No. 26-TX-0047

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

v.

AMERICAN PHILOSOPHICAL ASSOCIATION, *ET AL.*,
APPELLEES.

On Appeal from the
Superior Court for the District of Columbia
No. 2019-CVT-000003

BRIEF OF APPELLEES AMERICAN PHILOSOPHICAL ASSOCIATION AND AMERICAN ANTHROPOLOGICAL ASSOCIATION

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August 7, 2026

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 26.1 of the Rules of the District of Columbia Court of Appeals, Appellee American Philosophical Association states it is a nongovernmental non-profit organization. No parent corporation or publicly held corporation owns 10% or more of its stock. American Philosophical Association is not a partnership.

Further, in compliance with Rule 26.1, Appellee American Anthropological Association states it is a nongovernmental non-profit organization. No parent corporation or publicly held corporation owns 10% or more of its stock. American Philosophical Association is not a partnership.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court had subject-matter jurisdiction to decide the constitutional claims in this case pursuant to D.C. Code § 11-921; and
2. Whether the Superior Court properly awarded pre-judgment interest for an overpayment of tax pursuant to D.C. Code § 47-3310(c).

STATEMENT OF THE CASE

Section 47-2005(3)(C) of the D.C. Code violates the Commerce Clause of the United States Constitution, because it requires a semipublic institution to be located in the District in order to obtain an exemption from District sales and hotel taxes. It denies the same tax exemption to semipublic institutions that do not have an office in the District – classic discrimination against interstate commerce. The Superior Court agreed, granting summary judgment in favor of the Plaintiffs on liability and awarding damages after giving the Class an opportunity to submit Proof of Claims and hearings to resolve disputed Proof of Claims.

On appeal, the District does not challenge the lower court's finding that Section 47-2005(3)(C) is unconstitutional (even as the District continues to enforce it to this day). Instead, the District argues first that the Superior Court lacked jurisdiction to consider claims by parties who did not first file refund claims – an argument that three separate judges of the Superior Court rejected during the pendency of this case. Second, the District incorrectly claims that the Superior

Court's award of pre-judgment interest was improperly calculated. Finally, the District argues that if this Court concludes that the Superior Court had the requisite jurisdiction, this Court should nonetheless remand for further consideration of whether the Commerce Clause applies to the D.C. statute at issue here – an issue that it never raised below except in a footnote and did not even mention in its Screening Statement to its Notice of Appeal. This Court should reject all of the District's arguments and affirm the lower court's decision without any remand.

STATEMENT OF THE FACTS

Under District of Columbia law, a limited category of organizations (defined as "[s]emipublic institution[s]" under D.C. Code § 47-2001(r)) are exempt from sales and use taxes paid to hotels – but only if such organizations are located within the District. *See* D.C. Code § 47-2005(3)(C) ("Gross receipts from the following sales shall be exempt from the tax imposed by this chapter . . . (3) Sales to semipublic institutions; provided, however, that such sales shall not be exempt unless . . . (C) Such institution is located within the District.").

The requirement of a District-based office to claim an exemption under Section 47-2005(3)(C) has been implemented by the District's Office of Tax and Revenue ("OTR"), which has issued forms and guidance for obtaining the exemption. All forms make clear that only semipublic institutions with an office in the District can obtain a hotel and sales tax exemption.

Plaintiffs and the members of the Class certified by the Superior Court are non-profit organizations that qualify as "[s]emipublic institution[s]" pursuant to D.C. Code § 47-2001(r), and which maintain no office in the District of Columbia. During the Class Period (commencing December 12, 2016, and continuing through June 6, 2025), Plaintiffs and each Class member paid sales and hotel taxes in connection with meetings or events held at hotels located in the District. Because Plaintiffs and Class members do not have offices within the District, they are ineligible for an exemption from the hotel and sales taxes paid to District hotels under D.C. Code § 47-2005(3).

PROCEDURAL HISTORY

This action is now nine years old. It was filed on June 12, 2017, in the Civil Division of the Superior Court, as a putative class action challenging the constitutionality of D.C. Code § 47-2005(3)(C), and seeking a refund of taxes Plaintiffs and the members of the Class were unlawfully required to pay to the District.

