made an Opposition nearly bereft of analysis of those authorities controlling the Appellants' claims. What rebuttal the District of Columbia does make regarding the Appellants' argument is self-contradictory, and argued in direct conflict with such authorities without any attempt to distinguish or reverse existing law. The District of Columbia mentions *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803 (1989), but fails to even discuss the Appellants' demonstration that *Davis* is controlling, on point, and remains in direct conflict with nearly every single point made by the District. Indeed, the District of Columbia ***fails to offer a single published post-Davis case*** cited in its cursory and conclusory argument against the Appellants' Public Salary Tax Act claims.

III. Argument

1. *Davis* is controlling law.

In their Opening Brief, the Appellants offer *Davis* for several propositions. First, the offset imposed upon the Appellants "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over over retired federal employees", in this instance, the Appellants whose retirement annuities are paid by the United

States Treasury. *Davis*, 489 U.S. 817. Second, that federal pension payments are squarely protected by the anti-discrimination provisions of the Public Salary Tax Act. *Id*. at 808. Third, that the District of Columbia's mechanism or intent of the offset, reducing salaries to defeat purported "double dipping" against existing pensions, are of no consequence to implicating the protection of the Act, only that the federal government's efficacy in making such pension payments is diminished. *Id*. at 810-811. *Davis*, standing alone, establishes the District of Columbia's violation of the Public Salary Tax Act.

The federal judiciary invariably continues to rely upon *Davis* as black letter law on these points to the present day. *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 131 S. Ct. 1101, 1103 (2011); *Jefferson County v. Acker*, 527 U.S. 423, 437 (1999); *Swanson v. Powers*, 937 F.2d 965, 966-967, 970 (4th Cir. 1991). The District of Columbia offers no authorities to the contrary and does not even begin to suggest that *Davis* does not control herein.

2. *Davis* defeats <u>all</u> of the District of Columbia's Public Salary Tax Act arguments.

Despite each of the above points being cogently set forth in the Appellants' Opening Brief with citations and quotations in support, the District of Columbia proceeds without even the slightest acknowledgment

that this standing Supreme Court decision lies in direct conflict with their position, instead relying solely upon the equally unsupported decision by the District Court.

A. "The key is thus the pension system, not the source of the funding." Opp'n Br. at 12.

> 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) (emphasis added).

The District of Columbia asserts that, despite the Annuitants originally being federal annuitants as pre-1979 employees, and them being paid presently under the Balanced Budget Act of 1997's creation of a United States Treasury trust fund, see Opening Br. at 2-5, the District may now discriminate against the Appellants as it is "the District's" retirement system.

The 1997 Act specifically removed <u>any</u> authority of the District of Columbia to administer these annuitants' trust fund. See Pub. L. 105-33, Section 11033(d) ("The District Government shall promptly take all steps, and execute all documents, that the Secretary deems necessary to effect the transfer.") The Act specifically designated that the plan "shall be treated as as benefits provided under a governmental plan maintained by the District of

Columbia" for the purposes of ERISA and IRS taxation, Section 11034,

specifically because ***otherwise it was not***.

> In accordance with the provisions of this subtitle, the Federal Government shall make Federal benefit payments associated with the pension plans for police officers, firefighters, and teachers of the District of Columbia.

Section 11011(a).

> At no point after the effective date of this subtitle may the responsibility or any part thereof assigned to the Federal Government under subsection (a) for making Federal benefit payments revert to the District of Columbia.

Section 11011(b).

> The Secretary shall enter into a contract with the Trustee to provide for the management, investment, control and auditing of Trust Fund assets, the making of Federal benefit payments under this subtitle from the Trust Fund, and such other matters as the Secretary deems appropriate. The Secretary shall enforce the provisions of the contract and otherwise monitor the administration of the Trust Fund.

Section 11035(b).

> The Trustee shall report to the Secretary, in a form and manner and at such intervals as the Secretary may prescribe, on any matters or transactions relating to the Trust Fund, including financial matters, as the Secretary may require.

Section 11035(c).

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

Section 11084(a)(1).

"In *Davis*, the Court held that a state tax exempting retirement benefits paid by the State but not those paid by the Federal Government violated the Public Salary Tax Act's nondiscrimination requirement." *Jefferson County*, 527 U.S. at 442 (citing *Davis*, 489 U.S. at 817-818). The District position in this regard flies in the face of the holdings of *Jefferson County* and *Davis* without further elaboration. The Appellees' pensions are administered and paid by the United States Treasury, not the District of Columbia. Its citation to D.C. Code § 5-723(e) is to a law which solely had applicability to the 18 year period in which the District of Columbia did pay such pre-1997 annuities. It was rendered meaningless once the District no longer paid these annuities. D.C. Code § 5-723(e) was superseded by operation of Section 11084(a)(1), and once the United States Treasury took over payment, its continued employment violated the Public Salary Tax Act.[1]

[1] The intervening change in the law which the District of Columbia claims is wanting from the Appellants' claims, Opp'n Br. at 13-14, would be, of course, this Court's finding that D.C. Code § 5-723(e) as applied by the District of Columbia violates the Public Salary Tax Act, or that is was superseded entirely by the 1997 Act.

