No. 15-_____

IN THE

# Supreme Court of the United States

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

v.

DISTRICT OF COLUMBIA.

**On Petition for Relief from a judgment of United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR RELIEF

MATTHEW AUGUST LEFANDE
ATTORNEY AT LAW PLLC
*Counsel of Record*
4585 North 25th Road
Arlington VA 22207
(202) 657-5800
matt@lefande.com

*Attorney for Petitioners*

## QUESTIONS PRESENTED

The Balanced Budget Act of 1997, Pub. L. 105-33, removed the authority and responsibility of funding pre-Home Rule pensions of District of Columbia public safety employees from the District of Columbia government. The District of Columbia government now relies upon a vestige of the District of Columbia Retirement Reform Act of 1979 to offset the salaries of reemployed annuitants, despite the fact that the 1997 Act transferred the administration and funding of the annuitants' pre-Home Rule pensions to the United States Treasury. The District of Columbia offset the current salaries of the reemployed annuitants against their pensions the District of Columbia no longer paid.

1. Did the Balanced Budget Act of 1997 fully supersede and abrogate D.C. Code § 5-723(e)?

2. By abrogation of D.C. Code § 5-723(e), was the District of Columbia without authority to offset the pensions of the reemployed annuitants?

3. By discriminating as to the source of the present funding of the reemployed annuitants' pensions, does the District of Columbia's offset violate the Public Salary Tax Act of 1939?

4. Upon affirmative judgment for the Plaintiffs on a federal question, may the District Court indiscriminately eschew pendent jurisdiction on additional claims arising from the same transaction and occurrence?

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## PETITION FOR RELIEF

Petitioner herein seeks relief from a judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The April 17, 2015 opinion of the Court of Appeals, App. 2a, is reported at 783 F.3d 327 (D.C. Cir. 2015). The most recent decision of the District Court, App. 9a, is reported at 10 F. Supp. 3d 30 (D.D.C. 2014). The Court of Appeals' prior reversal of the District Court's summary dismissal, App. 32a is reported at 717 F.3d 200 (D.C. Cir. 2013). The District Court's first summary dismissal, App. 48a is reported at 873 F. Supp. 2d. 272 (D.D.C. 2012).

## JURISDICTION

On January 26, 2012, the Petitioners filed suit seeking, *inter alia*, relief arising from Section 11084 of the District of Columbia Retirement Protection Act of 1997 and asserting the exclusive jurisdiction and venue of the United States District Court for the District of Columbia under D.C. Code § 1-815.02.

The last dismissal of the Petitioners' suit concerning the validity or enforceability of the Act by the District Court was on July 6, 2014. The Petitioners timely appealed to the United States Court of Appeals for the District of Columbia Circuit. The judgment of the Court of Appeals was entered on April 17, 2015. App. 8a. The Petitioners sought rehearing en banc. The petition for en banc was

denied on May 28, 2015. App. 1a.

The District of Columbia Retirement Protection Act of 1997 provides:

> 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.C. Code § 1-815.02 (c).

Such petition for relief now has been timely filed with this court, invoking the court's jurisdiction to review the decision of the Court of Appeals.

## STATUTES INVOLVED

The District of Columbia Police and Fire Retirement System ("PFRS") was established in 1916 to replace several earlier programs which provided benefits to District of Columbia police, members of the Secret Service, and other federal police agencies operating within the District of Columbia at that time. At the time of the granting of Home Rule to the District of Columbia in 1974, there existed enormous problems within PFRS. A 1974 study by Arthur Anderson & Co. determined that the District's existing pension programs had some $2 billion in unfunded liabilities outstanding. Arthur Anderson & Co., REPORT TO THE U.S. SENATE COMMITTEE ON THE DISTRICT OF COLUMBIA ON THE ACCOUNTING AND FINANCIAL MANAGEMENT PRACTICES of

the District of Columbia Government (June 1976), Vol. 1, Exec. Summary at 8. In 1978, Congress passed a bill to provide the District of Columbia with a series of $65 million payments over twenty five years to cover the costs of entitlements of District of Columbia workers who retired prior to Home Rule. U.S. General Accounting Office, DISTRICT PENSIONS: FEDERAL OPTIONS FOR SHARING BURDEN TO FINANCE UNFUNDED LIABILITY (Dec. 1994) (GAO/HEHS-95-40) at 3. This bill was vetoed by President Carter. *Id*. at 17.

By 1979, unfunded liabilities for District of Columbia retirement entitlements had grown to $2.7 billion. Congress and the Carter administration agreed to a one-time $38 million payment and a series of twenty-five annual payments of $52 million which was intended to cover 80 percent of the projected retirement benefits and some of the disability benefits of pre-Home Rule retirees. District of Columbia Retirement Reform Act of 1979, PUB. L. 96-122.

Following passage of the District of Columbia Retirement Reform Act of 1979, the District of Columbia's required contributions tripled and the District's inherited liabilities increased. The District of Columbia eventually suspended payments to these pension programs and the District was subsequently sued to restore payments to the retirement programs. As it became clear in the mid 1990s that the existing regime to fund District of Columbia pensions was untenable, Congress again moved to reform or take over District of Columbia programs including pension programs. The District of Columbia Retirement Protection Act, Title XI,

Subtitle A of the Balanced Budget Act of 1997, PUB. L. 105-33, became effective in October of 1997.

Of $3.9 billion in existing annuity assets in the possession of the District of Columbia to fund pension programs, $2.6 billion was sent to a new Federal Trust Fund. PUB. L. 105-33, Sec. 11033. A second fund was also created, to be funded from future federal appropriations to pay benefits after the funds of the first fund were depleted. *Id*., Sec. 11051. All responsibility for payments of District of Columbia employees who retired before June 30, 1997 was transferred to the federal government. The act split responsibility for administration and payment for existing District of Columbia employees between the federal government and the District of Columbia. The federal government, through the Department of the Treasury, was, and is today, responsible for payment of benefits accrued by District of Columbia employees prior to June 30, 1997 and the District of Columbia pays and administers benefits accrued to District employees after that date.

## INTRODUCTION

Each of the Petitioners was first employed by the District of Columbia government as a police officer prior to October 1, 1987 and retired from the District of Columbia government after at least twenty years of service. Each Petitioner receives federal annuity retirement benefits as described above for their creditable service on or prior to June 30, 1997. At various times starting in 2008, the Petitioners became reemployed by the District of

Columbia, as administrators and supervisors of the Protective Services Police Department, a small police department charged with protection of District of Columbia buildings, a similar mission to that of the Federal Protective Service.

Starting with the pay period January 1-14, 2012, the District of Columbia offset the salaries of each of the Petitioners by the amount of their retirement benefit annuity payments, relying on D.C. Code § 5-723(e), a vestige of the District of Columbia Retirement Reform Act of 1979 and the time prior to the District of Columbia Retirement Protection Act of 1997 in which the District of Columbia directly paid such pre-Home Rule retirement annuities.

## STATEMENT OF THE CASE

On January 26, 2012, the Petitioners herein filed suit with the United States District Court for the District of Columbia, asserting, *inter alia*, that the District of Columbia Retirement Protection Act of 1997 superseded the offset provisions contained in D.C. Code § 5-723(e). The Petitioners invoked the exclusive forum and venue provisions of the District Court provided in the 1997 Act. D.C. Code § 1-815.02(a). The Petitioners moved for a temporary restraining order and preliminary injunction.

The Petitioners filed an amended complaint on February 8, 2012 and a supplemental complaint on February 10, 2012. The District of Columbia moved to dismiss or for summary judgment on February 23, 2012. The District Court denied the Petitioner's preliminary injunction on March 5, 2012. The Petitioners made a cross-motion for summary

judgment on April 3, 2012. The District Court granted the District of Columbia's motion to dismiss on July 6, 2012. *Cannon v. District of Columbia*, 873 F. Supp. 2d 272 (D.D.C. 2012). The Petitioners timely appealed.

The Court of Appeals affirmed the dismissal of the Petitioners' constitutional claims, but reversed the dismissal of the Petitioners' claims under the Fair Labor Standards Act and remanded the matter to the District Court for further proceedings. *Cannon v. District of Columbia*, 717 F.3d 200 (D.C. Cir. 2013).

The Petitioners filed a second amended complaint on September 24, 2013. The District of Columbia again moved to dismiss on October 18, 2013. The District Court granted summary judgment in favor of the Petitioners' FLSA claims on January 6, 2014. The District Court further dismissed the constitutional claims the Petitioners claimed to have been not previously fully litigated, and further dismissed the Petitioners' Public Salary Tax Act claims. The parties settled the FLSA claims.

The District Court refused to recognize that the Petitioners were asserting rights arising from the District of Columbia Retirement Protection Act of 1997, thus implicating the jurisdiction and venue of that court.

> Plaintiffs allege, as they did in their prior pleadings, that "[i]n at least one instance, this Court has exclusive jurisdiction over the Plaintiffs' claims." (Opp. at 11 (citing D.C. Code § 1-815.02).) However, as this Court explained in its earlier opinion, in so arguing

> plaintiffs have "misread that statute." *Cannon*, 873 F. Supp. 2d. at 288. This provision of Chapter 8 of the D.C. Code ("District of Columbia Retirement Funds") provides that the district court shall have exclusive jurisdiction over cases related to the payment of federal pensions. See D.C. Code § 1-815.02(a) (providing jurisdiction only for actions arising under Chapter 8).

*Cannon v. Dist. of Columbia*, 10 F. Supp. 3d 30, 39 (D.D.C. 2014).

The Petitioners again timely appealed. The Court of Appeals affirmed the District Court decision on April 17, 2015.

> [P]laintiffs 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" the amount "of such annuitant's annuity") (emphasis added).

*Cannon v. District of Columbia*, 783 F.3d 327, 330 (D.C. Cir. 2015).

The Petitioners sought rehearing and rehearing en banc. Those petitions were denied on May 28, 2015. App. 1a.

## ARGUMENT

### I. The provision of the District of Columbia Retirement Reform Act of 1979 upon which the District of Columbia relied to offset the Petitioner's pensions was superseded and abrogated by the District of Columbia Retirement Protection Act of 1997.

In 1979, authority and responsibility for payment of pre-existing public safety pension obligations in the District of Columbia were transferred from the federal government to the new "Home Rule" District of Columbia government by operation of the Retirement Reform Act. Pub. L. 96-122. As the 1979 Act conferred authority to pay such pensions to the District of Columbia, it also conferred authority to offset such pensions, if the District of Columbia also reemployed such retirees.

> 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 "November 17, 1979" language properly reflects the state of affairs at the time of the enactment of the District of Columbia Retirement Reform Act of 1979, the District of Columbia was responsible for paying these pensions and was conferred a right to protect itself from "double dipping", the payment of both a pension and a full salary by the same retiree.

Nonetheless, the 1979 regime was short lived. The District of Columbia quickly fell into profound financial crisis and stopped paying such pensions. In 1997, the responsibility for paying such pensions was wrest away and returned to the federal government. The offset provision of the 1979 Act was codified as D.C. Code § 5-723(e), but was never excised from the code books following the 1997 Act. The language of the 1979 Retirement Reform Act which enacted this section of § 5-723 is particularly important in this regard. It does not state "the salary of any annuitant who first becomes entitled to an annuity under this subchapter, after November 17, 1979…" as the D.C. Code section reads. It states instead, "the salary of any annuitant who first becomes entitled to an annuity under this section ***after the date of the enactment of the District of Columbia Retirement Reform Act***…", the moment at which the federal government first attempted to hand off

subsequent retirement liabilities to the Home Rule District of Columbia government. Pub. L. 96-122, Sec. 214 (emphasis added). Of course, it would later turn out that the District of Columbia would not be responsible for pre-1997 liabilities. The District of Columbia today makes no payment and provides no administration of any of the Petitioners' retirement entitlements accrued prior to the 1997 enactment.

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

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

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

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

District government employees who are federal annuitants".

On August 2, 2004, the District of Columbia City Council enacted D.C. Act 15-489, eliminating the reduction in pay of a District of Columbia government retiree identified in 5 U.S.C. § 8331 and is subsequently rehired by the District of Columbia after December 7, 2004. D.C. Code § 1-611.03(b). The stated purpose of D.C. Act 15-489 was "to treat former District government employees who are federal annuitants the same as former federal government employees who are federal annuitants by eliminating the reduction in pay of a former District government employee who is a reemployed federal annuitant." 51 D.C. Reg. 8779. None of the language in D.C. Act 15-489 indicates that a PFRS federal annuitant would not be entitled to this protection. This law remains in effect today.

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

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

None of this history or the copious conflicting language has ever been sufficiently discussed or discerned by either the Court of Appeals or the District Court. Yet, nearly every element originates

from Congressional enactments and directly implicates federal funds. Neither the District Court nor the Court of Appeals have ever reached the merits of the Petitioners' claim that § 5-723(e) was nullified by subsequent enactments, or was never applicable to them in the first place.

In originally affirming the dismissal of the Petitioners' constitutional claims, the Court of Appeals made an unexplained conclusion that D.C. Code § 5-723(e) is in some way applicable to the Petitioners in the present day. This assertion ignored the entire legislative history of public safety pension funding in the District of Columbia and a key point of contention by the Petitioners, that the District of Columbia offset a pension that the District of Columbia ***does not pay***. In remanding the case to the District Court for further consideration of the Petitioners' challenges to § 5-723(e), the Court of Appeals left the majority of their theories of relief unaddressed. If any of these theories proves valid, the Court of Appeals' premise for dismissing their constitutional claims is also necessarily nullified.

## II. The District of Columbia's offset violates the Public Salary Tax Act and the District of Columbia Self-Government and Governmental Reorganization Act.

Even if D.C. Code § 5-723(e) were not expressly superseded by the 1997 Act, the effect of § 5-723(e) under the present circumstances would still be the District of Columbia taking away money from the Petitioners which the federal government has

given them. Such taking of salaries at a direct ratio of 100 percent of their pensions and placed in the general fund of the District of Columbia amounts to a tax upon such salaries and pensions illegal under two different congressional enactments.