On August 29, 2017, the District moved to dismiss the Complaint. The District argued that the court lacked jurisdiction because Plaintiffs first had to exhaust their remedies before the OTR. The District principally relied on D.C. Code § 47-2021(a), § 47-3303, and § 47-3304(a), and also argued that Plaintiffs' claims were barred by the District's Anti-Injunction Act, D.C. Code § 47-3307. After extensive briefing, on December 1, 2017, Judge Holeman heard oral argument on the District's motion to dismiss. There was also briefing by the parties following the hearing. As Judge Holeman retired before ruling on this motion, the case was then assigned to Judge Epstein. By Order dated January 29, 2019 (JA 84-92) Judge Epstein denied the District's motion to dismiss, holding first that Plaintiffs were not required to apply for a refund from the OTR before seeking relief from the Superior Court as none of the Code provisions cited by the District contained such a requirement; and second, that their claims for money damages were not barred by the District's Anti-Injunction Act.[1] Judge Epstein then referred this matter to the Tax Division, which assigned the present Superior Court case number to it.

In the Tax Division, the case was assigned to Judge Pittman. On March 8, 2019, the District moved for reconsideration of Judge Epstein's ruling that Plaintiffs did not first have to make refund claims to the OTR before filing suit. The District further maintained that, even assuming Plaintiffs were not required to first file their claims with the OTR, the court could consider refund claims going back only six months from the date when the Complaint was filed. By order dated May 30, 2019 (JA 100-08), Judge Pittman denied the District's motion for reconsideration, concluding as Judge Epstein did, that none of these Code provisions required

[1] Judge Epstein only granted the District's motion to dismiss to the extent that it sought injunctive relief against continued enforcement of Section 47-2005(3)(C). *See* JA 89-90.

Plaintiffs to first file their refund claims with the OTR. His order did, however, limit the case to taxes paid no earlier than six months before the action was filed.

After certain discovery, Plaintiffs moved for Class certification, which Judge Pittman granted by Order dated April 30, 2021 (JA 109-27). Class Notice was mailed to 3,221 potential Class members on December 13, 2021.

Following the opt-out period, Plaintiffs moved for summary judgment on liability only on April 8, 2022. On February 12, 2024, the Superior Court, per Judge McCabe, who was then assigned to this case, granted Plaintiffs' motion for summary judgment, concluding that the residency requirement set forth in D.C. Code § 47-2005(3)(C) violated the Dormant Commerce Clause of the United States Constitution. JA 134-36.

On January 16, 2025, six years after last raising the issue, the District moved again for the Superior Court to dismiss the case for lack of subject-matter jurisdiction, arguing once again that Plaintiffs were required to submit claims to the OTR before filing suit. For the first time, the District relied on D.C. Code § 47-3310(b), which it maintained it had "overlooked" when it previously moved to dismiss. Defendant's Motion to Dismiss (Jan. 16, 2025) at 4. At the same time, the District also moved to decertify the class. *See* Defendant's Motion to Decertify the Class (Jan. 16, 2025). By Order dated February 19, 2025 (JA 138-145), Judge Knowles, who was then assigned to the case, denied both motions finding with regard to D.C. Code § 47-3310(b) that it also did not require Plaintiffs to first submit their claims to the OTR. Notice and Proof of Claim forms were then mailed to potential class members in March 2025 with a deadline for submission of June 6, 2025.

The OTR was extensively involved in the claims process established by the court and in fact reviewed every claim that was submitted. Following the June 6, 2025, deadline for the submission of claims, the District, by motion filed July 9, 2025, sought an adjournment of the evidentiary hearings scheduled for July 29 and 30, 2025, on the ground that the number of claims is "significant compared to what the Office of Tax and Revenue routinely processes." Def's. Opposed Mot. To Revise Scheduling Order (July 9, 2025) at 2. The hearings were adjourned to permit the OTR to complete its review of the claims. Order Continuing Hearing (July 23, 2025). The OTR's review process led the District to initially accept 149 of the approximately 240 claims submitted. *See* Exhibit A to Plaintiffs' Submission ISO Acceptance of Claims Disputed By Def. (Aug. 8, 2025). In the District's Submission Regarding Disputed Claims (Aug. 8, 2025), for purposes of the objections that certain claimants possessed unexpired D.C. tax exemption certificates issued before these claimants moved out of the District, the District relied on correspondence with these claimants provided by OTR and the OTR's position regarding the expiration of such exemptions after an organization left the District.