B. "[T]he offset required by D.C. Code § 5-723(e) is not a tax on the employee's pension benefits. It is not a tax at all." Opp'n Br. At 16.

Herein, the District of Columbia parrots the District Court's equally unsupported and spurious prior finding and does so in direct conflict with *Davis* and *Jefferson County*. The Public Salary Tax Act "does not require the local tax to be a typical 'income tax.'" *Jefferson County*, 527 U.S. at 442. In this regard, *Jefferson County* cited *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953), to provide a definition of tax which certainly now encompasses this offset. "The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts." *Howard*, 344 U.S. 629 (emphasis in original). In his *Howard* dissent, Justice Douglas highlighted the expansiveness of the Court's definition of a "tax" which the *Jefferson County* Court would later rely.

> I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e. g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals held it to be. *Louisville v. Sebree*, 308 Ky. 420, 214 S. W. 2d 248. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.

Howard, 344 U.S. at 629, DOUGLAS, J. *dissenting* (emphasis in original).

> 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, 489 U.S. at 815 n.4.

The District of Columbia Attorney General is fond of criticizing this attorney for his employment of block quotes, yet what is quoted here is a abject negation of the District's position by a standing Supreme Court decision. The above block quote appears in the Appellants' Opening Brief and the quote demonstrates that *Davis* makes no distinction whatsoever as to the mechanism of taxation, regardless of whether the District deducts from a salary or deducts from a pension, it only considers the end result.

Nonetheless, the District of Columbia has made no effort whatsoever to address this point and instead relies solely upon a citation to the Appendix of the District Court's same flawed reasoning. Opp'n Br. at 16 (citing J.A. 106). The complete absence of meaningful argument or authoritative citations in conflict should indicate to this Court that this issue is now conceded or waived by the District of Columbia's lack of developed argumentation. See *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990), *cert. denied*, 494 U.S. 1082 (1990)).[2]

[2] The District's untenable position is further highlighted by its self-contradictory and nonsensical statement that "[t]he employee's 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." Opp'n Br. at 16.

3. The District of Columbia's argument regarding post-1997 retirement benefits is of no consequence to the illegality of the discriminatory offset imposed on the pre-1997 benefits.

The District of Columbia gives great weight to its assertion that some of the Appellants may have a blend of pre-1997 retirement benefits paid solely by the federal government and post-1997 retirement benefits paid by the District of Columbia. Opp'n Br. at 17. For reasons upon which it does not elaborate, the District now asserts that there is, therefore, no discrimination whatsoever in its taxation of such benefits. This is of course, not correct.

The offset the District of Columbia imposes relying upon D.C. Code § 5-723(e) applies solely to police and fire retirement benefits originally impacted by the District of Columbia Retirement Reform Act of 1979. Pub. L. 96-122, Section 214. Such benefits were the sole benefits which were transferred to the United States Treasury trust fund in the 1997 Act for all pre-1997 benefits. The District of Columbia discriminates in taxation in that all pre-1997 benefits which are federally funded are offset while no pre-1997 benefits which are not federally funded are not offset. See D.C. Code § 1-611.03(b) (exempting District of Columbia funded retirement programs from a similar offset). Pre-1997 benefits are discriminated between present federal payments and non-federal payments and thus violate the Public

Salary Tax Act. Other kinds of annuitants' pre-1997 non-federal benefits are not subject to any kind of offset. See also, the District of Columbia Reemployed Annuitant Offset Elimination Amendment Act of 2004, D.C. Law 15-207, and its expansion caused by the Consolidated Appropriations Act of 2008, Pub. L. 110-161, Section 807, eliminating any offset "to any individual employed in an appointive or elective position with the District of Columbia government after December 7, 2004", which benefits are all funded by the District of Columbia. The District of Columbia cannot avoid a claim of discrimination for pre-1997 benefits simply by claiming it does not discriminate regarding other benefits.