The Public Salary Tax Act of 1939 permits the "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(a).

> The final clause of the section contains an exception for state taxes that discriminate against federal employees on the basis of the source of their compensation. This nondiscrimination clause closely parallels the non-discrimination component of the constitutional immunity doctrine which has, from the time of *McCulloch v. Maryland*, barred taxes that "operat[e] so as to discriminate against the Government or those with whom it deals." *United States v. City of Detroit*, 355 U.S. 466, 473 (1958).

*Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 812-813 (1989) (citing *McCulloch v. Md.*, 17 U.S. 316, 436-437 (1819); *Miller v. Milwaukee*, 272 U.S. 713, 714-715 (1927); *Helvering v. Gerhardt*, 304 U.S. 405, 413 (1938); *Phillips Chemical Co. v. Dumas*

*Independent School Dist.*, 361 U.S. 376, 385 (1960); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397, and n. 7 (1983)).

The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. Code § 1-201.01 *et seq.*), prohibits the District of Columbia government from imposing "any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District". D.C. CODE § 1-206.02.

The Petitioners herein challenge an unnamed tax imposed upon them in violation of D.C. Code § 1-206.02 (a)(5). See *Banner v. United States*, 428 F.3d 303, 305 (D.C. Cir. 2005) ("[t]he local government of the District of Columbia is prohibited by Congress from imposing a 'commuter tax' – from taxing the personal income of those who work in the District but reside elsewhere"). They further assert the offset violates the Public Salary Tax Act as the District of Columbia "taxes" the pensions of reemployed annuitants paid from the United States Treasury Trust Fund, but not other District of Columbia retirees not paid from the Trust Fund.

The District of Columbia, the Court of Appeals and the District Court have simply denied that the offset is a tax. "It is a question of federal law whether a municipal charge constitutes a tax." *Qwest Communs. Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1091 (N.D. Cal. 2001) (citing *Wright v. Riveland*, 219 F.3d 905, 911 (9th Cir. 2000); *Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992)). Herein, "immunity from state taxation is asserted on the basis of federal law with

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

The Public Salary Tax Act "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). "'[P]ay or compensation' includes retirement benefits, the nondiscrimination clause must include them as well." *Davis*, 489 U.S. at 809.

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.*, 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 (emphasis added).

In denying that the offset is a tax, the Court of Appeals completely ignored this 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 Court of Appeals relied was quoted out of context of an opinion which is wholly inapposite to the Court's conclusion.

> 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).

*Cannon*, 783 F.3d at 329-330.

> 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.

*Id.*, 783 F.3d at 330.

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 Court of Appeals 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 Court of Appeals could read *National Federation of Independent Business*, and find it to undermine, not support, the Petitioners' citations to *Davis*. Indeed, the Court of Appeals relied on a single short citation taken wholly out of context and standing alone, ***antagonistic to the holding of the case***. The Court of Appeals' citation was to one of three factors considered in a single paragraph of the case while the remainder of the opinion falls squarely in support of the Petitioners' claims.

The Court of Appeals' distinction without a difference as to which side of the ledger the offset falls lies in direct conflict with the *Davis* analysis relying solely as to how the offset impacts the federal government's efficacy in making retirement annuity payments.

## III. Once the Petitioners prevailed on one federal cause of action, the federal courts could not eschew pendant jurisdiction for claims arising from the same transaction and occurrence.

In *Cannon v. District of Columbia*, 717 F.3d 200 (D.C. Cir. 2013), the Court of Appeals reversed the dismissal of the Petitioners' claims under the Fair Labor Standards Act and remanded the matter to the District Court for further proceedings. Upon

awarding judgment to the Petitioners for the Fair Labor Standards Act claims, the District Court summarily dismissed what the District Court characterized as state law claims, declining to exercise pendent jurisdiction.

Claims interpreting congressional enactments regarding District of Columbia Home Rule are not state law claims and the District Court may not eschew pendent jurisdiction for claims arising from the same transaction or occurrence in which a federal claim has prevailed.

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy…

28 U.S.C. § 1367(a) (emphasis added).

"[I]t is clear that section 1367(a) authorizes a district court to exercise its supplemental jurisdiction in mandatory language." *Lindsay v. Gov't Employees. Ins. Co.*, 448 F.3d 416, 421 (D.C. Cir. 2006) (citing *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1509 (3d Cir. 1996) ("By its language § 1367(a) confers jurisdiction in mandatory terms to include those cases 'which form part of the same case or controversy under Article III of the United States Constitution" (except as expressly excluded by statute or as provided for in subsections (b) and (c)); *McCoy v. Webster*, 47 F.3d 404, 406 n.3 (11th Cir.

1995) ("Section 1367(a) *requires* the district court to exercise supplemental jurisdiction over claims which are closely related to claims over which the district court has original jurisdiction." (emphasis added)); *Executive Software N. Am. v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 24 F.3d 1545, 1555 (9th Cir. 1994) ("By use of the word 'shall,' the statute makes clear that if power is conferred under section 1367(a), and its exercise is not prohibited by section 1367(b), a court can decline to assert supplemental jurisdiction over a pendent claim only if one of the four categories specifically enumerated in section 1367(c) applies.")).

> A federal claim and a state law claim form part of the same Article III case or controversy if the two claims derive from a common nucleus of operative fact such that the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case.

*Lindsay*, 448 F.3d at 423-424 (quoting *Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164-165 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)) (additional quotation marks omitted, alteration in original))).

"Nonfederal claims are part of the same 'case' as federal claims when they… are such that a plaintiff would ordinarily be expected to try them in one judicial proceeding." *Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 855-856 (9th Cir. 2004) (quoting *Trs. of the Constr. Indus. & Laborers Health & Welfare v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d

923, 925 (9th Cir. 2003) (internal quotation marks omitted)). See also *Osborn v. Haley*, 549 U.S. 225, 245 (2007) (quoting *United Mine Workers*, *supra*).

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

> It is indeed unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed in or removed to that court in accordance with the applicable statutes. But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.

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

> Considering *Thermtron* together with [*Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)] and [*Quackenbush v. Allstate Ins. Co.*,

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

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

"[T]he discretion to decline supplemental jurisdiction is available only if founded upon an enumerated category of [28 U.S.C. § 1367(c)].'" *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 702 F.3d 685, 701 (2d Cir. 2012) (quoting *Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir. 2002) (quoting *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442, 448 (2d Cir. 1998) (alteration in *Treglia*))). That the Appellants have prevailed upon one of their federal claims forming part of the same case and controversy herein is not an enumerated cause to dismiss what are questionably state claims under § 1367(c). Therefore, it could not form the basis for dismissal as demanded by the District of Columbia.

Furthermore, these remaining questions regarding D.C. Code § 5-723(e) are indisputably

federal questions. 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." *Banner*, 428 F.3d at 305 (citing U.S. CONST. art. I, § 8, cl. 17). "Congress has delegated to the District the authority to tax the personal income of District residents; it has withheld such authority to tax non-residents who work in the District." *Id*. at 306-307.

> The Home Rule Act is thus a hybrid statute. Its impact extends beyond the narrow sphere of the District of Columbia to various federal employees and to the actual structure of the Department of Labor. In *Key v. Doyle*, 434 U.S. 59 (1977), the Supreme Court equated exclusively local provisions of the D.C. Code to laws "enacted by state and local governments having plenary power to legislate for the general welfare of their citizens." Section 204 of the Home Rule Act is not such a provision. A state or local statute cannot direct the federal government to affect transfers or to abolish positions altering its structure in the manner required by section 204.

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

The District of Columbia Retirement Protection Act of 1997 provides that the "United States District Court for the District of Columbia shall have exclusive jurisdiction and venue,

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

## CONCLUSION

For these reasons, and for such other reasons as this honorable court finds to be good and sufficient cause, this Petition for Relief should be GRANTED. The decision of the D.C. Circuit should be reversed with instructions to grant judgment to the Petitioners as to their claim that D.C. Code § 5-723(e), has been superseded and abrogated by the District of Columbia Retirement Protection Act of 1997.

Respectfully submitted, this sixteenth day of June, 2015,

Matthew August LeFande
Attorney at Law PLLC
*Counsel of Record*
4585 North 25th Road
Arlington VA 22207
(202) 657-5800
matt@lefande.com

*Attorney for the Petitioner*

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 14-7014** **September Term, 2014**
**1:12-cv-00133-ESH**
**Filed On:** May 28, 2015

Louis P. Cannon, et al.,
Appellants

v.

District of Columbia,
Appellee

**BEFORE:** Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

**O R D E R**

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 14-7014**

Argued February 6, 2015
Decided April 17, 2015

Louis P. Cannon, *et al.*,

Appellants

v.

District of Columbia,

Appellee

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

*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

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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).

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 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

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

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" 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 [4]

* * *

We affirm the judgment of the District Court.
*So ordered.*

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[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.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 14-7014** **September Term 2014**
Filed On: April 17, 2015

LOUIS P. CANNON, *et al.*,
Appellants
v.
DISTRICT OF COLUMBIA,
Appellee

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

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

**J U D G M E N T**

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

**ORDERED** and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/
Ken Meadows
Deputy Clerk

# APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS P. CANNON, *et al.*,

Plaintiffs,

v. Civil Action No. 12-0133 (ESH)

DISTRICT OF COLUMBIA,

Defendant.

## MEMORANDUM OPINION

Plaintiffs represent a class of retired District of Columbia police officers subsequently rehired by the District for different jobs. Following their retirements, plaintiffs received pension benefits from the District of Columbia Police Officers and Firefighters' Retirement Plan ("PFRP"). After being rehired, they continued to receive these benefits in addition to their new salaries (a practice commonly referred to as "double dipping"). In early 2012, pursuant to D.C. Code§ 5-723(e), the District began reducing plaintiffs' salaries by the amounts they received from their PFRP pensions. Plaintiffs sued for injunctive relief and damages. This Court denied plaintiffs' motions for injunctive relief and dismissed all of plaintiffs' constitutional and federal claims. The Court remanded plaintiffs' remaining D.C. law claims to Superior Court. *See Cannon v. District of Columbia*, 873 F. Supp. 2d. 272, 287-88 (D.D.C. 2012). On appeal, the Circuit affirmed the dismissal of all of plaintiffs' federal claims except the Fair

Labor Standards Act ("FLSA") claim brought by three particular class plaintiffs. On this claim, the Court of Appeals directed that summary judgment be entered for plaintiffs and remanded to this Court for the determination of damages. Because a federal claim remained, the Court of Appeals also vacated the decision not to exercise supplemental jurisdiction over the D.C. law claims. *See Cannon v. District of Columbia*, 717 F.3d 200, 206-09 (D.C. Cir. 2013).

Upon remand, plaintiffs filed a Second Amended Complaint adding an additional claim for relief under the Public Tax Act, 4 U.S.C. § 111(a). Soon thereafter, defendants filed a motion to dismiss all claims except the FLSA claim, as well as a notice of calculation of FLSA damages. For the reasons set forth below, the Court will grant defendant's motion to dismiss plaintiffs' constitutional claims (Counts I, III, and X-XI) and Public Tax Act claim (Count V) and will remand plaintiffs' D.C law claims (Counts IV, VI-IX, and XII-XV) to Superior Court. The Court will also enter summary judgment for plaintiffs Ford-Hayes, Neill, and Weeks on liability for their FLSA claim (Count II) and set a briefing schedule for the determination of back pay and damages.

## FACTUAL BACKGROUND

The material facts relevant to this case were described in detail in the Court's prior opinion and the opinion of the Court of Appeals. Therefore, an abbreviated version will suffice. Plaintiffs were police officers hired by the D.C. Metropolitan Police Department ("MPD") prior to September 30, 1987 that participated in the District of Columbia Police Officers' and Firefighters' Retirement Plan. *Cannon*, 873 F. Supp. 2d. at 275. Under federal law, the PFRP

is jointly administered by the United States and the District of Columbia. *See* District of Columbia Retirement Board, District of Columbia Police Officers and Firefighters' Retirement Plan, Summary Plan Description, *available at* http://dcrb.dc.gov/sites/default/files/dc/sites/dcrb/ publication/attachments/SPD_PoliceFirePlan2012Final.pdf, at 1-2, 73 (last visited January 6, 2014) ("Summary Plan").[1] The United States Treasury Department is responsible for all benefits attributable to services performed by plaintiffs prior to July 1, 1997. The D.C. Retirement Board ("DCRB") is responsible for benefits attributable to services performed after that date. *Id.* Upon retirement, plaintiffs began receiving benefits from their PFRP pensions.

Beginning in 2004, plaintiffs were rehired by the District of Columbia Department of General Services ("DGS"). *Cannon*, 873 F. Supp. 2d. at 275. Upon returning to work for the District, plaintiffs received both their pension benefits and their full

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[1] Like the Court of Appeals, this Court takes judicial notice of the contents of this summary. *See Cannon* 717 F.3d at 205, n.2. The summary explains the federal-district relationship in the following way,

> Under Title XI of the Balanced Budget Act (Act) of 1997, Public Law 105-33, as amended, the Federal Government and the D.C. Government share responsibility for the Plan. The Treasury Department is responsible for paying benefits attributable to police officer or firefighter service performed on or before June 30, 1997. DCRB is responsible for paying benefits attributable to police officer or firefighter service performed after June 30, 1997 and for lateral transfer service.

salaries simultaneously. *Id.* In the fall of 2011, however, the District informed plaintiffs that it had mistakenly failed to enforce D.C. Code § 5-723(e), a provision which expressly forbids this sort of double-dipping, and it would soon begin reducing their DGS salaries accordingly.[2] *Id.* at 276.