With regard to disputed claims, Judge Knowles held evidentiary hearings on September 3 and 4, 2025 and on October 1 and 2, 2025 at which a number of claimants testified remotely. As a result of this claimant testimony and meeting and conferring with District counsel, the District and OTR agreed to accept a total of 31 additional claims (in whole or in part) and, as a result, Judge Knowles was only called upon to resolve disputes concerning 18 claimants. Judge Knowles resolved all disputes in these claimants' favor, except for a part of one claim by Order dated December 1, 2025. JA 150-55.

By the same Order, after extensive briefing, the court ruled that Plaintiffs and Class claimants were entitled to pre-judgment interest of 6 percent on the amount of tax overpaid to be computed, for claimants whose meetings were held prior to March 29, 2019, the date Plaintiffs moved for Class certification, from that date; for those claimants whose meetings were held after that date, interest would run from the date of their meeting(s); and for the named Plaintiffs, interest would run from the date the original Complaint was filed. JA 155-156.

The District filed its Notice of Appeal on January 16, 2026. In its Screening Statement, the District identified only two issues for appeal: First, whether the Superior Court erred in holding that Plaintiffs and Class members were not required to exhaust their claims by filing an administrative refund claim before filing suit; and second, whether the Superior Court erred in its determinations of what date(s) pre-judgment interest owed by the District should run from for claimants other than the named Plaintiffs.

STATEMENT OF THE STANDARD OF REVIEW

Questions of law are reviewed de novo. *See Szymkowicz v. President of the Coll. of Georgetown Univ.*, 336 A.3d 650, 653-54 (D.C. 2025). This Court's review is limited to questions that were properly raised and preserved below. *See MP PPH, LLC v. District of Columbia*, 339 A.3d 132, 143-44 (D.C. 2025). "Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal." *Wolff v. Washington Hosp. Ctr.*, 938 A.2d 691, 694 (D.C. 2007) (quoting *Miller v. Avirom*, 384 F.2d 319, 321-22 (D.C. Cir. 1967)). "[A]bsent a manifest miscarriage of justice, [this Court] need not, and usually will not, reverse a trial court ruling in a civil case on the basis of arguments made for the first time on appeal." *Corporate Accountability Lab v. Sambazon, Inc.*, 340 A.3d 1277, 1286 (D.C. 2025).

SUMMARY OF ARGUMENT

Appellants' first issue for appeal should be summarily rejected. Three Superior Court Judges correctly denied the District's three attempts to argue that the Superior Court lacked jurisdiction absent the exhaustion of administrative remedies. Specifically, Judges Epstein and Pittman properly concluded that neither of the two statutes then pointed to by the District – D.C. Code § 47-2021(a) and § 47-3303 – contained the "sweeping and direct statutory language" required to indicate that there is no jurisdiction prior to exhaustion of administrative remedies. JA 85-87; JA 104-05. Judge Knowles also correctly held that D.C. Code § 47-3310(b), the provision on which the District based its third attempt, did not deprive the Superior Court of jurisdiction, because the statute plainly lacks any language suggesting that administrative exhaustion was a prerequisite to the Superior Court's jurisdiction. JA 142-43.

Each of these decisions was correct for it is well-established that absent a clear and unmistakable legislative intent to make exhaustion of administrative remedies a jurisdictional prerequisite, a statute that provides for judicial review after administrative proceedings does not strip a trial court of subject-matter jurisdiction. *See Ali v. District of Columbia*, 278 F.3d 1, 5-6 (D.C. Cir. 2002) (A lawsuit cannot be dismissed for lack of subject-matter jurisdiction based on administrative exhaustion unless the statute at issue contains "the type of 'sweeping and direct' language that would indicate a jurisdictional bar rather than a 'mere codification[] of administrative exhaustion requirements.'"). The provisions on which the District relies do nothing more than codify administrative procedures and authorize trial court review of those procedures. They do not contain the type of language required to deprive the Superior Court of jurisdiction.

