**№ 14-7014**

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

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**LOUIS P. CANNON, *et al*.**

*Appellants*

v.

**DISTRICT OF COLUMBIA**

*Appellee*

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# PETITION FOR REHEARING

# PETITION FOR REHEARING EN BANC

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## Certificate as to Parties, Rulings and Related Cases

### (A) Parties and Amici.

There are no corporate parties to this appeal.

The Appellants were represented before the District Court by Matthew LeFande of Arlington, Virginia.

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

### (B) Rulings Under Review.

The Appellants appeal the District Court Judge Ellen Huvelle's January 6, 2014 summary dismissal of their claims. *Cannon v. District of Columbia*, 10 F. Supp. 3d 30 (D.D.C. 2014); J.A. 115. The panel's decision of April 17, 2015 is not yet reported, but is attached to this Petition.

### (C) Related Cases.

There are no related cases.

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## III. Statement regarding en banc.

This Court's panel has finally decided, albeit incorrectly, the issue of whether the offset imposed upon these retired police officers by the District of Columbia is a tax. In denying that the offset is a tax, the panel has completely ignored an established and controlling body of Supreme Court precedent and reverted to instead making decisions curiously based upon inapplicable dictionary definitions. The sole competent authority upon which the panel relies is quoted out of context of an opinion which is wholly inapposite to the panel's conclusion. The panel continues to rely on a summary conclusion that D.C. Code § 5-723(e) is in some way applicable to the Appellants in the present day. In doing so, the panel willfully ignores the 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 offset a pension that it ***does not pay***.

## IV. Argument

### 1. The panel has affirmed the dismissal of the Appellants' illegal tax claims solely upon a single statute without explanation or regard for the Appellants' demonstration it was abrogated under subsequent legislation.

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." In direct conflict with this law, the panel relies solely on a vestige of the District of Columbia Retirement Reform Act of 1979, PUB. L. 96-122, to permit the District of Columbia to offset federal pension payments to the Appellants from their salaries, even though the Appellants are indisputably "former District government employees who are federal annuitants".

The District of Columbia Retirement Protection Act, Title XI, Subtitle A of the Balanced Budget Act of 1997, PUB. L. 105-33, transferred all responsibility for payments of District of Columbia employees who retired before June 30, 1997 to the federal government. The federal government is today responsible for payment of retirement benefits accrued by District of Columbia employees prior to June 30, 1997, including those of the Appellants. D.C. Code § 5-723(e) remains solely as an artifact from a time in which the District of Columbia paid these retirees from District of Columbia funds and it exists upon the books today solely as a result of inadvertence in subsequent codification.

The § 5-723(e) language is completely inconsistent with the 1997 Act, and therefore superseded and nullified. The § 5-723(e) language is

predicated upon the fact, at the time, 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. The District of Columbia offered no argument in rebuttal and did even suggest that § 5-723(e) is not inconsistent with the 1997 Act. This issue should have been treated as conceded by the District of Columbia for its lack of developed argumentation. The panel's affirmance of this premise offers no further authority or rationale whatsoever.

Even if § 5-723(e) were not expressly superseded by the 1997 Act, the effect of § 5-723(e) under the present circumstances would still be District of Columbia taking away money from the Appellants which the federal government has given them. The panel fails to explain why the District of Columbia would be entitled to take away retirement benefits it does not pay, any more than it would if the Appellants received benefits from United Airlines or Ford Motor Company. § 5-723(e) was written at a time when the District of Columbia paid such benefits. It no longer pays these benefits and no longer has any right to take them from the Appellants who rightfully

earned them. The panel has failed to address or rebut any of this argument and relies solely upon a conclusory assertion that § 5-723(e) remains valid. The panel's repeated refusal to perform this fundamental inquiry and determination of what actually does comprise the current law is simply inexplicable.

### 2. The offset imposed upon the Appellants is an illegal tax and the panel completely ignores controlling Supreme Court authority in finding to the contrary.

> As a general matter, taxes are a "charge," usually "monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." BLACK'S LAW DICTIONARY 1685 (10th ed. 2014). That basic definition is longstanding. The edition of Black's Law Dictionary in effect when the Act was passed in 1939 defined "taxation" as an exaction imposed by the government "for the purpose of providing revenue for the maintenance and expenses of government." BLACK'S LAW DICTIONARY 1707 (3d ed. 1933). A contemporaneous edition of Webster's concurred, defining "taxation" as "the raising of revenue by the imposition of compulsory contributions; also, a system of so raising revenue." Webster's NEW INTERNATIONAL DICTIONARY 2587 (2d ed. 1934).