On January 25, 2012, the District began reducing plaintiffs' paychecks by the amount they received from their PFRP pensions. In response, plaintiffs immediately filed for a temporary restraining order and preliminary injunction to enjoin the offset. Plaintiffs also sued for damages under the United States Constitution, federal law, and D.C. law. At a hearing on January 31, 2012, plaintiffs' motion for injunctive relief was denied. *Id.* On July 6, 2012, this Court issued a Memorandum Opinion and Order granting defendant's motion to dismiss all of plaintiffs' federal and constitutional claims. *See id.* at 287. With the absence of federal claims in the case, the Court declined to exercise supplemental jurisdiction over plaintiffs' D.C. law claims and remanded them to Superior Court. *Id.* (citing 28 U.S.C. § 1367(c)(3)). The Court reasoned that "[r]emand to Superior Court [wa]s particularly appropriate . . . because plaintiffs' remaining claims raise novel and complex issue[s] of [District] law." *Id.* at 288 (citing 28 U.S.C. § 1367(c)(1)).

On appeal, the D.C. Circuit affirmed this Court's dismissal of all of plaintiffs' constitutional claims. *Cannon*, 717 F.3d at 206 ("The district court found the plaintiffs' constitutional claims meritless, and we agree."); *see also id.* at 208 ("We affirm the

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[2] The District did not seek to recover the amounts already paid, but rather sought to fix the problem going forward only. *See Cannon,* 873 F. Supp. 2d at 276.

district court's judgment on the constitutional claims . . . ."). However, the Court of Appeals reversed this Court's dismissal of the FLSA claim brought by three plaintiffs—Sheila Ford-Haynes, Gerald Neill, and Harry Weeks. While this Court had held that these plaintiffs' pension benefits constituted "compensation" for purposes of the minimum wage to which they were entitled under the FLSA, *see Cannon*, 873 F. Supp. 2d. at 279, the Court of Appeals held that this was "not a reasonable reading of the D.C. Code Section 5–723(e) [which] provides no authority for the District to claim that pension payments may be 'included as salary' . . ." *Cannon*, 717 F.3d at 205. The Court of Appeals "direct[ed] that summary judgment be entered for th[ese] three plaintiffs on that claim" and remanded as to "the extent of the District's FLSA liability" because "the parties ha[d] not briefed the issues of back pay and liquidated damages" under 29 U.S.C. § 216. *Id.* at 206. "Because the district court's decision not to exercise supplemental jurisdiction over the plaintiffs' D.C. law claims was premised on the dismissal of all federal claims from this case," the Court of Appeals also vacated "that part of the district court's order dismissing the D.C. law claims and remand[ed] for further proceedings." *Id.* at 208-09.

On remand, plaintiffs filed a Second Amended Complaint alleging fifteen counts (including six federal law counts and nine D.C. law counts). (Second Amend. Compl., Sept. 24, 2013 [ECF No. 50].) Though most of plaintiffs' claims were previously pled, this Complaint introduced one additional federal claim under the Public Tax Act (Count V). On October 18, defendant filed a motion to dismiss (Def. the District of Columbia's Mot. To

Dismiss [ECF No. 51] ("Mot.")) and a notice of calculation of back pay (Notice of Def.'s Calculation of FLSA Back Pay [ECF No. 52] ("Notice")). Plaintiffs filed an opposition (Opp. to Def.'s Mot. to Dismiss, Nov. 8, 2013 [ECF No. 53]) in which they did not respond to defendant's calculation of back pay. Defendant then filed a reply (District of Columbia's Reply, Nov. 22, 2013 [ECF No. 54] ("Reply")) in which it argued that its FLSA back pay calculations were conceded. This Court instead issued an Order to Show Cause to plaintiffs to explain why it "should not enter a judgment in the amount calculated by defendants in their notice." (Order to Show Cause, Dec. 11, 2013 [ECF No. 55], at 1) In response, plaintiffs did not respond directly to defendant's damage calculations, but instead, they challenged the propriety of calculating the FLSA damages at this stage in the litigation. (Response to the Court's Order of Dec. 11, 2013, Dec. 19, 2013 [ECF No. 56] ("Response").)

## ANALYSIS

### I. LEGAL STANDARD

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), courts must first assume the veracity of all "well-pleaded factual allegations" contained in the complaint. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see also Atherton v. D.C. Office of Mayor, 567 F.3d 672, 681 (D.C. Cir. 2009). Next, courts must determine whether the allegations "plausibly give rise to an entitlement to relief." (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570). "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. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal,* 556 U.S. at 663. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Id.* (quoting *Twombly,* 550 U.S. at 557). "Although for the purposes of a motion to dismiss [a court] must take all of the factual allegations in the complaint as true, [a court is] not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal,* 556 U.S. at 663 (internal quotation marks omitted)). Thus, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.*

## II. **FEDERAL CLAIMS**

Of the fifteen counts in plaintiffs' second amended complaint, the six that arise under the United States Constitution or federal law include: Count I (Deprivation of Property); Count II (FLSA); Count III (Equal Protection Clause); Count V (Public Tax Act); and Counts X-XI (First Amendment). For the reasons discussed below, the Court will dismiss Counts I, III, V, and X-XI. On Count II, the Court will enter summary judgment for plaintiffs as to liability and issue an order setting a briefing schedule on the issue of damages.

**A. Constitutional Claims Previously Dismissed**

In its prior opinion, this Court dismissed all of plaintiffs' constitutional claims (Counts I, III, and X-XI). *See Cannon*, 873 F. Supp. 2d at 280-87. The Court of Appeals affirmed. *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 . . . ."). Plaintiffs seem to think that despite this affirmance, the Court is free to reconsider these constitutional claims anew because "the D.C. Circuit made a summary conclusion that D.C. Code § 5-723(e) is in some way applicable to the Plaintiffs in the present day . . .[which] ignored the entire tortured legislative history of public safety pension funding in the District of Columbia . . . [and] [i]n remanding the case to this Court for further consideration . . . the D.C. Circuit left the majority of their theories of relief unaddressed." (Opp. at 31-32.) In plaintiffs' view, the Court of Appeals' discussion of their constitution claims was nothing but "dicta." (*Id.* at 31.)

In so arguing, plaintiffs misconstrue both the Court of Appeals opinion and the relevant standard for the reconsideration of issues previously decided by a district court and affirmed on appeal. Under the doctrine known as the law of the case, "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). Where the appeals court has "affirmatively decided the issue," the trial court is generally precluded from reconsidering that issue. *See id.* (citing *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751

& n.14 (D.C. Cir. 1990)).[3] In its prior opinion, this Court directly considered plaintiffs' constitutional claims and determined that dismissal was justified. *See Cannon*, 873 F. Supp. 2d at 280-87. On appeal, the Circuit considered and affirmed the dismissal of each of these constitutional claims. *See Cannon*, 717 F.3d at 206-08. Accordingly, this Court rejects plaintiffs' unjustified attempt to reopen these claims on remand and will once again dismiss with prejudice Counts I, III, and X-XI.

**B. Federal Public Tax Claim Act Claim**

Plaintiffs' second amended complaint introduces a new federal claim alleging that by reducing their salaries by the amounts they received from their PFRP pensions, the District violated the Public Tax Act, 4 U.S.C. § 111(a). (*See* Second Amend. Compl., Count V, at ¶¶ 98-106.) In relevant part, the Public Tax Act provides,

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[3] Plaintiffs argue incorrectly that the "law of the case doctrine only applies to the prior rulings of a different judge in the same case." (Opp. at 30.) *See In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 749 (D.C. Cir. 2006) ("Law of the case doctrine applies within the same case, proceeding, or action.") The D.C. Court of Appeals opinion cited by plaintiffs, *Nunnally v. Graham*, 56 A.3d 130, 142 (D.C. 2012), is not binding on this Court and also does not stand for the proposition that plaintiffs say it does. It does not hold that the law of the case doctrine *only* applies to the prior rulings of a different judge in the same case, rather it simply holds that when a new judge enters a case, the law of the case doctrine still applies.

> [t]he 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.

Passed in 1939, prior to the establishment of District Home Rule, the Act serves as "a partial congressional consent to nondiscriminatory state taxation of federal [and D.C.] employees." *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989). It also prohibits taxation that discriminates "based on the source of the pay or compensation being taxed." *See id*.

In Count V, plaintiffs argue that the District violated the anti-discrimination clause of the Act by taxing plaintiffs' PFRP pensions by an amount equal to one-hundred percent of their benefits. (*See* Second Amend. Compl. at ¶¶ 98-106; Opp. at 10.) They allege that this is "source discrimination" because the District of Columbia Civil Service Retirement System, which is funded by the District, is statutorily exempt from the offset provision, whereas PFRP, which is funded in part by the United States Treasury, is not. (*See* Opp. at 10-11.) In response, defendant argues that the source of plaintiffs' pension is not "federal" simply because parts of the pension benefits are paid by the United States

Treasury and, in addition, that the salary offset "does not 'tax' [plaintiffs' retirement] benefits, but merely reduces their *District* salaries." (*See* Reply at 4 (emphasis in original).)

The Court agrees that the plaintiff has failed to state a claim under the Public Tax Act, 4 U.S.C. § 111(a), for two reasons. First, the offset scheme outlined in § 5-723(e) does not constitute a tax on plaintiffs' pension benefits earned for work done during the course of their prior employment with the MPD. At most, the offset represents a tax on plaintiffs' current salaries earned for work done at DGS.[4] Plaintiffs explicitly recognize as much in their Opposition when they state that the District has no means of actually taxing plaintiffs' annuity benefits, "since such benefits are paid directly by the United States Treasury." (Opp. at 17.) This conclusion is further supported by the fact that plaintiffs are entitled to one hundred percent of their pension benefits regardless of whether they are rehired by

[4] In their Opposition plaintiffs spend a great deal of time discussing whether the offset is a "tax." (*See* Opp. at 7-9.) However, this argument is misplaced. The legal issue here is not whether the offset constitutes a tax, but rather what income is being taxed (plaintiffs' PFRP benefits or their DGS salaries).

the District.[5] To be sure, the question of whether the District is entitled to withhold parts of plaintiffs' DGS salaries is important for the adjudication of plaintiffs' other legal claims, however, because plaintiffs' pension benefits were never reduced, they cannot constitute a tax in violation of the Public Tax Act.

The Court of Appeals' prior decision on plaintiffs' FLSA claim supports, if not compels, this conclusion. In the context of their FLSA claim, plaintiffs argued that their "compensation" for work at DGS did not include the amounts they received from their PFRP pensions. *Cannon*, 717 F.3d at 205. The Court of Appeals agreed holding that "[t]here is no connection between their pensions and the work they currently perform for the District, and thus no sense in which their annuities constitute 'compensation' for that work." *Id.* "The District could not force the plaintiffs to suspend the receipt of the pension payments." *Id.* at 206. Now plaintiffs seek to have it both ways. For purposes of the FLSA, they 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. For purposes of the Public Tax Act, they now switch gears and argue that the offset

[5] This fact, that plaintiffs state wages are reduced and not their pension benefits, also distinguishes the present case from *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). In that case, the Supreme Court did not hold, as plaintiffs argue that "annuity payments are compensation subject to the public tax act," (Opp. at 9, n.2), but rather held that the state of Michigan could not exempt its own state retirement benefits from taxation and still tax federal benefits *directly*. *Id.* at 817.

constitutes an impermissible tax on their pension benefits. (*See* Opp. at 10.) As the Court of Appeals explained, "plaintiffs have no entitlement to *both* full salary *and* their annuities," *Cannon*, 717 F.3d at 207, and therefore, plaintiffs cannot now claim that the offset constitutes a tax on their pension benefits and not a reduction of their DGS salaries.

Second, even if the offsets under § 5-723(e) were to be considered "taxes" on plaintiffs' pension benefits, the District cannot have violated the Public Tax Act because the alleged taxation did not discriminate against the officer or employee "because of the source of the pay or compensation." Plaintiffs base their source discrimination argument on the fact that under the District of Columbia Retirement Protection Act of 1997, "[p]laintiffs are paid from a *Federal* system to which the United States government is directly responsible" for work done on or before June 30, 1997. (Opp. at 10.) However, as plaintiffs' own reading of the Act recognizes, the purported tax is also applied to plaintiffs' pension benefits for work done after June 30, 1997, paid for by the District. D.C. Code § 5-723 does not differentiate between pre- and post-1997 benefits. Therefore, even under plaintiffs' 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. For these reasons, Count V will be dismissed with prejudice.

### C. FLSA Claim of Plaintiffs Ford-Haynes, Neill, and Weeks

Plaintiffs Sheila Ford-Haynes, Gerald Neill, and Harry Weeks alleged in their initial complaint

that by reducing their DGS salaries by the amounts received from their PFRP pensions, the District had failed to pay them the minimum salary required by the FLSA. *Cannon*, 717 F.3d at 204. Under § 13(a)(1) of the FLSA and 29 C.F.R. § 541.600(a), employees that serve in a "bona fide executive, administrative, or professional capacity" must be "compensated on a salary basis at a rate of not less than $455 per week . . . ." While the parties agreed that these particular plaintiffs work in such capacities at DGS, they disagreed on whether the pension benefits they received constituted "compensation" for FLSA purposes. *See Cannon*, 717 F.3d at 204. On appeal, the Circuit held that "the District may not count these plaintiffs' annuities as compensation for purposes of the salary basis test [because u]nder no reasonable reading of the term can the pension payments be considered 'compensation' for these plaintiffs' current work." *Id.* at 205. Therefore, the Circuit "direct[ed] that summary judgment be entered for those three plaintiffs on th[eir FLSA] claim" and remanded for a determination of back pay and liquidated damages because the parties had not yet briefed the issue "[such that] the extent of the Districts' FLSA liability remain[ed] to be determined." *Id.* at 206.

Under Fed. R. Civ. P. 54(b), "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Based on the Court of Appeal's explicit instructions, this Court finds no reason to delay entering judgment as to liability on these plaintiffs' FLSA claim. Therefore, pursuant to the Court of Appeals decision, summary judgment will be entered

for plaintiffs Ford-Haynes, Neill, and Weeks on Count II.