Accordingly, none of the three Superior Court Judges who considered the District's jurisdictional argument committed any error in rejecting the District's baseless contentions. And even if administrative exhaustion were required and jurisdictional, it should be excused here for futility, since the District has made its position that it will continue to enforce its unconstitutional law clear, and because its refund procedure is not available to entities that do not regularly remit sales taxes to the District.

Appellants' pre-judgment interest argument fares no better. Appellant maintains that the submission of Proof of Claims in this case pursuant to D.C. Superior Court Civil Rule 23 should determine when pre-judgment interest should run from for the members of the Class who submitted a validly determined Proof of Claim to the court appointed claims administrator. The basis for Appellant's contention is the reference to "filing a claim for refund" in D.C. Code § 47-3310(c)(1). The District's position defies logic as no claims for a refund were ever "filed" in this action and because the phrase "filing a claim for refund," can only refer to the statutory administrative procedure for obtaining a tax refund set forth in D.C. Code § 47-2020 which requires the filing of such a claim, which procedure, as noted above, three Superior Court judges held does not apply to this case.

D.C. Code § 47-3310(c)(1) provides in the alternative that "[i]nterest shall be allowed and paid only from the date of filing . . . a petition to the Superior Court, as the case may be." Indeed, Appellant conceded below that for the two named Plaintiffs in this action, this provision applies to the pre-judgment interest calculation with regard to their determined tax refunds even though they, like Class members, later submitted Proofs of Claims.

The Superior Court properly determined that this alternative also applied to Class member claimants with certain modifications given the broad "as the case may be" language in the statute. The court concluded, on the basis of that statutory language, that pre-judgment interest should run from the date of the Appellee's motion for class certification. That holding was correct, and nothing the District has pointed to in the statute or the case law provides any basis to conclude otherwise.

ARGUMENT

I. Exhaustion Of Administrative Remedies Was Not A Prerequisite To The Superior Court's Exercise Of Jurisdiction Over This Case

The District's argument rests principally on the premise that D.C. Code § 47-3310(b) imposes a jurisdictional bar on Plaintiffs' suit. But Section 47-3310(b) does no such thing. The Superior Court is a court of general jurisdiction, and statutes are not construed to withdraw that jurisdiction unless the legislature makes its intent unmistakable. *See* D.C. Code § 11-921. Section 47-3310(b) does not contain the kind of sweeping and direct terms required to impose a jurisdictional bar; at most, Section 47-3310(b) codifies an available path for judicial review following an administrative refund claim. And even if administrative exhaustion were required here, it is properly excused under the circumstances of this case for futility. The Court should reject the District's arguments to the contrary.

A. The Plain Language Of Section 47-3310(b) Does Not Implicate The Superior Court's Subject-Matter Jurisdiction

The District erroneously attempts to cast Section 47-3310(b) as a jurisdictional bar to suits brought by taxpayers who have not first filed an administrative refund request. Section 47-3310(b) is at most, as the District concedes in its brief, an "administrative exhaustion" requirement. Br. at 25.[2] And the Supreme Court has squarely held that exhaustion requirements are non-jurisdictional affirmative defenses, absent a clear and unmistakable legislative intent to make them jurisdictional.

As a preliminary matter, it is important to note that the District did not raise Section 47-3310(b) until nearly eight years into this case. It did not raise it in its motion to dismiss, its motion for reconsideration, its answer to the Complaint, its opposition to Class certification, or its response to Plaintiffs' motion for summary judgment or in its cross-motion for summary judgment. Therefore, the District waived years ago any argument Section 47-3310(b) provides a possible affirmative

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[2] Br. refers to Appellant's opening brief.

defense to Plaintiffs' claims. The District's motion is timely if and only if Section 47-3310(b) implicates the court's subject-matter jurisdiction, which it does not. Whether or not the District could properly have raised Section 47-3310(b) as an affirmative defense is not at issue on this appeal.