Op. at 4.

There is only something "novel" about the Appellants' claims of an illegal tax if, as the panel has repeatedly done herein, the entire body of Supreme Court case law on this subject already cited is simply ignored ***in favor of a handful of dictionary definitions***. The Public Salary Tax Act, PUB. L. 76-32, "does not require the local tax to be a typical 'income tax.'"

*Jefferson County v. Acker*, 527 U.S. 423, 442 (1999). 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 v. Michigan Department of the Treasury*, 489 U.S. 804, 815 n.4 (1989) (emphasis added).

> Here, D.C.'s salary reduction provision is not a tax. It does not raise revenue. Rather, it operates on the opposite side of D.C.'s financial ledger. It reduces D.C.'s total expenditures on salaries. In particular, it decreases employees' salaries by the amount of their pensions from prior service in the D.C. government.

Op. at 4.

The "normal means of taxation", *id*. (quoting *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2596, slip op. at 36 (2012)), is not dispositive here. Instead, the federal government's capacity to contract for employment and its capacity to compensate these annuitants is compromised by the diminution of the value of such annuities by the District of Columbia's offset. This issue of taxation of retirement benefits has already been well settled by *Davis*. The panel has simply ignored *Davis*, which speaks directly to the impact of the state charge upon federal retirement benefits, in favor of analysis of a purported penalty imposed under Obamacare.

Read *in toto*, *National Federation of Independent Business* stands for ***the exact opposite proposition that the panel offers it***.

> In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996); see also *United States v. La Franca*, 282 U.S. 568, 572 (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful.

*National Federation of Independent Business*, 132 S. Ct. at 2596-2597 (parallel citations omitted).

As repeatedly stated by the District of Columbia, the purpose of the offset was solely to "protect the public fisc", not to suggest that a retiree continuing to serve the city was illegal.

> An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment. Interpreting such a law to be a tax would hardly "[i]mpos[e] a tax through judicial legislation." *Post*, at ___, 183 L. Ed. 2d, at 549. Rather, it would give practical effect to the Legislature's enactment.

*National Federation of Independent Business*, 132 S. Ct. at 2597-2598.

It remains a complete mystery how the panel could read *National Federation of Independent Business*, and find it to undermine, not support, the Appellants' citations to *Davis*. Indeed, the panel relies on a single short citation taken wholly out of context and standing alone, ***antagonistic to the holding of the case***. The panel's citation is to one of three factors in considered in a single paragraph of the case while the remainder of the opinion falls squarely in support of the Appellants' claims. The panel's distinction without a difference as to which side of the ledger the offset falls lies in direct conflict with *Davis*' analysis relying solely as to how the offset

impacts the federal government's efficacy in making retirement annuity payments.

### 3. The panel wholly ignores the federal nature of the controversy of the offset.

Finally, the panel skirts around the issue that D.C. Code § 5-723(e) remains an issue of federal law, not District of Columbia law. The entirety of the Complaint centers upon congressional enactments in 1979 and 1997 regarding federal retirement annuities. The Appellants' salaries were offset solely because of the existence of their federal pensions and the application of D.C. Code § 5-723(e). The panel's claim that "the salary reduction provision does not affect the amount or payment of plaintiffs' pensions", Op. at 5, lies in direct conflict with *Davis*. It affects the *efficacy* of such pensions by wiping out their salaries solely because of the pensions.

The Appellants have asserted from the onset of this case that § 5-723(e) was superseded by the 1997 Act. 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.

28 U.S.C. § 1367 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)).

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).[1] 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

[1] The panel appears to be again led astray by the inaccurate codification of the 1997 Act. The Act's language here actually reads "A civil action may be brought—(1) by a participant or beneficiary to enforce or clarify rights to benefits from the Trust Fund or Federal Supplemental Fund ***under this subtitle***" (emphasis added), not just "under this chapter", thus giving effect to judicial enforcement to <u>all</u> provisions of Title XI, Chapters 1-9 of the 1997 Act. See Section 11001 (titling such chapters the ''District of Columbia Retirement Protection Act of 1997'').

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). "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." *Executive Software N. Am. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1555 (9th Cir. 1994).

"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*).