The issue of damages, however, is not yet ripe for review. On October 28, 2013, defendant filed its "Notice of [] Calculation of FLSA Back Pay" which it referenced in its motion to dismiss filed on the same day. (*See* Mot. at 10.) Plaintiffs, however, chose not respond to the calculations contained in the Notice in their opposition. Defendant alleged in its Reply that the Court should therefore treat the calculations as conceded. (*See* Reply at 2.) The Court instead issued an Order to Show Cause as to why it "should not enter a judgment in the amount calculated by defendants in their notice." (Order to Show Cause, Dec. 11, 2013.) In response, plaintiffs once again chose not to respond to defendant's calculation and instead argued that it was premature to respond to defendants' Notice at the present stage of litigation. (*See* Response at 3.)

Under Fed. R. Civ. P. 12(d), "[i]f on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Defendant filed the Notice (which included a signed declaration and exhibits) contemporaneously with their motion to dismiss and referenced the Notice in that motion. (Mot. at 10.) Therefore, the Court will treat defendants' Notice as a motion for summary judgment on damages. The Court will give plaintiffs twenty days to respond with "all the material that is

pertinent" for a determination of damages.[6] Defendant then will have fourteen days to file a reply.

## III. D.C. LAW CLAIMS

Besides the calculation of FLSA damages, the only claims which remain in the case are the nine D.C. law counts not previously considered by this Court or the Court of Appeals. They include: Count IV (Home Rule)[7], Count VI (Breach of Contract), Count VII (Unjust Enrichment), Count VIII (Detrimental Reliance and Promissory Estoppel), Count IX (Intentional or Negligent Misrepresentation), Count XII (Defamation), Counts XIII-XIV (D.C. Whisteblower Law), and Count XV

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[6] This holding should resolve the disagreement between the parties as to the appropriate time for calculating the FLSA damages to which plaintiffs Ford-Haynes, Neill, and Weeks are unquestionably entitled. In response to this Court's Order to Show Cause, plaintiffs argued that "[w]ith regards to the Plaintiffs' FLSA claims, Defendant now specifically seeks judgment, not dismissal" and "[s]hould the Defendant seek judgment on the FLSA claims, a Rule 56 motion for summary judgment is appropriate and necessary." (Response at 3.) By treating defendant's Notice as a Rule 56 motion for summary judgment on damages, the Court prevents the needless step of requiring defendants to re-file its Notice as a separate motion for summary judgment and gives plaintiffs sufficient notice under Fed. R. Civ. P. 12(d) to respond accordingly.

[7] In plaintiffs' Opposition Brief, plaintiffs refer to their Home Rule claim as a "Commuter Tax" claim. (*See* Opp. at 15)

(Constructive Termination). Plaintiffs argue that this Court has exclusive jurisdiction and venue over at least one of these claims under D.C. Code § 1-815.02(a) and that they are therefore prevented from "claim splitting." (Opp. at 17-22.) Plaintiffs further argue that this Court must exercise supplemental jurisdiction over these remaining D.C. law claims under 28 U.S.C. 1367(a). (Opp. at 1-5.) However, for the reasons discussed below, the Court concludes that it does not have exclusive jurisdiction over any of plaintiffs' claims and it will decline to exercise supplemental jurisdiction over the remaining D.C. law claims. Accordingly, these claims will be remanded to D.C. Superior Court.

A. **Exclusive Jurisdiction Under D.C. Code § 1-815.02(a)**

Plaintiffs allege, as they did in their prior pleadings, that "[i]n at least one instance, this Court has *exclusive* jurisdiction over the Plaintiffs' claims." (Opp. at 11 (citing D.C. Code § 1-815.02).) However, as this Court explained in its earlier opinion, in so arguing plaintiffs have "misread that statute." *Cannon*, 873 F. Supp. 2d. at 288. This provision of Chapter 8 of the D.C. Code ("District of Columbia Retirement Funds") provides that the district court shall have exclusive jurisdiction over cases related to the payment of federal pensions. *See* D.C. Code § 1-815.02(a) (providing jurisdiction only for actions arising under Chapter 8). However, for the same reasons discussed above regarding plaintiffs' Public Tax Act claim, this case does not deal with the "payment of federal pensions," but rather it concerns a reduction in present salary. *See also Cannon*, 717

F.3d at 206. Plaintiffs have not articulated any reason why the Court should reconsider its prior holding and thus, for the reasons explained in its earlier opinion, the Court holds that D.C. Code § 1-815.02(a) remains inapplicable to this case.[8]

**B. Supplemental Jurisdiction Under 28 U.S.C. § 1367**

Plaintiffs argue that even if this Court does not have exclusive jurisdiction, this Court must exercise supplemental jurisdiction under 28 U.S.C. §

[8] Without citation to binding authority, plaintiffs also argue that this Court is "completely precluded" from "claim splitting" based on § 1-815.02(a) and therefore must consider plaintiffs state law claims. (Opp. at 18-22). Though the Court believes plaintiffs' claim splitting argument is likely without merit, because the Court rejects the application of § 1-815.02 to this case, it need not consider the issue but instead will proceed to its supplemental jurisdiction analysis under 28 U.S.C. § 1367(c).

1367(a).[9] (*See* Opp. at 1-5.) Under this statute, a district court is required to exercise supplemental jurisdiction over related state law claims, unless it finds that one (or more) of the statutory exceptions in 28 U.S.C. § 1367(c) is present,

> (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.

Two of these exceptions represent independent bases for refusing to exercise supplemental

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[9] Under 28 U.S.C. § 1367(a),

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

jurisdiction over plaintiffs' pendant state law claims in this case. First, under § 1367(c)(1), the Court finds that several of the remaining claims raise novel issues of D.C. law best suited to adjudication by the D.C. Superior Court. Plaintiffs core challenge to the offset requires the interpretation of D.C. Code § 1-611.03(b), as amended by the D.C. Government Reemployed Annuitant Offset Elimination Amendment Act of 2004, Act 15-489)) and D.C. Code § 5-723(e). Questions of statutory interpretation involving local statutes are best resolved in the first instance by the local courts. *See Barnes v. Dist. of Columbia*, 611 F. Supp. 130, 136 (D.D.C. 1985) ("The plaintiffs' claims under the D.C. Code and the personnel manual involve unexplored questions of state law which are best left to the local courts. In this situation, 'a federal District Court opinion is no substitute for an authoritative decision by the courts of the District of Columbia.'") (quoting *Doe v. Bd. on Prof'l Responsibility of the D.C. Court of Appeals*, 717 F.2d 1424, 1428 (D.C. Cir. 1983)). Moreover, as other courts within this District have held, retaliation under the D.C. Whistleblower Protection Act, D.C. Code § 1-615.53(a), is an undeveloped body of law that should be interpreted by the D.C. Superior Court. *See, e.g.*, *Lowe v. Dist. of Columbia*, 669 F. Supp. 2d 18, 31-32 (D.D.C. 2009) (remand of Whistleblower Protection Act claims is especially appropriate given the undeveloped state of the law).

Second, under § 1367(c)(2), D.C. law claims "substantially predominate[] over the claim or claims over which the district court has original jurisdiction." The only federal claim which still remains in the case is the determination of FLSA damages for plaintiffs Ford-Haynes, Neill, and Weeks. This is a narrow, largely mathematical

question, which has little if anything to do with the nucleus of facts common to plaintiffs' nine D.C. law claims. It would therefore be imprudent for the Court to exercise supplemental jurisdiction over these D.C. law claims. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 727 (1966) ("Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."); *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 439 (2d Cir. 2011) ("Even if the existence of one narrow surviving federal claim means that not *all* claims over which [the district court] has original jurisdiction have been dismissed it has nonetheless become clear that the state-law claims now substantially predominate[ ] in this litigation) (internal citations and quotation marks omitted); *Dargis v. Sheahan,* 526 F.3d 981, 991 (7th Cir.2008) (not exercising supplemental jurisdiction over case with one narrow federal claim and seven state-law claims).[10] For these reasons, the Court will once

[10] This is particularly appropriate in light of the goal of judicial economy. Neither this Court nor the Court of Appeals has considered previously the issues presented by plaintiffs' D.C. law claims. Nor does the determination of the FLSA damages have anything to do with defendant's liability on the remaining claims. *See Runnymede-Piper v. District of Columbia*, 2013 WL 3337797, *7 (D.D.C. July 3, 2013) ("The Court has not yet invested significant time and resources on the state law claims, and the District of Columbia Superior Court would naturally have greater familiarity and interest in the issues that remain insofar as they require interpretation of the District's own statutory and common law.").

again remand the remaining D.C. law claims to D.C. Superior Court.

**CONCLUSION**

Accordingly, and for the reasons stated above, the motion to dismiss will be granted as to Counts I, III, V, and X-XI. Summary judgment on liability will be entered for plaintiffs Ford-Haynes, Neill, and Weeks on their FLSA claim (Count II). They will have twenty days to file an opposition to defendant's damage calculations as presented in its Notice, which the Court is treating as a Rule 56 motion for summary judgment. Defendant then will have fourteen days thereafter to file a reply. Two separate Orders accompany this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: January 6, 2014

**APPENDIX E**

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

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**No. 12-7064** **September Term, 2012**
**1:12-cv-00133-ESH**
**Filed On:** July 17, 2013

Louis P. Cannon, et al.,
Appellants
v.
District of Columbia,
Appellee

**BEFORE:** Garland, Chief Judge, and Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, and Srinivasan, Circuit Judges

**O R D E R**

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk
BY: /s/
Jennifer M. Clark
Deputy Clerk

**APPENDIX F**

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Argued March 14, 2013 Decided June 4, 2013

No. 12-7064

LOUIS P. CANNON, ET AL.,
APPELLANTS
v.
DISTRICT OF COLUMBIA,
APPELLEE

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

*Matthew August 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 brief were *Irvin B. Nathan*, Attorney General, *Todd S. Kim*, Solicitor General, and *Donna M. Murasky*, Deputy Solicitor General.

Before: HENDERSON, GRIFFITH and KAVANAUGH, *Circuit Judges*.

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

GRIFFITH, *Circuit Judge*: Like many state and local governments, the District of Columbia has

passed laws against "double-dipping": the simultaneous drawing of both a pension and a salary by a retired employee who has been rehired by the District. The District enforced a law aimed at curbing double-dipping against the six plaintiffs, sharply reducing their salaries by the amount of their pension payments. We hold that the plaintiffs' federal challenges to this action are meritless except in one respect. In slashing three of the plaintiffs' salaries, the District overstepped the boundaries of the Fair Labor Standards Act.

I

The plaintiffs are retired from the Metropolitan Police Department (MPD). During their time with the MPD, they contributed portions of their salaries to the Police Officers' and Firefighters' Retirement Plan (Retirement Plan), which provides retirement and disability benefits to employees of the MPD and the District of Columbia Fire Department. Upon retirement, each of the plaintiffs began receiving annuities from the Retirement Plan.

Under § 5-723(e) of the D.C. Code, the salary of a retired MPD employee drawing on a Retirement Plan pension, who has been rehired by the District, is offset by the amount of the pension payments:

> Notwithstanding any other provision of law, the salary of any annuitant who first becomes entitled to [a Retirement Plan pension], 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).

In other words, the statute requires the District to reduce the salary of employees who simultaneously draw money from the Retirement Plan. Other state and local governments across the nation also forbid double-dipping by employees. *See, e.g.*, *Connolly v. McCall*, 254 F.3d 36, 43 (2d Cir. 2001) (per curiam) (New York's "policy of preventing receipt of a public pension while also receiving a public salary reflects the notion that such simultaneous income streams could constitute an abuse of the public fisc." (internal quotation marks omitted)); *Mascio v. Pub. Employees Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998) (describing an Ohio statute preventing double-dipping by state elected officials).

Between 2008 and 2011, the District rehired the plaintiffs to work in its Protective Services Police Department (Protective Services), a local law enforcement agency that protects government agencies and property. Notwithstanding § 5-723(e), through the end of 2011, the District paid the plaintiffs their full salaries while they continued to receive Retirement Plan annuities. On October 12, 2011, however, the District sent the plaintiffs letters notifying them that in November it would begin reducing their salaries by the amount of their pension payments. The plaintiffs were told that they could choose to suspend those payments as an

alternative to the salary offset. None did. November passed, and the double-dipping continued.

With the coming of the new year, however, the District followed through on its warning and enforced § 5-723(e) against the plaintiffs. The effect was dramatic. One of the plaintiffs, Harry Weeks, received no pay for the first pay period of 2012 after the District deducted the amount he received in pension payments from his Protective Services salary.

When the plaintiffs learned that the District had reduced their salaries, they immediately filed suit on January 26, 2012, claiming numerous violations of federal and D.C. law arising out of the salary offset. Two weeks after the plaintiffs sued, the District fired plaintiff Louis Cannon from his position as chief of Protective Services. At the same time, the plaintiffs discovered that the District had not paid them by direct deposit for the preceding pay period. Instead, they were issued paper paychecks. The plaintiffs amended their complaint on February 14 to allege that the firing and the missed payday were retaliatory.

Only the plaintiffs' federal claims are at issue in this appeal. Three of the plaintiffs assert that they did not receive the minimum wage required by the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, and all of them claim that: the salary offset violated the Fifth Amendment, the manner in which the District administered the offset violated the Equal Protection Clause, and the District violated the First Amendment by retaliating against them for filing their suit. On February 23, 2012, the District moved to dismiss the plaintiffs' suit, or, in the alternative, for summary judgment. The plaintiffs also moved for summary judgment on the

FLSA claim. On July 6, 2012, the district court entered summary judgment for the District on the FLSA and First Amendment claims, and dismissed the plaintiffs' Fifth Amendment claims under Fed. R. Civ. P. 12(b)(6). The district court declined to exercise supplemental jurisdiction over the plaintiffs' remaining D.C. law claims. *See Cannon v. District of Columbia*, 873 F. Supp. 2d 272, 287-88 (D.D.C. 2012).