1. Section 47-3310(b) Lacks the "Sweeping and Direct" Language Required To Impose a Jurisdictional Bar

The Supreme Court "has demanded an unusually high degree of clarity to trigger the 'drastic' 'consequences that attach to the jurisdictional label.'" *Myers v. Commissioner*, 928 F.3d 1025, 1035 (D.C. Cir. 2019) (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). As noted above, a lawsuit cannot be dismissed for lack of subject-matter jurisdiction for failure to exhaust administrative remedies unless the statute at issue contains the type of "sweeping and direct" language that would indicate a jurisdictional bar rather than a "mere codification[] of administrative exhaustion requirements." *Ali*, 278 F.3d at 5-6. "The modern 'bright line' default is that procedural rules, even those codified in statutes, are nonjurisdictional in character." *Mathis v. District of Columbia Hous. Auth.*, 124 A.3d 1089, 1101 (D.C. 2015) (citation omitted). Thus, courts presume administrative exhaustion provisions are non-jurisdictional unless the legislature "states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision." *Avocados Plus Inc. v.*

Veneman, 370 F.3d 1243, 1248 (D.C. Cir. 2004) (quoting *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton TRI Indus.*, 727 F.2d 1204, 1208 (D.C. Cir. 1984)).

The United States Supreme Court has also drawn a strong line between "jurisdictional prescriptions," which "delineat[e] the classes of cases a court may entertain," and "claims-processing rules," which " 'seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.' " *Fort Bend Cnty. v. Davis*, 587 U.S. 541, 548-49 (2019) (quoting *Henderson*, 562 U.S. at 435); *see also Myers*, 928 F.3d at 1034 ("The Supreme Court in recent years has 'pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not.' ") (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012)). The Supreme Court has urged that, in order for a statute's scope to be jurisdictional, the legislature must "clearly" state that "a threshold limitation" is jurisdictional and, absent such clear instruction, "courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006); *see also Wilson v. Bowser*, 330 A.3d 993, 999 (D.C. 2025) ("In order to imbue a procedural bar with jurisdictional consequences, the legislature must do something special.") (cleaned up).

As the court below correctly concluded, Section 47-3310(b) is non-jurisdictional. Section 47-3310(b) states: "In any proceeding under this title the

Superior Court has jurisdiction to determine whether there has been any overpayment of tax and to order that any overpayment be credited or refunded to the taxpayer, if a timely refund claim has been filed." JA 142. As the court below concluded, "the statute lacks a qualifier to indicate the Superior Court *only* has jurisdiction where a timely refund has been filed." JA 142. Instead, "[a] plain reading of the statute indicates . . . that where a timely refund claim has been filed, jurisdictional challenges are moot." *Id*. That succinct analysis by the court, which is correct, is sufficient to end the inquiry.

And although this code provision uses the word "jurisdiction," courts have been clear that the mere fact that a statute uses the word "jurisdiction" does not mean that the provision implicates the court's subject-matter jurisdiction. In *Myers*, for example, the D.C. Circuit found that Section 7623(b)(4) of the Internal Revenue Code, 26 U.S.C. § 7623(b)(4) – a statute very similar to the one at issue here – was non-jurisdictional. The relevant statute stated: "Any determination regarding an award under [certain provisions] may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." 928 F.3d at 1034. The D.C. Circuit held that Congress, despite its use of the word "jurisdiction" had not "ma[d]e unmistakable its intent to deprive the Tax Court" of jurisdiction to hear such cases. Similarly, here, there is no "unmistakable" legislative intent to make Section 47-3310(b) a limit on this Court's general subject-matter jurisdiction.