4 U.S.C. § 111 (a) prohibits taxation if it discriminates because of the source of the pay or compensation. The District of Columbia offsets all pre-1997 retirement benefits paid by the United States Treasury trust fund under the 1997 Act. It does not offset any other pre-1997 retirement benefits. The District of Columbia is discriminatorily taxing the Appellants' retirement benefits based upon the source of the compensation.

4. There remains proper federal jurisdiction herein.

The District of Columbia again repeats the same argument with regard to the exclusive venue provision of D.C. Code § 1-815.02(a), and now assert

that the Appellants never claimed the imposition of the offset affected their retirement benefits. Opp'n Br. at 20-21. This was a key element of the Appellants' claims from the beginning. The District Court imposed a construction of their claims that asserted only salaries, and not their pensions, were affected, in direct conflict with both the holdings in the Supreme Court cases already cited, as well as the prior holding of this Court with regard to the Appellants' FLSA claims.

The Appellants' salaries have been offset solely because of the existence of their federal pensions and the application of D.C. Code § 5-723(e). The Appellants have asserted from the onset of this case that § 5-723(e) was superseded by the 1997 Act, and the 1997 Act provides exclusive venue in the District Court for any action arising in whole or part from that enactment. D.C. Code § 1-815.02(a). The Appellants have no claim regarding D.C. Code § 5-723(e) ***but for the existence of the 1997 Act***. The jurisdiction of the District Court remains irrefragable.

The District of Columbia again ignores a wealth of authorities and misstates the procedural posture of this case. The District Court did not dismiss all the remaining federal claims of the Appellants. Opp'n Br. At 21. It entered a monetary judgment sustaining the Appellants' FLSA claims as instructed by this Court. 28 U.S.C. § 1367(c)(3) is inapplicable as there was

no such dismissal of all claims and the District of Columbia failed to plead any of the other criteria necessary to avoid supplemental jurisdiction. "[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); *McCoy v. Webster*, 47 F.3d 404, 406 n.3 (11th Cir. 1995)).

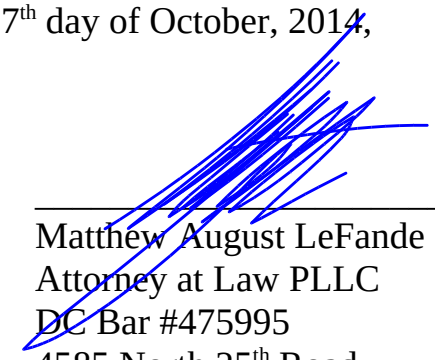
Finally, with regard to the District of Columbia's present claim of the purported exclusive jurisdiction of the Superior Court as to part of the Appellants' claims, its citation to *Jenkins v. Washington Convention Ctr.*, 236 F.3d 6, 11 (D.C. Cir. 2001), like its prior citation to *Fernebok v. District of Columbia*, 534 F. Supp. 2d 25 (D.D.C. 2008), is certainly inapplicable, as the case speaks solely to "an appeal from or petition for review of any assessment of tax (or civil penalty thereon) made by the District of Columbia" under D.C. Code §§ 11-921(a)(3)(B), 11-1201 or 11-1202. Herein, the Appellants challenge an unnamed tax imposed upon them in violation of, *inter alia*, D.C. Code § 1-206.02(a)(5), not a challenge to an express tax assessment. 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 District of Columbia has again ***completely denied it is a tax***, thus implicating that federal question. *Banner* is applicable herein, *Fernebok* is not.

VI. Conclusion

The District of Columbia continued application of the now defunct D.C. Code § 5-723(e) to the Appellants' pensions and salaries violates the Public Salary Tax Act. The District Court's January 6, 2014 Opinion and Order should be reversed with instructions for the District Court to enter summary judgment for Appellants' illegal taxation and takings claims. The prior finding of such federal subject matter jurisdiction for the FLSA claims should require reversal of the District Court's dismissal of the Appellants' other claims based upon the already established federal subject matter and supplemental jurisdiction.

Respectfully submitted, this 27th day of October, 2014,



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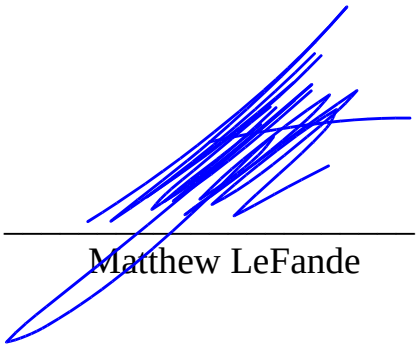
CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,608 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using OpenOffice Writer in Times New Roman 14 point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Reply Brief were served via Appellate ECF and via United States Postal Service Priority Mail, postage prepaid, to the District of Columbia Solicitor General, this 27th day of October, 2014.



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