The plaintiffs timely appealed, and we have jurisdiction pursuant to 28 U.S.C. § 1291. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Our review is de novo. *Figueroa v. D.C. Metro. Police Dep't*, 633 F.3d 1129, 1131 (D.C. Cir. 2011). We also review a Rule 12(b)(6) dismissal de novo and affirm if, accepting all allegations in the plaintiffs' complaint as true, they have nevertheless failed to state plausible grounds for relief. *Winder v. Erste*, 566 F.3d 209, 213 (D.C. Cir. 2009).

## II

We first address the FLSA claim brought by plaintiffs Sheila Ford-Haynes, Gerald Neill, and Weeks. They allege that the District has failed to pay them the federal minimum wage required by the FLSA since January 2012, when the District began applying the salary offset. Weeks also claims that the FLSA entitles him to overtime. In response, the District asserts that these employees are not covered by the FLSA, and that the District had no obligation to pay them minimum wage and overtime.

An employee is entitled to the federal minimum wage and overtime unless specifically

exempted by the FLSA. *See Smith v. Gov't Emp. Ins. Co.*, 590 F.3d 886, 892 (D.C. Cir. 2010). The employer bears the burden of demonstrating that its employee is exempt, and exemptions are "narrowly construed." *Havey v. Homebound Mortg., Inc.*, 547 F.3d 158, 163 (2d Cir. 2008) (citation omitted).

The District contends that Ford-Haynes, Neill, and Weeks are exempt under the terms of § 13(a)(1) of the FLSA because they are employed in a "bona fide executive, administrative, or professional capacity," as those terms are defined by Department of Labor (DOL) regulations. 29 U.S.C. § 213(a)(1). One such regulation requires that employees exempted under § 13(a)(1) be "compensated on a salary basis at a rate of not less than $455 per week . . . , exclusive of board, lodging or other facilities." 29 C.F.R. § 541.600(a); *see also Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 847-51 (6th Cir. 2012) (describing the "salary basis test"); *Hilbert v. District of Columbia*, 23 F.3d 429, 431 (D.C. Cir. 1994) (same).[1] To be "compensated on a salary basis," an employee must "regularly receive[] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602(a).

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[1] The employer must also demonstrate that its employee performs duties associated with "bona fide executive, administrative, or professional" employees, as set forth in DOL regulations. *Orton*, 668 F.3d at 846 (citation omitted). The plaintiffs do not dispute that their duties fit the exemption. The dispute is whether they are "compensated on a salary basis."

The crux of the dispute is whether Ford-Haynes, Neill, and Weeks receive less than $455 per week in compensation; if so, the District fails the salary basis test and they are covered by the FLSA's minimum wage and overtime requirements. Both parties agree that the amount each of these plaintiffs receives in their paychecks has fallen below $455 per week since January 2012. There is likewise no disagreement that if these plaintiffs' annuities are counted as compensation, they are paid well above $455 per week, and the District is entitled to summary judgment.

We hold that the District may not count these plaintiffs' annuities as compensation for purposes of the salary basis test. Under no reasonable reading of the term can the pension payments be considered "compensation" for these plaintiffs' current work. Rather, the money they receive from their pensions is a retirement benefit, earned over the course of their past employment with the MPD, not their present work for the District. The pensions were funded in part by the plaintiffs' own required contributions, which were automatically deducted from their MPD paychecks. *See* District of Columbia Retirement Board, District of Columbia Police Officers' and Firefighters' Retirement Plan, Summary Plan Description – 2007, at 9 (2007), *available at* http://dcrb.dc.gov/publication/police-officers-and-firefighters-summary-plan-description (last visited April 23, 2013).[2] There is no connection

[2] The District of Columbia Retirement Board administers the Retirement Plan. This document, which summarizes the operation of the pension fund for its beneficiaries, is available on the Retirement Board's website. We take judicial notice of its contents. *See* Fed. R. Evid. 201.

between their pensions and the work they currently perform for the District, and thus no sense in which their annuities constitute "compensation" for that work.

Conversely, as the plaintiffs correctly argue, their compensation comes in the form of the salaries the District pays them. But the District slashed those salaries. As paychecks in evidence demonstrate, Ford-Haynes, Neill, and Weeks did not actually receive $455 per week in pay once the District began applying the offset. Thus, the District cannot carry its burden of showing that these three plaintiffs are compensated "at a rate of not less than $455 per week."

The District argues that the annuities became compensation through the operation of § 5-723(e). According to the District, because the D.C. Code required the District to reduce the plaintiffs' salaries so that the sum of their annuities and the "compensation for [their] employment" equals the salaries they were otherwise entitled to receive, the annuities are the functional equivalent of salary. That is not a reasonable reading of the D.C. Code. Section 5-723(e) provides no authority for the District to claim that pension payments may be "included as salary," Appellee's Br. at 21, or that they have been transformed into compensation. Indeed, the statute explicitly distinguishes between the annuities and "compensation." *See* D.C. CODE § 5-723(e) (stating that a re-employed annuitant's salary "shall be reduced by such amount as is necessary to provide that the sum of such annuitant's annuity . . . and *compensation for such employment* is equal to the salary otherwise payable for the position . . . ." (emphasis added)).

The District also asserts that the plaintiffs' pension payments should be considered compensation because the plaintiffs were given the choice between accepting the salary offset and suspending annuities in the letters the District sent them in October 2011. Asking the plaintiffs to choose between losing their pension payments and taking a pay cut to satisfy § 5-723(e) does not convert the annuities into compensation for purposes of the FLSA. Indeed, placing this choice in the plaintiffs' hands merely underscores the salient point in our analysis: their pensions are not contingent upon their current work. The District could not force the plaintiffs to suspend receipt of the pension payments. Whatever else it may have authorized the District to do, § 5-723(e) surely does not allow the District to interfere with their pensions. It directs the District to reduce the *salaries* of double-dipping employees, while leaving annuity payments unaffected. Had the District invoked § 5-723(e) to reduce the plaintiffs' salaries to $455 per week, it would be in compliance with the FLSA. But for these three plaintiffs, the District went further. The choice described in the October 2011 letters does not muddy a record that is sufficiently clear: the District has paid these three plaintiffs less than $455 per week since January 2012.

Ford-Haynes, Neill, and Weeks do not receive the $455 weekly compensation necessary to qualify for the exemption as "bona fide executive, administrative, or professional" employees. Because the District raises no other defense, we hold that it has violated the FLSA. We therefore reverse the grant of summary judgment against Ford-Haynes, Neill, and Weeks on their FLSA claim and direct that summary judgment be entered for those three

plaintiffs on that claim. As the parties have not briefed the issues of back pay and liquidated damages, the extent of the District's FLSA liability remains to be determined. On remand, therefore, the district court should calculate any back pay and damages to which these plaintiffs may be entitled under 29 U.S.C. § 216.

III

The district court found the plaintiffs' constitutional claims meritless, and we agree.

A

All of the plaintiffs claim a "cognizable property interest" in the simultaneous receipt of their annuities and full salaries. The District's use of the offset, they argue, amounted to a taking and interfered with that property interest. The plaintiffs seek to avoid the force of § 5-723(e) by arguing that it has been superseded by amendments to § 1-611.03(b), a different section of the D.C. Code that provides, in relevant part: "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).

It is true that, as a result of these amendments, retirees from District employment who receive pension benefits pursuant to 5 U.S.C. § 8331, the Civil Service Retirement Act (CSRA), may continue to receive benefits while retaining their full salary if they are rehired by the District. But this does not help these plaintiffs, because they do not

receive pension benefits under 5 U.S.C. § 8331. The Retirement Plan is separate from the CSRA. "The [CSRA] codified at 5 U.S.C. §§ 8331 *et seq.*, provides for payment of annuities to retired federal employees and their surviving spouses." *Fornaro v. James*, 416 F.3d 63, 64 (D.C. Cir. 2005). In the past, when the "District personnel apparatus" was "awkwardly meshed . . . with the federal personnel system," *District of Columbia v. Thompson*, 593 A.2d 621, 632 (D.C. 1991) (internal quotation marks omitted), some District employees participated in the federal pension program established under the CSRA. 51 D.C. Reg. 8779 (Sept. 10, 2004). The Retirement Plan, by contrast, originated in a wholly different statute, the "stated purpose" of which was "to provide benefits *comparable* to those given under the" CSRA. *Ridge v. Police & Firefighters Ret. & Relief Bd.*, 511 A.2d 418, 427 (D.C. 1986) (emphasis added).

The plaintiffs have no entitlement to *both* full salary *and* their annuities. Lacking such an entitlement, their due process and takings claims fail. *See Hettinga v. United States*, 677 F.3d 471, 479-80 (D.C. Cir. 2012) (per curiam) (holding that plaintiffs must plead a "threshold requirement" of due process claims: "that the government has interfered with a cognizable liberty or property interest"); *see also Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) ("[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it.").

B

Around the same time that the District reduced the plaintiffs' salaries, the plaintiffs allege that the MPD gave large raises to senior officers who, like the plaintiffs, were retirees who had been rehired by the District and collected both salaries and Retirement Plan annuities. Although the officers were subject to the salary offset, the raises meant that their incomes remained roughly what they had been before the offset.

The plaintiffs argue that exposing them to the full force of the offset while shielding others from its impact violated their right to equal protection of the laws. "To prevail on an equal protection claim, the plaintiff must show that the government has treated it differently from a similarly situated party and that the government's explanation for the differing treatment does not satisfy the relevant level of scrutiny." *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215 (D.C. Cir. 2013) (internal quotation marks omitted). Because plaintiffs do not allege that the pay raises "target[ed] a suspect class or burden[ed] a fundamental right," we apply rational basis review. *Id.* The District's challenged action "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and the plaintiffs bear the burden of showing that the pay raises were "not a rational means of advancing a legitimate government purpose." *Hettinga*, 677 F.3d at 478-79 (citation omitted).

We affirm the district court's dismissal of the plaintiffs' equal protection claim. As the district

court observed, their claim boils down to "the fact that the District gave raises to some District employees, but not to them." *Cannon*, 873 F. Supp. 2d at 283. Before the district court, the plaintiffs essentially conceded that there are two ways in which they are not similarly situated to the officers who received pay raises. The plaintiffs work for Protective Services and not the MPD, and they do not "perform the same functions, have the same duties and responsibilities, or the same background or experience, as these MPD employees." Pls. April 3, 2012 Opp. to Summ. J. (April 3, 2012), at 18-19.

In any event, the plaintiffs cannot show that it was arbitrary and irrational for the District to give raises to the senior MPD officers. As the District asserts, "[g]iven their differing responsibilities, the District may have a greater need and/or desire to re-hire and retain experienced officers for the MPD than it does for [Protective Services] and, therefore, may offer salary increases to attract and retain the former and not the latter." Appellee's Br. at 36. In other words, the District may have had greater use for the senior officers' services and a greater fear of losing them. That plausible explanation for the raises is more than sufficient to survive rational basis review.

C

The plaintiffs claim that the District took two retaliatory actions against the exercise of their First Amendment right to bring this suit. The District fired plaintiff Louis Cannon, then chief of Protective Services, on February 8, 2012. Two days later, the plaintiffs did not receive their pay as expected

through direct deposit. The District issued them paper paychecks instead.

As to the paycheck claim, the district court concluded that "receiving a single paycheck in the form of a paper check, rather than by direct deposit," would not be sufficient to "deter a person of ordinary firmness" from exercising First Amendment rights. *Cannon*, 873 F. Supp. 2d at 286-87 (*quoting Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002)). On appeal, the plaintiffs do not contest this conclusion. They argue instead that summary judgment was improper because a jury should have determined the District's intent in issuing the paper paychecks. But the question of retaliatory intent was rendered irrelevant by the court's holding that the District's use of a paper paycheck in the place of direct deposit would not deter the exercise of First Amendment rights. The plaintiffs' challenge fails.

As to Cannon's firing, the District produced documentary evidence and an affidavit demonstrating that the director of the Department of Human Resources approved the firing on January 18, 2012, before the plaintiffs filed suit and for unrelated reasons. The district court therefore held that the plaintiffs could not establish that the lawsuit "was a substantial or motivating factor" in Cannon's firing. *Id.* at 285 (*quoting Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007)). The plaintiffs claim they needed additional discovery to demonstrate that the District's documentary evidence about Cannon's firing was fraudulent. They contend that the district court abused its discretion by failing to stay its summary judgment while the plaintiffs pursued that theory. *See* Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or

declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; [or] (2) allow time to obtain affidavits or declarations or to take discovery . . . .").

The plaintiffs, however, failed to comply with the requirements of Rule 56(d). "To obtain [Rule 56(d)] relief, the movant must submit an affidavit which states with sufficient particularity why additional discovery is necessary." *Convertino v. U.S. Dep't of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012) (citation omitted).

> The affidavit must satisfy three criteria. First, it must outline the particular facts [the movant] intends to discover and describe why those facts are necessary to the litigation. Second, it must explain why [the movant] could not produce the facts in opposition to the motion for summary judgment. Third, it must show the information is in fact discoverable.

*Id.* at 99-100 (internal quotation marks and citations omitted). The plaintiffs submitted no Rule 56(d) affidavit, nor did they make any of the required representations discussed in *Convertino*. The district court did not abuse its discretion in deciding the District's summary judgment motion on the record before it.

## IV

We affirm the district court's judgment on the constitutional claims, but reverse and remand as to the claim under the FLSA. Because the district

court's decision not to exercise supplemental jurisdiction over the plaintiffs' D.C. law claims was premised on the dismissal of all federal claims from this case, *see Cannon*, 873 F. Supp. 2d at 287-88, we vacate that part of the district court's order dismissing the D.C. law claims and remand for further proceedings.