2. The District's Reading of Section 47-3310(b) Improperly Converts a Jurisdictional Grant into a Jurisdictional Bar

The District nevertheless argues that Section 47-3310(b)'s language, which states that the Superior Court has jurisdiction, "if a timely refund claim has been filed," should be understood to mean that, if a timely refund claim has not been filed, the Superior Court lacks jurisdiction over the refund case. The District's argument "commit[s] the logical fallacy known as 'denying the antecedent,' concisely refuted because 'If P then Q' does not mean 'If Not P then Not Q.'" *New LifeCare Hosps. of N.C. LLC v. Azar*, 466 F. Supp. 3d 124, 136 n.7 (D.D.C. 2020) (quoting *New England Power Generators Ass'n v. F.E.R.C.*, 707 F.3d 364, 370 (D.C. Cir. 2013)), *aff'd*, 7 F.4th 1215 (D.C. Cir. 2021). The statute's "if" condition establishes only that the filing of a timely refund claim is sufficient to confer jurisdiction; it says nothing about what follows in the absence of a refund claim. The statute's silence as to what happens when no timely refund claim is filed thus cannot be read as an affirmative jurisdictional bar. The District's inference rests on a logical error, not on the statutory text, and should be rejected accordingly.

Rejection of the District's position is also supported by the *expressio unius est exclusio alterius* principle of statutory construction for, when the D.C. Council wants to impose a condition on an appeal to the Superior Court, it has employed various ways of clearly expressing its intention to do so, which it did not include in Section 47-3310(b). Such formulations include "must," "only if," and "provided, that," as Judge Knowles observed in her opinion below. *See* JA 143 ("the Court, in looking at Title 47 Chapter 33 of the D.C. Code, found multiple uses of the words 'must,' 'only,' and one use of 'provided, that' in D.C. Code Section 3303."). The D.C. Council has also frequently employed "only if" as a qualifier when it intends to impose a strict condition on relief. *See*, *e.g.*, D.C. Code § 38-1417 (provides that a payment by the Mayor to medical and dental schools may be made *only if* the application: "(1) Is approved by the Mayor upon his determination that the applicant meets the eligibility conditions of this subchapter; and (2) Contains such information as the Mayor and the Secretary may require to make determinations required . . . and such assurances as they may find necessary to carry out the purposes of this subchapter"). The fact that the D.C. Council did not employ mandatory conditional language here demonstrates that it never intended, through Section 47-3310(b), to make the filing of a refund claim a jurisdictional prerequisite to filing suit.

Appellant nevertheless argues that "the 'if' clause of Section 47-3310(b) would serve no purpose if a pre-suit administrative refund claim were not a prerequisite to filing suit." Br. at 14, 19. That is simply untrue. The "if" clause in Section 47-3310(b) serves the purpose of codifying an avenue for appealing an adverse tax refund decision by the OTR directly to the Superior Court. Appellant challenges the necessity of providing such an avenue if the Superior Court has general jurisdiction to hear the controversy directly (Br. at 19) but that argument is misguided as absent a codified avenue for appeal to the Superior Court, under the District's Administrative Procedures Act, where a person is aggrieved from the final decision of any District administrative agency, the legislature has expressly provided that such an appeal be heard by this Court; not the Superior Court. *See* D.C. Code § 2-510. The "if" clause is therefore necessary to create an exception to that law.

3. Legislative History Confirms that Section 47-3310(b) Is a Jurisdictional Grant

That Section 47-3310(b) is a grant of jurisdiction, rather than a bar, is confirmed by the legislative history of the statute. An earlier version of Section 47-3310(b), then codified at D.C. Code § 47-2413(b) (1951), read as follows: "In any proceeding under this chapter, the Board of Tax Appeals for the District of Columbia shall have jurisdiction to determine whether there has been any overpayment of tax and to order that such overpayment be credited or refunded to the taxpayer: Provided, That a timely refund claim has been filed." That version of the statute was later amended, changing the "provided that" of the final clause to "if." The District's subsequent change in the language from "provided that" to the weaker "if" – and its decision not to use "only if," "must," or some other mandatory formulation – shows that Section 47-3310(b), as presently formulated, is not intended to create a subject-matter jurisdiction bar to bringing suit in Superior Court for those who have not sought tax refunds – instead, it merely provides authorization to those who have sought refunds before OTR to appeal to the Superior Court.