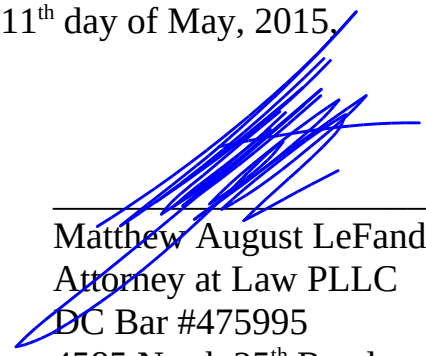
In the exact same manner, the federal judiciary has a interest and responsibility to ensure the enactments of the United States Congress are correctly construed as to not improperly diminish the efficacy of the taxpayer dollars expended upon federal retirement annuities. The panel has wholly failed in this duty. The District of Columbia's interference with the payment of salaries due to these federal annuitants undermines the mandate of the District of Columbia Retirement Protection Act of 1997. This is indisputably a matter of federal subject matter jurisdiction which the panel and the District Court have eschewed.

## V. Conclusion

The panel's April 17, 2015 Opinion and Order should be reversed with instructions to invalidate D.C. Code § 5-723(e) and remand the case to the Superior Court for calculation of refunds of the salaries of these federal annuitants in the manner described by *Davis*, 489 U.S. at 818. See *Reich v.*

*Collins*, 513 U.S. 106, 109-110 (1994) and the cases cited therein (federal due process requires that the remedy of a refund of illegal taxes somehow be provided to the aggrieved retiree, but the refund itself must proceed in state court).

Respectfully submitted, this 11th day of May, 2015.



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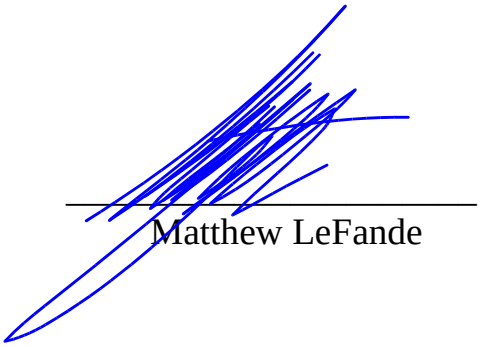
## Certificate of Compliance with Rule 40

1. This brief complies with the type-volume limitation of Fed. R. App. P. 40 because this brief is less than fifteen pages in length, 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 Petition were served via Appellate ECF and via United States Postal Service Priority Mail, postage prepaid, to the District of Columbia Solicitor General, this 11th day of May, 2015.



Matthew LeFande

**4 U.S.C. § 110. Same; definitions**
As used in sections 105-109 of this title [4 USCS §§ 105-109]--
…
(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.
…

**4 U.S.C. § 111. Same; taxation affecting Federal employees; income tax**
(a) General rule. 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.
…

**28 U.S.C. § 1367. Supplemental jurisdiction**
(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in 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 under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title [28 USCS § 1332], the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332 [28 USCS § 1332].

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
(1) the claim raises a novel or complex issue of State law,
(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
(3) the district court has dismissed all claims over which it has original jurisdiction, or
(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

**D.C. Code § 1-803.01. Obligation of federal government to make benefit payments [Formerly § 1-762.1]**
(a) In general. -- In accordance with the provisions of this chapter, the federal government shall make federal benefit payments associated with the pension plans for police officers, firefighters, and teachers of the District of Columbia.
(b) No reversion of federal responsibility to District. -- At no point after the effective date of this chapter may the responsibility or any part thereof assigned to the federal government under subsection (a) of this section for making federal benefit payments revert to the District of Columbia.

**D.C. Code § 1-815.01. Judicial review [Formerly § 1-768.1]**
(a) In general. -- A civil action may be brought:
(1) By a participant or beneficiary to enforce or clarify rights to benefits from the Trust Fund or Federal Supplemental Fund under this chapter;
(2) By the Trustee:
(A) To enforce any claim arising (in whole or in part) under this chapter or the contract; or
(B) To recover benefits improperly paid from the Trust Fund or Federal Supplemental Fund or to clarify a participant's or beneficiary's rights to benefits from the Trust Fund or Federal Supplemental Fund; and
(3) By the Secretary to enforce any provision of this chapter or the contract.

(b) Treatment of Trust Fund. -- The Trust Fund may sue and be sued as an entity.
(c) Exclusive remedy. -- This subchapter shall be the exclusive means for bringing actions against the Trust Fund, the Trustee, or the Secretary under this chapter.