*So ordered.*

**APPENDIX G**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS P. CANNON, *et al.*,

Plaintiffs,

v. Civil Action No. 12-0133 (ESH)

DISTRICT OF COLUMBIA,

Defendant.

**MEMORANDUM OPINION**

Plaintiffs purport to represent a class of retired police officers who were first employed by the District of Columbia ("District" or "defendant") before 1987 and were subsequently rehired by the District after 2004. After they retired, they received federal retirement benefits and, when they were rehired, they began receiving a salary from the District. When the District began reducing their pay by the amount of their pension payments, plaintiffs filed suit, alleging violations of the Fair Labor Standards Act, the First Amendment, their Fifth Amendment rights to due process, just compensation, and equal protection, and asserting multiple claims arising under District of Columbia law. Before the Court is the District's motion to dismiss or, in the alternative, for summary judgment and plaintiff's cross-motion for partial summary judgment. For the reasons set forth below, the Court will grant defendant's motion with respect to the

federal claims, remand the remaining claims to Superior Court, and deny plaintiffs' motion or partial summary judgment.

## BACKGROUND

### I. FACTS

Plaintiffs were first employed by the District as police officers before 1987.[1] (First Am. Compl. ¶ 35; Def.'s Opp'n to Mot. for Temporary Restraining Order, Ex. 1 ("Toliver Decl.") ¶ 5.) When they retired, they began receiving federal retirement benefits. (*Id.*) At various points after 2004, plaintiffs were rehired by the District to serve in the Department of General Services ("DGS") and, at that point, began receiving salaries from the District. (*Id.* ¶ 4; First Am. Compl. ¶ 37.) From the time that they were rehired until early 2012, plaintiffs received both their federal pension payments and their full salaries for the current positions as District employees. (*See, e.g.,* Pls.' Opp'n to Def.'s Mot./Cross-Mot. for Summ. J. ("Pls.' Mot."), Ex. 5 ("Cannon Decl.") ¶ 19.) The simultaneous receipt of federal pension and salary payments is commonly referred to as "double-dipping."

In summer 2011, the District began looking into the legality of double-dipping. (Compl., Ex. 2, at 2.) In fall 2011, it informed plaintiffs that it had mistakenly overpaid them for several years, since it had neglected to apply the offset set forth in D.C. Code § 5-723(e) to reduce their current paychecks by their pension payments. (*See* Def.'s Partial Mot. to

[1] The named plaintiffs are Louis P. Cannon, Stephen R. Watkins, Eric Westbrook Gainey, Gerald G. Neill, Sheila Ford-Haynes, and Harry Louis Weeks, Jr.

Dismiss or, in the Alternative, for Summ. J. ("Def.'s Mot."), Ex. 7 (letters to plaintiffs dated Oct. 12, 2011).) In particular, the District notified them that although it would not recoup the thousands of dollars that it had erroneously paid in the past, it would rectify the error prospectively by offsetting their current salary payments by their monthly pension payments. (*Id*.)

January 25, 2012 was the first date that plaintiffs' paychecks were reduced to reflect their pension payments. (*See* First Am. Compl. ¶¶ 46, 50.) One day later, plaintiffs filed suit, seeking a temporary restraining order ("TRO") and preliminary injunction ("PI") to enjoin the offset and claiming that double-dipping was expressly permitted by a D.C. law enacted in 2004-- the D.C. Government Reemployed Annuitant Offset Elimination Amendment Act of 2004 ("Offset Elimination Act of 2004"), Act 15-489. (*See* Compl. ¶ 32; Mot. for TRO at 6.) At a hearing on January 31, 2012, plaintiffs' motion for a TRO was denied.

Plaintiff Cannon was fired on February 8, 2012, as Chief of the Protective Services Police Department because he allegedly failed to properly investigate an incident that occurred during an Occupy D.C. protest and subsequently submitted a false investigative report to the Director of DGS. (Pls.' Mot. for Leave to File Suppl. Compl. ("Supp. Compl."), Ex. 3 ("Cannon Termination Letter"); Def.'s Opp'n to Pls.' Renewed Mot. for a Preliminary Injunction, Ex.1 ("D.C. Human Resources Decision Form").) He was terminated at the conclusion of a Human Resources Department investigation that was initiated on October 26, 2011, and ended with General Counsel Charles Tucker's recommendation that Cannon be terminated. (Def.'s Mot. For Leave to

File a Sur-Reply ("Def.'s Renewed PI Sur-Reply"), Ex. 1 ("Tucker Decl.") ¶ 7.) Tucker's recommendation was made on January 17, 2012—one week before plaintiffs' paychecks were reduced by their pension payments and nine days before the instant suit was filed. (*Id*.)

On February 10, 2012, some District employees, including several of the plaintiffs, did not receive their normal direct deposit salary payments. (*See* Def.'s Opp'n to Pls.' Renewed Mot. for a PI, Ex. 2 ("Burrell Decl.") ¶ 6; Def.'s Renewed PI Sur-Reply, Ex. 2 ("Rivera Portis Decl.") ¶ 6.) Due to a clerical error, they received paper checks instead. (*Id*. ¶ 4.) Employees of DGS called each plaintiff to explain what had happened and the plaintiffs were ultimately paid in full. (Burrell Decl. ¶ 6.)

Plaintiffs subsequently amended their complaint to add claims based on these two events.[2] (*See* Supp. Compl.) They now assert claims under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*. ("FLSA"), and under 42 U.S.C. § 1983 for the deprivation of due process, just compensation, and equal protection in violation of the Fifth Amendment and for retaliation in violation of the First Amendment. In addition, plaintiffs assert multiple claims under District of Columbia common law,[3] the District of Columbia Self-Government and Governmental Reorganization Act, codified as amended at D.C. Code §§ 1-201.01 *et seq*., and the

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[2] They again sought a preliminary injunction, which was denied. (*See* Pls.' Renewed Mot. for a Preliminary Injunction.)

[3] The common law claims are: breach of contract; unjust enrichment; detrimental reliance/promissory estoppel; intentional or negligent misrepresentation; and defamation (Cannon only).

District of Columbia Whistleblower Protection Act, codified as amended at D.C. Code §§ 1-615.51 *et seq*. Defendant has moved to dismiss or, in the alternative, for summary judgment, on all claims and plaintiffs have cross-moved for partial summary judgment on their FLSA claims only.

## ANALYSIS

### I. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(1), plaintiffs must demonstrate that the court has jurisdiction. *See Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). Since district courts are courts of limited jurisdiction, the inquiry into "subject matter jurisdiction is, of necessity, the first issue for an Article III court." *Loughlin v. United States*, 393 F.3d 155, 170 (D.C. Cir. 2004) (internal quotation marks omitted). In "determining the question of jurisdiction, federal courts accept the factual allegations contained in the complaint as true . . . . Moreover, the Court can consider material outside of the pleadings when determining whether it has jurisdiction." *Halcomb v. Office of the Senate Sergeant-At-Arms*, 563 F. Supp. 2d 228, 235 (D.D.C. 2008).

To survive a Rule 12(b)(6) 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.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "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." *Id*.

(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). This facial plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "[A] complaint [does not] suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (some alteration marks omitted).

Under Rule 56, summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). There is a "genuine issue" of material fact if a "reasonable jury could return a verdict for the nonmoving party." *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1031 (D.C. Cir. 2007) (quoting *Anderson*, 477 U.S. at 248). A moving party is thus entitled to summary judgment against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Waterhouse v. Dist. of Columbia*, 298 F.3d 989, 992 (D.C. Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). While "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor, *Anderson*, 477 U.S. at 255, the non-moving party "may not rest upon the mere on allegations or denials of his pleading." *Id.* at 298.

## II. FAIR LABOR STANDARDS ACT

Plaintiffs Ford-Haynes, Neill, and Weeks assert claims under the FLSA, arguing that they are being paid less than the minimum wage mandated by the FLSA since their paychecks have been reduced by the offset. (First Am. Compl. ¶¶ 56-61.) Under the FLSA, employers must pay employees at least $7.25 per hour, plus time-and-ahalf for overtime work. 29 U.S.C. §§ 206, 207. Exempt from the FLSA's overtime and minimum wage requirements are those "employed in a bona fide executive, administrative, or professional capacity . . . ." 29 U.S.C. § 213(a)(1). To qualify as an exempt "executive" or "administrative" employee, the person must be "[c]ompensated on a salary basis at a rate of not less

than $455 per week." 29 C.F.R. §§ 541.100, 541.200.[4] This is consistent with the FLSA's goal of "protect[ing] low paid rank and file employees" since "[h]igher earning employees . . . are more likely to be bona fide managerial employees." *Darveau v. Detecon, Inc.*, 515 F.3d 334, 338 (4th Cir. 2008) (quoting *Counts v. S.C. Elec. & Gas Co.*, 317 F.3d 453, 456 (4th Cir. 2003)). The District argues that Ford-Haynes, Neill, and Weeks are exempt from the

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[4] In addition, to qualify as an exempt "executive," the employee must also be one

> (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
>
> (3) Who customarily and regularly directs the work of two or more other employees; and
>
> (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

*Id.* § 541.100. Similarly, an exempt "administrative" employee is one

> (2) Whose primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

*Id.* § 541.200.

FLSA because they are high-level, managerial employees. (*See* Def.'s Mot. at 22-25 (arguing that Neill and Weeks are exempt as "executive" employees); Def.'s Combined Reply/Opposition (Def.'s Reply") at 18-22 (arguing that Ford-Haynes is exempt as an "administrative" employee).) Plaintiffs do not dispute that they perform the management-related duties described in 29 C.F.R. §§ 541.100(2)-(4), 541.200(2)-(3), but they argue that they do not qualify for the FLSA exemption because they earn less than $455 per week. (*See* Pls.' Reply at 9-10.) Therefore, the sole dispute between parties is whether plaintiffs Ford-Haynes, Neill, and Weeks are "[c]ompensated on a salary basis at a rate of not less than $455 per week." 29 C.F.R. §§ 541.100, 541.200.

Ford-Haynes receives $1,739.71 gross per week for full-time work. She earns $43.50 per hour—a salary of $90,474.00 annually—as a Management Analyst employed by the District. (*See* Pls.' Reply, Ex. 4.) From her rehire in July 2011 until January 2012, she also received approximately $72,000 per year—$6,000 per month— in pension payments. (*Id.*) Since January 25, 2012, her District paychecks have been offset by her pension payments, so she now receives $239.88 gross per week from the District (Answer ¶ 59; Pl.'s Mot., Ex. 2 (Pls.' Stmt.) ¶ 5) and $1,500.00 per week from her pension. (Pls.' Reply, Ex. 4.) Neill receives approximately $1,897.71 gross per week for full-time work. He earns $40.48 per hour—a salary of $84,202.00 annually—as a District employee. (*See* Pls.' Mot., Ex. 8.) From his rehire in 2009 until January 2012, he also received $77,724.96 per year—$6,477.08 per month— in pension payments. Since January 25, 2012, his District

paychecks have been offset by his pension payments and now he receives $278.44 gross per week in his paycheck (Pls.' Stmt. ¶ 4) and $1,619.27 per week from his pension. (Pls.' Mot., Ex. 8 at 3.) Weeks receives at least $883.52 per week for full-time work. He earns $22.09 per hour— a salary of $45,943.00 annually—as a Supervisory Protective Services Officer for the District. (*See* Pls.' Mot., Ex. 9 at 2-3.) From March 2010 until January 2012, he also received $42,408.96 per year—$3,534.08 per month — in pension payments. (*See id*. at 4-5.) Since January 25, 2012, his District paychecks have been offset by his pension payments, so he now receives $0 per week in his paycheck and $883.52 per week from his pension. (*Id*.)

It is therefore undisputed that each of these plaintiffs receives a total of more than $455 per week. However, the parties disagree about whether the federal pension payments should be included in the calculation of the minimum "salary basis" necessary to be exempt from the FLSA. The District calculates the relevant "salary basis" as the amount that plaintiffs would receive before the offset is applied. (*See* Def.'s Mot. at 23.) Plaintiffs urge a narrower interpretation, insisting that the FLSA "salary basis" refers to the amount of their paychecks after they have been reduced to account for their pension payments. (*See* Pls.' Mot. At 14).

Plaintiffs, however, offer no authority for the proposition that the Court should ignore the thousands of dollars in pension payments that they receive each month and look only at the money that they receive from their current paychecks. Nor can the Court find any. Rather, the Department of Labor's related administrative interpretations, *see, e.g.*, Administrator's Op. Letter, FLSA 2006-43

(Dep't of Labor Nov. 26, 2006),[5] and the relevant case law support defendant's interpretation of the FLSA. *See Fed. Air Marshals v. United States*, 84 Fed. Cl. 585, 596-97 (2008) (explaining that, although the pilots' "Availability Pay" was not hourly compensation under the FLSA, the pilots were not entitled to a "windfall" and therefore it was properly deducted from their regular pay); *see also Rogers v. Dist. Unemployment Compensation Bd.*, 290 A.2d 586, 587 (D.C. 1972) ("[P]etitioner's annuity is deductible from his unemployment benefits because his employer contributed to it.").

Although plaintiffs correctly argue that the Court should focus on the pay that the employee actually receives, *see Orton v. Johnny's Lunch Franchise, LLC*, 668 F.3d 843, 848 (6th Cir. 2012), they ignore the fact that they receive compensation

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[5] The Department of Labor explained that, for compensation to qualify as "free and clear" payment on a "salary basis,"

> it is immaterial what specific terms . . . an employer uses when compensating employees on a fee or commission basis. What matters is that the employee receives no less than the weekly required amount as a guaranteed salary constituting all or part of total compensation, which amount is not subject to reduction due to the quality or quantity of the work performed, and that the employee is never required to repay any portion of that salary even if the employee fails to earn sufficient commissions or fees.
>
> *Id.*

far in excess of the FLSA threshold.[6] Moreover, plaintiffs in fact control whether their earnings come through their paycheck or their pension checks because, as the October 12, 2011 letters explain, plaintiffs may elect to receive their full salary in their paychecks and suspend the annuity payments instead. (Def.'s Mot., Ex. 7 at 3.) Regardless of whether it comes in their paychecks or in their pension checks, they earn *and* receive between $22.09 and $43.50 per hour, which far exceeds the cut-off for coverage under the FLSA.