Although the District maintains that this change means nothing, such a reading is contrary to accepted statutory interpretation principles that presume that this change would have been unnecessary if the legislature believed "provided, that" and "if" mean the same thing. *See Stone v. I.N.S.*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantive effect.").[3] And the Supreme Court of the District of Columbia long ago held that "provided . . . that" is a proviso and that the function of a proviso in a statute is to qualify or restrain the enacting clause. *See Thaw v. Ritchie*, 1886 WL 15902, at *7 (D.C. Oct. 11, 1886), *aff'd*, 136 U.S. 519 (1890). A proviso such as "provided that" is therefore functionally equivalent to "only if."

Accordingly, the court below properly recognized that "if" is weaker compared to a "provided that" clause and concluded that the D.C. Council's change

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[3] Ignoring these principles, the District nevertheless argues that "provided that" and "if" mean the same thing, relying on the 1968 edition of Webster's Dictionary and Bryan Garner's Modern English Usage. They, however, cannot be considered legal definitions or legislative usages of these terms. *See* Br. at 28. Further, "provided that" is actually functionally equivalent to "only if" and "if" is clearly not the same as "only if." The District also points to some legislative history which, it argues, does not support a change in meaning (*id.* at 29-30), but none of that legislative history addresses the change from "provided that" to "if" reflected in Section 47-3310(b). Rather, *National Graduate University v. District of Columbia*, 346 A.2d 740 (D.C. 1975), and the cited House Report concerned the six-month requirement in D.C. Code § 47-2403 (1973) (now Section 47-3303).

to "if" is further proof that Section 47-3310(b) does not bar subject-matter jurisdiction. *See* JA 143 (noting that this change in the language from "provided that" to the weaker "if" supports a legislative intent that Section 47-3310(b) not create a subject-matter jurisdiction bar to bringing suit in Superior Court for those who have not previously sought tax refunds before the OTR).

B. No Precedent Supports The District's Extreme Interpretation Of Section 47-3310(b)

The District argues that its interpretation of Section 47-3310(b) is supported by precedent, relying exclusively upon the D.C. Circuit's 1956 decision in *American Security & Trust Co. v. District of Columbia*, 235 F.2d 19 (D.C. Cir. 1956). That reliance is misplaced, for at least three reasons. First, although the D.C. Circuit stated that it lacked "jurisdiction" to adjudicate plaintiff's untimely claims in *American Security*, it is far from clear that the court meant to hold that the statutory deadline was a limit on subject-matter jurisdiction. The better reading is that the court used "jurisdiction" imprecisely, as shorthand for concluding that the claim was time-barred. That usage was common in older cases, as the Supreme Court later recognized in *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004), where it observed that courts have "more than occasionally" used "jurisdictional" incorrectly to describe mandatory time limits. *American Security* is best understood in that sense: as treating the plaintiff's claim as untimely, not as announcing a jurisdictional rule.

Second, *American Security* predates dozens of decisions from the United States Supreme Court, the D.C. Circuit, and this Court holding that claim processing rules are non-jurisdictional. To the extent that this Court did hold that the administrative exhaustion requirement in the statute implicated the court's subject-matter jurisdiction, that holding has been overruled by the many cases holding that administrative exhaustion requirements are non-jurisdictional, unless explicitly stated to be jurisdictional by the statute. *See*, *e.g.*, *Smith v. Clinton*, 253 F. Supp. 3d 222, 238 (D.D.C. 2017) ("There is a presumption that exhaustion is non-jurisdictional unless Congress states in clear and unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision."), *aff'd*, 886 F.3d 122 (D.C. Cir. 2018).

Finally, as discussed above, the court in *American Security* considered an earlier version of the statute that was later amended to replace the "provided that" language in the final clause with the weaker term "if." Because this amendment removed language that could have been construed as mandatory, *American Security* cannot govern the interpretation of Section 47-3310(b).

C. D.C. Code § 11-921 Provides The Basis For Subject-Matter Jurisdiction Over This Action

Appellant further maintains that decisions on other tax laws show that the Superior Court lacks jurisdiction to order a tax refund absent a jurisdictional grant under a specific tax refund statute. Br. at 21-22. But this proposition is precisely backwards. D.C. Code § 11-921(a) provides the foundation of the Superior Court's authority to adjudicate any civil action in law or in equity (except those matters set forth in subsection (b), which are not applicable here). Thus, the Superior Court has subject-matter jurisdiction to decide a tax case, unless a tax refund statute specifically deprives the Superior Court of its general jurisdiction under Section 11-921.