**D.C. Code § 1-815.02. Jurisdiction and venue [Formerly § 1-768.2]**
(a) In general. -- The United States District Court for the District of Columbia shall have exclusive jurisdiction and venue, regardless of the amount in controversy, of:
(1) Civil actions brought by participants or beneficiaries pursuant to this chapter, and
(2) Any other action otherwise arising (in whole or part) under this chapter or the contract.
(b) Review by Court of Appeals. -- Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia issued pursuant to an action described in subsection (a) of this section that concerns the validity or enforceability of any provision of this chapter or seeks injunctive relief against the

Secretary or Trustee under this chapter shall be reviewable only pursuant to a notice of appeal to the United States Court of Appeals for the District of Columbia Circuit.
(c) Review by Supreme Court. -- Notwithstanding any other provision of law, review by the Supreme Court of the United States of a decision of the Court of Appeals that is issued pursuant to subsection (b) of this section may be had only if the petition for relief is filed within 20 calendar days after the entry of such decision.
(d) Restrictions on declaratory or injunctive relief. -- No order of any court granting declaratory or injunctive relief against the Secretary or the Trustee shall take effect during the pendency of the action before such court, during the time an appeal may be taken, or (if an appeal is taken or petition for certiorari filed) during the period before the court has entered its final order disposing of the action.

**D.C. Code § 5-723. Accruement and payment of annuities; persons who may accept payment; waiver; reduction [Formerly § 4-629]**

…

(e) 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.

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued February 6, 2015 Decided April 17, 2015

No. 14-7014

LOUIS P. CANNON, ET AL.,
APPELLANTS

v.

DISTRICT OF COLUMBIA,
APPELLEE

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Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00133)

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*Matthew A. LeFande* argued the cause and filed the briefs for appellants.

*Richard S. Love*, Senior Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellee. With him on the briefs were *Irvin B. Nathan*, Attorney General, at the time the brief was filed, Office of the Attorney General for the District of Columbia, *Todd S. Kim*, Solicitor General, and *Loren L. AliKhan*, Deputy Solicitor General.

Before: KAVANAUGH, MILLETT, and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* KAVANAUGH.

KAVANAUGH, *Circuit Judge*: Plaintiffs are retired officers of D.C.'s Metropolitan Police Department. After retiring, they were subsequently re-hired by the D.C. Protective Services Division, which protects government buildings and D.C.-owned property.

Plaintiffs received pension benefits from their service with the Metropolitan Police Department *and* salaries for their jobs with the Protective Services Division. But Section 5-723(e) of the D.C. Code requires the D.C. Government to reduce plaintiffs' salaries by the amount of their pensions. The goal of that statute is to prevent so-called double-dipping by D.C. government employees who retire and then are re-hired back into another D.C. government job.

Pursuant to that statutory provision, D.C. reduced plaintiffs' salaries by the amount of their pensions. In response to their salary reduction, plaintiffs sued D.C. under a variety of theories. In an earlier round in this Court, we considered plaintiffs' claims under the federal Fair Labor Standards Act, the First Amendment, the Fifth Amendment, and the Equal Protection Clause. We ruled in favor of the plaintiffs on the Fair Labor Standards Act claim, ruled in favor of D.C. on the remaining constitutional claims, and remanded for further proceedings. *See Cannon v. District of Columbia*, 717 F.3d 200 (D.C. Cir. 2013).

Plaintiffs' victory on the FLSA claim gave them only partial relief and did not fully restore their salaries. On remand, still seeking to fully restore their salaries, plaintiffs therefore filed an amended complaint that asserted a new federal claim: that D.C.'s salary reduction provision violates

the federal Public Salary Tax Act of 1939. *See* Pub. L. No. 76-32, § 4, 53 Stat. 574, 575 (1939) (codified as amended at 4 U.S.C. § 111(a)). The District Court rejected that argument, and so do we.[1]

As relevant here, the Public Salary Tax Act allows States and D.C. to impose "taxation" on compensation paid to employees of the Federal Government, but only so long as the taxation does not discriminate against Federal employees as compared to state and local government employees, for example. 4 U.S.C. § 111(a).[2] Plaintiffs' theory here is as follows: They say that their pensions from the D.C. Metropolitan Police Department are actually *federal* compensation (due to the complex interaction of the Federal and D.C. Governments in funding those pensions). And they say that D.C., by means of this salary reduction provision, is in effect taxing plaintiffs' federal pensions in a discriminatory manner in violation of the Public Salary Tax Act.