Therefore, since Ford-Haynes, Neill, and Weeks meet the FLSA exemption's threshold salary requirement, and it is undisputed that they qualify as exempt executive or administrative employees, their FLSA claims fail matter of law.

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[6] An employee is considered to be paid "on a salary basis" if he receives a set amount of compensation that is not, as a general rule, subject to reduction. 29 C.F.R. § 541.602(a). There are a few permissible types of deductions set forth in the regulations, *see id*. § 541.602(b), and plaintiffs argue that the offset is unlawful because it is not one of those deductions. (Pls.' Mot. at 13-14.) However, § 541.602(b) is irrelevant to the offset at issue because it relates to deductions from the salary payment which are based upon employee absence or disciplinary penalties. The permissible deductions listed in § 541.602(b) are different because they reduce the total compensation amount. Plaintiffs, by contrast, continue to be compensated at their regular rates which are "not subject to reduction because of variations in the quality or quantity of the work performed." *Id*. § 541.602(a).

## III. DEPRIVATION OF PROPERTY INTEREST

Plaintiffs also claim that they were deprived of "pay accrued to them" without due process or just compensation in violation of the Fifth Amendment. (First. Am. Compl. ¶¶ 51- 53.)

Under the Due Process Clause, the government must provide "notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006).[7] Beyond these threshold requirements, the extent of procedural protections "varies with the particular situation" and the interest at stake. *See Zinermon v. Burch*, 494 U.S. 113, 127 (1990). In *Mathews v. Eldridge*, the Supreme Court articulated the three factors that govern the extent of procedural protections that are required:

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and

[7] The Due Process Clause provides that "no person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "The procedural due process guarantee imposes procedural requirements on the government before it deprives individuals of protected interests." *Pearson v. Dist. of Columbia*, 644 F. Supp. 2d 23, 46 (D.D.C. 2009) (quotation marks omitted).

> administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

Plaintiffs first claim that they were deprived of procedural due process when their paychecks were reduced because they were not given a pre-deprivation forum to challenge the offset. (Pls.' Mot. at 21-23; Pls.' Reply at 10.) However, this claim fails because plaintiffs were provided all that due process requires (*i.e.*, notice and a forum to challenge the impending offset), but they neglected to avail themselves of it. (Def.'s Mot. at 15-17.)

As an initial matter, plaintiffs received notice of the offset months before it became effective. They were individually informed of the impending offset through letters dated October 12, 2011, and told to contact the Deputy General Counsel of Human Resources, Dwayne Toliver, with any questions. (Def.'s Mot., Ex. 7.) However, they failed to do so.[8] Instead, plaintiffs waited until the offset was applied to their paychecks and raised the issue by filing for emergency relief in federal court.

More importantly, plaintiffs had an opportunity to challenge the offset, but ignored the procedures that exist to resolve this type of dispute. (*See* Def.'s Mot. at 15-17.) Pursuant to the Comprehensive Merit Protection Act ("CMPA"), D.C.

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[8] Plaintiff Cannon states that he called Shawn Stokes, the Director of Human Resources and told her that the offset was inapplicable and that he "understood . . . that the letters regarding the offset had been issued in error" (Cannon Decl. ¶ 20), but does not explain what, if any, response he was given.

Code § 1-603.01 *et seq*., District personnel disputes are resolved through local procedures that provide for "prompt handling . . . . [and the] expeditious adjustment of [employee] grievances and complaints." D.C. Code § 1-616.53(a). As the D.C. Court of Appeals recently explained, this process "provide[s] 'the exclusive remedy for a District of Columbia public employee who has a work-related complaint *of any kind*.'" *Lattisaw v. Dist. of Columbia*, 905 A.2d 790, 794 (D.C. 2006) (quoting *Robinson v. Dist. of Columbia*, 748 A.2d 409, 411 (D.C. 2000)) (emphasis added).

Plaintiffs' only response is that the CMPA does not apply to them, but that argument is factually and legally flawed. The single authority on which they rely—D.C. Code § 1-207.13(d) (*see* Pls.' Reply at 10)—is inapposite, since that provision does not relate to the CMPA and, in any case, applies to individuals employed by the federal government before the District established its own personnel system in 1979. D.C. Code § 1-207.13(d); *see Dist. of Columbia v. Hunt*, 520 A.2d 300, 302 (D.C. 1987). It is therefore irrelevant to the plaintiffs, all of whom were hired by the District after 2004, and, as a result, their complaints are covered by the CMPA grievance process. *See Lattisaw*, 905 A.2d at 793. ("[F]or the purpose of determining the CMPA's applicability, our case law has emphasized that 'grievances' are to be broadly construed.")

Plaintiffs, having chosen not to avail themselves of the available process (*see* 6 DMCR § 1636 (providing for initiation of process by filing a written grievance)), cannot now complain that they did not have the opportunity "to be heard at a meaningful time and in a meaningful manner."

*Mathews*, 424 U.S. at 333; *English v. Dist. of Columbia*, 815 F.Supp.2d 254, 267 (D.D.C. 2011) ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.") (quoting *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000)). Thus, their allegations that "[d]efendant has never provided any meaningful means for . . . respond[ing] to [the offset] and [p]laintiffs were given no pre-deprivation forum to assert their defenses against it" (Pls.' Mot. at 22) are simply wrong.

Nor can plaintiffs argue that greater procedural protection was warranted under *Mathews*. First, they have not demonstrated that the risk to their private interests is great. Even if the offsets were arguably improper, plaintiffs would risk only temporary deprivation of the offset amounts. Meanwhile, they would continue to receive their full federal pensions—thousands of dollars per month—in addition to partial salary payments (except for Weeks). Moreover, their own actions suggest that the effect on their personal finances is not dire; even with notice of the impending offset, they did not challenge the application of the offset or restructure their personal finances to account for the reduction in their income. (*See* Tr. TRO Hearing at 60, Jan 31, 2012.) Second, there is a low risk of error here where the District's decision is based on statutory interpretation and does not require a factual determination. Finally, the District has a significant interest in ensuring that its employees address personnel matters through the prescribed grievance process. Therefore, there can be no basis for plaintiffs to argue that their procedural due

process rights were violated. *See Lattisaw*, 905 A.2d at 793; *see also Deschamps v. Dist. of Columbia*, 582 F. Supp. 2d 14, 17 (D.D.C. 2008) (explaining that the CMPA "provides all the process [plaintiff] is entitled to").

In addition, plaintiffs contend that the offset constitutes a "taking" under the Fifth Amendment (First Am. Compl. ¶ 52), which prohibits taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. This claim fails as well. Plaintiffs appear to have "confuse[d] a property right cognizable under the Takings Clause of the Fifth Amendment with a due process right to payment of a monetary entitlement under a compensation statute." *Adams v. United States*, 391 F.3d 1212, 1220 (Fed. Cir. 2004) *aff'g* No. 00-447 C, 2003 U.S. Claims LEXIS 238 (Aug. 11, 2003).[9] In *Adams*, Judge Block rejected a similar claim for unpaid overtime wages, explaining that

> [t]his is either a standard claim for money . . . or a due process claim . . . . However, it is not a Takings Claim under the Fifth Amendment, for even if an obligation to pay money can be considered property, no property was here seized for public use. In other words, nothing was really 'taken' from plaintiffs for the [benefit] of the public - at best, [wages] simply

[9] Although the Court of Appeals for the District of Columbia left open the question of whether a FLSA claim could provide the basis for a Takings Claim in *Adams v. Hinchman*, 154 F.3d 420, 425-26 (D.C. Cir. 1998), the Federal Circuit's resolution of that case provides persuasive authority here.

> were not paid. Accordingly, the government did not appropriate plaintiffs' money for its own purpose. Instead, it simply did not pay plaintiffs . . . overtime because it believed plaintiffs' [sic] exempt . . . .

2003 U.S. Claims LEXIS 238, at *29-30. Furthermore, this Circuit has recently explained that, if the proceeding by which property is transferred from an individual to the government does not violate due process, then "'[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.'" *Tate v. Dist.of Columbia*, 627 F.3d 904, 909 (D.C. Cir. 2010) (quoting *Bennis v. Michigan*, 516 U.S. 442, 452 (1996)). Since the Court has already found that the procedures by which the District imposed the offset did not violate due process, its action did not "constitute a taking without compensation violative of the Fifth Amendment." *See Tate*, 627 F.3d at 909-10; *Fox v. Dist. of Columbia*, No. 10-2118, 2012 U.S. Dist. LEXIS 44141, at *33-34 & n.17 (D.D.C. Mar. 30, 2012).

Therefore, plaintiffs' claims in Count I, based on the deprivation of a property interest, are dismissed.

## IV. EQUAL PROTECTION

Plaintiffs also claim that they were discriminated against in violation of their Fifth Amendment right to equal protection. They argue that defendant "enforced this offset against the

[p]laintiffs . . . but [has] effectively negat[ed] the effect of the offset on other persons by simply giving them more money." (First Am. Compl. ¶¶ 64, 77.)[10] In effect, plaintiffs challenge the fact that the District gave raises to some District employees, but not to them. The District has moved to dismiss this count for failure to state a claim. (*See* Def.'s Mot. at 17-22.)

First, to establish an equal protection claim, plaintiffs must show that they were singled out and treated differently from others who were similarly situated. *Women Prisoners of D.C. Dep't of Corrs. v. Dist. of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996). To meet this burden, plaintiffs allege that they were treated differently from District police officers who were given a raise to compensate for the income reduction resulting from the offset. (*See* Pls.' Mot. at 15 (relying upon Compl., Ex. 2 (*Washington City Paper* article discussing raises given to Metropolitan

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[10] At various points, plaintiffs make the conflicting assertion that they are challenging the application of the offset and not the recent raises. (*See, e.g.*, Pls.' Mot. at 16; Pls.' Reply at 14.) However, the offset has also been applied to the MPD officers (*see* Compl., Ex. 2 at 3), as plaintiffs recognize (First Am. Compl. ¶¶ 48, 64, 68, 72, 76) , so they cannot claim that the offset itself has been discriminatorily applied. Thus the Court must interpret the claim as set forth in the complaint and conclude that the challenge is to the salary increases that "offset the offset." (*Id*; *see also* Pls.' Mot. at 19 ("What [plaintiffs] properly complain of is that [defendant] gave these reemployed federal annuitants *additional* money . . . solely to offset the offset . . . .").)

Police Department ("MPD") employees Hickson, Major, and Sarvis)).) However, these officers are not similarly situated. First, they are employed by a different agency within the District government—the MPD (*see* Compl., Ex. 2)—whereas plaintiffs work for the Department of Protective Services, which is a division of DGS. (Toliver Decl. ¶ 4; *see also* Tr. TRO Hearing at 25, Jan 31, 2012 (explaining that plaintiffs "do not perform the ordinary street patrol duties and primary criminal response to the general public that the Metropolitan Police Department does.").) Second, as plaintiffs appear to concede (Pls.' Mot. at 18-19), the MPD officers are not similar to plaintiffs in terms of responsibilities, background, or experience.

Given these differences, the Court cannot agree with plaintiffs' contention that the single way in which the MPD officers and plaintiffs *are* similar —that they are both subject to the offset—means that "all of the relevant aspects of [their] employment were 'nearly identical' to those of [the MPD officers]." *Royall v. Nat'l Ass'n of Letter Carriers*, 548 F.3d 137, 145 (D.C. Cir. 2008) (internal quotation omitted); *see Noble v. U.S. Parole Comm'n*, 194 F.3d 152,155 (D.C. Cir. 1999) (finding "groundless" the plaintiff's contention that there exists "a constitutional right to equal treatment under the law by the government, even where that treatment is imposed by two different agencies"); s*ee also Vandermark v. City of New York*, 391 Fed. Appx. 957, 959 (2d Cir. 2010) ("There are numerous reasonable bases on which the City of New York might decide that NYPD officers and [Environmental Police Officers] should receive different compensation and benefits, including the danger associated with the positions, [and] the

physical strain of the job . . . ."); *Tumminello v. United States*, 14 Cl. Ct. 693, 697 (1988) ("[F]actual distinctions between employees in different categories and in different federal agencies preclud[ed] a finding that they are all similarly situated. . . .").

Second, even if plaintiffs could be considered to be similarly situated to the MPD officers, which they cannot, their equal protection claim would still fail because they have not shown that the District's action was irrational. *See Brandon v. Dist. of Columbia Bd. of Parole*, 823 F.2d 644, 650 (D.C. Cir. 1987) ("[T]he government may avoid violating equal protection principles if it can demonstrate that its reasons for treating an individual differently bear some rational relationship to a legitimate state purpose."). Since plaintiffs concede that they are not part of a suspect class (Pls.' Mot. at 16), the only question is whether the District's action can be considered a reasonable way of addressing the underlying concern. *See Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 83-84 (2000); *Heller v. Doe*, 509 U.S. 312, 319-20 (1993). Under this standard, "[t]he government . . . has no obligation to produce evidence to sustain the rationality of [its determination]; instead , . . . [t]he burden is on the one attacking the [governmental] arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Tate*, 627 F.3d at 910 (internal quotation marks omitted).

Plaintiffs' claim also fails because it does not violate equal protection to give raises to some employees and not to other ones. As the Supreme Court has made clear, "[t]o treat employees

differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 605 (2008) ("[W]e have never found the Equal Protection Clause implicated in the specific circumstance where, as here, government employers are alleged to have made an individualized, subjective personnel decision in a seemingly arbitrary or irrational manner.") Therefore, even if the District did raise the MPD officers' pay to offset the offset, that would not raise equal protection concerns.

Moreover, as numerous courts have recognized, the decision to apply the offset to plaintiffs' salaries is rationally related to legitimate government interests. *See, e.g.*, *Haworth v. Office of Personnel Mgmt.*, 112 Fed. Appx. 406, 408 (6th Cir. 2004) ("[T]he purpose of [5 U.S.C.] § 8344(a) is to prevent retired federal employees from 'double-dipping,' *i.e.*, receiving full retirement benefits and full regular wages at the same time. Protecting the public fisc by enacting laws against double-dipping by retired employees is a rational legislative decision."); *Connolly v. McCall*, 254 F.3d 36, 43 (2d Cir. 2001) ("The default policy of preventing receipt of a public pension while also receiving a public salary reflects the notion that such simultaneous income streams could constitute an abuse of the public fisc . . . . [W]hether sound policy or not, there is nothing irrational about [it].") (internal quotation marks omitted).

Ultimately, plaintiffs have not stated a claim because equal protection "does not require [that] all

persons everywhere be treated alike,"[11] but instead only prohibits the government from "treat[ing] *similarly situated* individuals differently without a rational basis." *Noble*, 194 F.3d at 154 (emphasis in original).

## V. FIRST AMENDMENT

Plaintiffs bring two claims under the First Amendment, alleging that defendant violated their right to petition the government by retaliating against them after they initiated the instant lawsuit. (Supp. Compl. ¶¶ 13-24.) Specifically, they contend that Cannon's termination and plaintiffs' receipt of paper paychecks rather than direct deposit payments were acts of retaliation designed to intimidate plaintiffs and members of the proposed plaintiff class from challenging the offset. (*Id.*)

Because plaintiffs are public employees, their speech warrants "considerable, but not unlimited, First Amendment protection." *Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007). Therefore, their claims of retaliation are governed by a four-factor test:

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[11] Contrary to plaintiffs' contention (Pls.' Mot. at 15-21), they are not entitled to discovery on this point because they have not provided any basis to believe that they are similarly situated to the MPD officers who received a raise. *See Dunning v. Quander*, 508 F.3d 8, 10 (D.C. Cir. 2007) (denying discovery under Rule 56(f) because"[w]ithout some reason to question the veracity of affiants, . . . [plaintiff]'s desire to test and elaborate affiants' testimony falls short.") (alterations in original) (internal quotation marks omitted).

> First, the public employee must have spoken as a citizen on a matter of public concern. Second, the court must consider whether the governmental interest in promoting the efficiency of the public services it performs through its employees outweighs the employee's interest, as a citizen, in commenting upon matters of public concern. Third, the employee must show that her speech was a substantial or motivating factor in prompting the retaliatory or punitive act. Finally, the employee must refute the government employer's showing, if made, that it would have reached the same decision in the absence of the protected speech.

*Id.* (internal quotation marks and citations omitted). In addition, to be actionable, the government's action must be "likely to deter a person of ordinary firmness from th[e] exercise [of protected activity]." *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 585 (D.C. Cir. 2002) (quoting *Crawford-El v. Britton*, 93 F.3d 813, 826 (D.C. Cir. 1996)).

**A. Cannon's Termination**

The first claim under the First Amendment, which is based on Cannon's termination, is deficient in several respects. (*See* Supp. Compl. ¶¶ 6-10, 13-18.) However, it is unnecessary to address defendant's multiple grounds for dismissal because Cannon cannot establish causation, for he cannot show that the initiation of the instant suit "was a substantial or motivating factor in prompting [his firing]." *Wilburn*, 480 F.3d at 1149; *see Velikonja v. Mueller*,

362 F. Supp. 2d 1, 24 (D.D.C. 2004) ("Plaintiff fails to offer evidence to suggest a link between the government's conduct and [this lawsuit]; thus, the Court need not consider whether his [initiation of this suit] was constitutionally protected."), *aff'd*, 466 F.3d 122, 124 (D.C. Cir. 2006).

With respect to causation, Cannon relies solely upon the short temporal proximity between the filing of the lawsuit and his letter of termination. (Supp. Compl. ¶¶ 6-10, 13-18; *see* Pls.' Mot. at 29-30.) This asserted causal link, however, is inconsistent with the facts. According to the termination letter, Cannon was fired for his failure to adequately investigate an October 26, 2011 incident involving Occupy D.C. and for generating a report containing false information that he submitted to his superiors within DGS. (Cannon Termination Letter at 1.) The evidence makes clear that the disciplinary action that resulted in his firing was undertaken months before the lawsuit was filed or even contemplated (*id*), and the recommendation that he be fired, dated January 17, 2012, was also made well before there was any reason for litigation. (D.C. Human Resources Decision Form.) On that date, Charles Tucker, General Counsel for the Department of Human Resources, formally recommended that Cannon, as well as another individual, be fired for the reasons stated in the termination letter. (*Id*.) Tucker's recommendation was approved on January 18, 2011 (*id*.), which was over a week before plaintiffs filed their initial complaint. Thus, as plaintiffs concede, when the District made the decision to fire Cannon, it had no reason to retaliate against him. (*See* Tr. Second PI Hearing at 15, Mar. 5, 2012 (plaintiffs' attorney agreeing that "[t]he

District would not have known— the folks of HR would not have known about the lawsuit, because the cause of the lawsuit didn't occur until January 25th.").)

In the alternative, plaintiff's claim of retaliation cannot survive because he has not rebutted the District's legitimate—and well substantiated—reason for its decision.

In an attempt to refute defendant's explanation, Cannon argues that, even if the allegations against him were true, termination was such a disproportionate penalty for the offense that retaliation must be inferred. (*See* Pls.' Mot. at 19; Pl.'s Mot., Ex. 3 (Pls.' Stmt. in Response to Def.'s Stmt.) at 7-10.)[12] In his view, the penalty cannot be legitimate because it is inconsistent the District's other disciplinary policies. (*Id*.)

However, the policy that Cannon cites does not even apply to him since he was an "at will" employee who occupied a high-level position within DGS and was found to have committed a breach of trust. (*See* Pls.' Mot., Ex. 4 at 48 (progressive discipline policy applicable only to "Career Service" employees who have completed their probationary period); *id*., Ex. 5 at 1 (penalty table applicable only to MPD officers).)

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[12] Plaintiffs' unfounded allegations that defendant's attorneys fabricated evidence of the decision to terminate Cannon (*see, e.g.*, Reply in Support of Renewed Mot. for a Preliminary Injunction at 4 n.3 ("[The Human Resources Decision Form] is entirely a backdated fabrication and a fraud upon this Court"); Tr. Second PI Hearing, at 15, 17-18, Mar. 5, 2012; Pls.' Mot. at 29 n. 11), have already been rejected by the Court. (*See* Tr. Second PI Hearing at 15, Mar. 5, 2012.)

Ultimately, defendant has shown that it not only "would have reached the same decision in the absence of protected speech," *Wilburn*, 480 F.3d at 1149, but also that it *did* reach that decision before the arguably protected activity occurred. Therefore, Cannon's claim of retaliation will be dismissed.

**B. Issuance of Paper Checks**

Plaintiffs' second claim of retaliation, which is based on the District's issuance of paper, rather than electronic, paychecks is also seriously flawed. First, it is not cognizable under the First Amendment because it would not deter a person of ordinary firmness from exercising his or her rights. Second, plaintiffs have again failed to establish causation.

"The widely accepted standard for assessing whether 'harassment for exercising the right of free speech [is] … actionable'. . . depends on whether the harassment is '[]likely to deter a person of ordinary firmness from that exercise.'" *Toolasprashad*, 286 F.3d at 585 (quoting *Crawford-El*, 93 F.3d at 826) (alternations in original). The Circuit has explained that, in the employment context, the action taken against an employee need not be as significant as the denial of a promotion and may be satisfied by acts such as the refusal to consider someone for a new position within a department, a two-day suspension, or the transfer of a teacher to another school. *See Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) (describing case law and finding that requiring submission of new materials that necessitated twenty-seven hours of additional work could deter a person of ordinary firmness); *accord Crawford-El*, 93 F.3d at 826 (small pecuniary losses could deter a

prisoner of ordinary firmness); *Baumann v. D.C.*, 744 F. Supp. 2d 216, 223 (D.D.C. 2010) (planting police monitors to "monitor" speech could deter a person of ordinary firmness); *Banks v. York*, 515 F. Supp. 2d 89, 111-12 (D.D.C. 2007) (placing prisoner in solitary confinement could deter a person of ordinary firmness); *Anderson-Bey v. Dist. of Columbia*, 466 F. Supp. 2d 51, 65 (D.D.C. 2006) (imposition of restraints and denial of food and water could deter a person of ordinary firmness). By contrast, coercing a colleague into withdrawing as a co-presenter has been found to be insufficient to sustain a First Amendment retaliation claim. *Krieger v. United States Dep't of Justice*, 529 F. Supp. 2d 29, 57-58 (D.D.C. 2008)

Under this standard, plaintiffs' claims are not cognizable because receiving a single paycheck in the form of a paper check, rather than by direct deposit, would not deter a person of ordinary firmness from exercising his First Amendment rights. Indeed the plaintiffs' receipt of paper rather than electronic paychecks has not dampened their zeal for litigation since they responded to this incident by filing a supplemental complaint, renewing their motion for a preliminary injunction, and filing a cross-motion for summary judgment. *See Hatfill v. Ashcroft*, 404 F. Supp. 2d 104, 119 (D.D.C. 2005) ("[W]here a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech.") (quoting *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001)); *see also Krieger*, 529 F. Supp. 2d at 57-58 (dismissing retaliation claim alleging that employer sought to impede the plaintiff's speaking engagement where the plaintiff nevertheless participated in the engagement as scheduled).

Furthermore, plaintiffs have not rebutted defendant's explanation that the issuance of paper checks was the result of a clerical error. (*See* Burrell Decl. ¶ 6; Rivera Portis Decl. ¶ 6.) Scott Burrell, the Chief Operating Officer of DGS, who is responsible for overseeing the Human Resources Division, has explained that "the Office of Payroll and Retirement Services made a mistake and plaintiffs were issued 'live,' paper checks, instead of direct deposits." (Burrell Decl. ¶ 6.) Plaintiffs baldly assert that this mistake only affected plaintiffs (*see* Pls.' Reply to Pls.' Renewed Mot. for a PI at 7), but that is not true. At least one District employee (another reemployed federal annuitant) who is not a plaintiff was affected by this same error (Rivera Portis Decl. ¶ 6), which lends further credibility to defendant's explanation. Moreover, defendant contacted all of the affected employees and explained the problem, which has not occurred again. (*See id*; Burrell Decl. ¶ 6.) Ultimately, there is *no* indication that retaliation had anything to do with this clerical error.

## VI. SUPPLEMENTAL JURISDICTION

Since all of the federal claims are being dismissed, the Court will decline to exercise supplemental jurisdiction over the remaining claims pursuant to 28 U.S.C. § 1367(c)(3). *See Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423-24 (D.C. Cir. 2005) (if "all federal-law claims are dismissed before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining

state-law claims") (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Remand to Superior Court is particularly appropriate here because plaintiffs' remaining claims raise novel and complex issue[s] of [District] law." 28 U.S.C. § 1367(c)(1). Their core challenge to the offset requires interpretation of D.C. Code § 1-611.03(b), as amended by the D.C. Government Reemployed Annuitant Offset Elimination Amendment Act of 2004, Act 15- 489)) and § 5-723(e), which is best resolved in the first instance by the local courts. *Barnes v. Dist. of Columbia*, 611 F. Supp. 130, 136 (D.D.C. 1985) ("The plaintiffs' claims under the D.C. Code and the personnel manual involve unexplored questions of state law which are best left to the local courts. In this situation, 'a federal District Court opinion is no substitute for an authoritative decision by the courts of the District of Columbia.'") (quoting *Doe v. Bd. on Prof'l Responsibility of the D.C. Court of Appeals*, 717 F.2d 1424, 1428 (D.C. Cir. 1983)). Similarly, their claims of retaliation under the D.C. Whistleblower Protection Act, D.C. Code § 1- 615.53(a), delve into an undeveloped body of law which is also more suitable for elaboration by the local courts. *See Lowe v. Dist. of Columbia*, 669 F. Supp. 2d 18, 31-32 (D.D.C. 2009) (remand of Whistleblower Protection Act claims is especially appropriate given the undeveloped state of the law); *see also Terrell v. Dist. of Columbia*, 703 F. Supp. 2d 17, 23 (D.D.C. 2010) (same); *Pearson v. Dist. of Columbia*, 644 F. Supp. 2d 23, 49-50 (D.D.C. 2009) (same).

Although plaintiffs insist that this Court has exclusive jurisdiction over this case pursuant to D.C. Code § 1- 815.02(a) (*see* Pls.' Reply at 10; First Am. Compl. ¶ 7), they have misread that statute. This

provision of Chapter 8 of the D.C. Code ("District of Columbia Retirement Funds") provides that the district court shall have exclusive jurisdiction over cases related to the payment of federal pensions. *See* D.C. Code § 1-815.02(a) (providing jurisdiction only for actions arising under Chapter 8). However, plaintiffs make no claim regarding their pensions, nor could they, since their pensions have not been affected. Rather, they contest the fact that their salary is being reduced by their pension payments. *See Barnes*, 611 F. Supp. at 136 (explaining that the offsets did not reduce the plaintiffs' federal pensions but rather affected their local salaries). Therefore, D.C. Code § 1-815.02(a) is irrelevant.

## CONCLUSION

For the foregoing reasons, the Court grants defendant's motion to dismiss or, in the alternative for summary judgment, with respect to plaintiffs' claims under the FLSA, the Fifth Amendment (due process, just compensation, and equal protection), and the First Amendment, remands the remaining claims to Superior Court, and denies plaintiffs' cross-motion for partial summary judgment. A separate order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: July 6, 2012