Plaintiffs' argument under the Public Salary Tax Act has a plethora of potential problems. One initial (and in this case dispositive) problem with plaintiffs' novel theory is that the

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[1] Some of the plaintiffs no longer work with the Protective Services Division, but plaintiffs are suing for damages as well as forward-looking injunctive relief.

[2] The full text of the relevant provision reads: "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).

Act applies only to "taxation." And the D.C. salary reduction provision at issue here is not "taxation" of plaintiffs' pensions.

As a general matter, taxes are a "charge," usually "monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." Black's Law Dictionary 1685 (10th ed. 2014). That basic definition is longstanding. The edition of Black's Law Dictionary in effect when the Act was passed in 1939 defined "taxation" as an exaction imposed by the government "for the purpose of providing revenue for the maintenance and expenses of government." Black's Law Dictionary 1707 (3d ed. 1933). A contemporaneous edition of Webster's concurred, defining "taxation" as "the raising of revenue by the imposition of compulsory contributions; also, a system of so raising revenue." Webster's New International Dictionary 2587 (2d ed. 1934). As far back as *McCulloch v. Maryland*, the Supreme Court has understood the power to tax as the power "of raising revenue, and applying it to national purposes." *McCulloch v. Maryland*, 17 U.S. 316, 409 (1819). One of the few Supreme Court cases interpreting the Public Salary Tax Act similarly indicates that revenue raising is a hallmark of "taxation" under the Act. In *Jefferson County v. Acker*, 527 U.S. 423 (1999), the Supreme Court concluded that a license fee imposed on judges was "revenue-raising" and constituted taxation for purposes of the Public Salary Tax Act. *Id.* at 440-42.

Here, D.C.'s salary reduction provision is not a tax. It does not raise revenue. Rather, it operates on the opposite side of D.C.'s financial ledger. It reduces D.C.'s total expenditures on salaries. In particular, it decreases employees' salaries by the amount of their pensions from prior service in the D.C. government. Moreover, the

reduction takes effect when the employee's salary is initially computed by the Protective Services Division. The salary reduction is thus not collected "through the normal means of taxation," which is yet another indication that this is not taxation for purposes of this Act. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2596, slip op. at 36 (2012).

The salary reduction statute, in short, is nothing more than a way for D.C. to prevent so-called double-dipping and thereby reduce its expenditures on employee salaries. It is not a tax on plaintiffs' pensions. We therefore reject plaintiffs' novel Public Salary Tax Act argument.[3]

In this second appeal, plaintiffs also renew the due process and takings claims that we found unavailing on their last trip to this Court. The law of the case doctrine bars us from reconsidering those holdings. *See PNC Financial Services Group, Inc. v. Commissioner of IRS*, 503 F.3d 119, 126 (D.C. Cir. 2007).

Finally, plaintiffs contend that the District Court erred by declining to exercise jurisdiction over their separate D.C. law claims. (Plaintiffs' complaint tacked on several D.C. law claims to their numerous federal claims.) Plaintiffs primarily argue that D.C. Code § 1-815.02 gives federal courts "exclusive jurisdiction" over claims related to the payment of their pensions. But the salary reduction provision does not affect the amount or payment of plaintiffs' pensions. It affects only the amount of their salaries. *See* D.C. Code § 5-723(e) ("the *salary* of any annuitant . . . shall be reduced by"

[3] To be clear, we do not here purport to say what constitutes a tax under any other statute.

the amount "of such annuitant's annuity") (emphasis added). Alternatively, plaintiffs contend that the District Court abused its discretion by declining to exercise supplemental jurisdiction over plaintiffs' D.C. law claims. Federal district courts may decline to exercise supplemental jurisdiction if, among other things, "the claim raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). Plaintiffs' D.C. law claims appear to be novel. Our review of the District Court's declination of supplemental jurisdiction is deferential. We conclude that the District Court did not abuse its discretion in declining to exercise supplemental jurisdiction over plaintiffs' D.C. law claims.[4]

* * *

We affirm the judgment of the District Court.

*So ordered.*

[4] The District Court transferred the remaining D.C. law claims to the Superior Court. D.C. did not cross-appeal to argue that those claims should have been dismissed rather than transferred. Therefore, we do not consider the propriety of the transfer.