The Superior Court's broad jurisdiction was conferred by Congress through the District of Columbia Court Reorganization Act of 1970, which transformed the Superior Court from a court of limited jurisdiction into a court of general jurisdiction with plenary power over civil matters. *Reichman v. Franklin Simon Corp.*, 392 A.2d 9, 12-13 (D.C. 1978). Indeed, this Court has repeatedly and consistently described the Superior Court as a court of general jurisdiction with the power to adjudicate any civil action at law or in equity <u>involving local law</u>. *Martin v. District of Columbia Cts.*, 753 A.2d 987, 991 (D.C. 2000); *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2 (D.C. 1993); *RDP Dev. Corp. v. District of Columbia*, 645 A.2d 1078, 1083 n.19 (D.C. 1994).

Decisions of this Court have also recognized the plenary jurisdiction of the Superior Court to award statutory damages even where the statute does not expressly grant jurisdiction to the Superior Court to do so. For example, in *Qasim v. Washington Metropolitan Area Transit Authority* ("WMATA"), 455 A.2d 904 (D.C.

1983) (*en banc*), this Court reversed the Superior Court's dismissal of tort claims against the WMATA for lack of subject-matter jurisdiction, holding that the Superior Court had plenary jurisdiction pursuant to D.C. Code § 11-921 to adjudicate tort claims against the WMATA authorized pursuant to Section 80 of the Washington Metropolitan Area Transit Authority Compact even though Section 81 specified other courts, but did not list the Superior Court as a court in which such claims could be brought. 455 A.2d at 907; *see also Washington Gas Light Co. v. Public Serv. Comm'n of D.C.*, 982 A.2d 691, 721-22 (D.C. 2009) (holding that the Public Service Commission of D.C. had to bring an action in the Superior Court to enforce D.C. Code § 34-706(a) and obtain for the District the monetary penalties provided therein even though that statute did not expressly confer jurisdiction on the Superior Court to do so).

Neither of the two cases the District relies on, *District of Columbia v. Craig*, 930 A.2d 946 (D.C. 2007), nor *District of Columbia v. Keyes*, 362 A.2d 729 (D.C. 1976), support its position that the Superior Court lacked subject-matter jurisdiction here. Neither case addressed the Superior Court's legislatively conferred plenary power to adjudicate "any civil action at law or in equity involving local law" and to award, as this Court has held, statutory damages. Instead, those cases stand only for the propositions that a tax refund cannot be premised on the common law and that mandatory conditional language in a statutory provision requiring administrative exhaustion can be jurisdictional.

Craig concerned an allegedly improper real estate assessment for which the D.C. legislature had specifically and clearly conditioned the ability of an aggrieved real estate owner to go the Superior Court on the owner having first appealed an adverse determination by the OTR to the Board of Real Property Assessments and Appeals. *See Craig*, 930 A.2d at 954 & n.8 (noting that D.C. Code § 47-825.01(f1)(3) (2001) states that "[u]nless otherwise provided in this section, a good faith petition for a administrative review shall be a prerequisite for filing an appeal from a proposed assessed value or classification with the BRPPA" (emphasis added), and that D.C. Code § 47-825.01(j-1) (2001) states that "for an owner aggrieved by a proposed assessed value . . . [to] appeal the proposed assessed value . . . to the Superior Court of the District of Columbia in the same manner and to the same extent as provided in §[] 47-3303 . . . *provided, that (1) the owner shall have first appealed in good faith the assessed value. . . to the [BRPAA]* immediately preceding the appeal to the Superior Court" (underline emphasis added)). As discussed above, no such mandatory language is to be found in the text of Section 47-3310(b).

Keyes concerned a previous version of the same statute at issue in *Craig*, which also expressly made appeal from an assessment contingent upon a taxpayer first having complained to the Board of Equalization and Review (the predecessor of the OTR). *See Keyes*, 362 A.2d at 733 n.8 (quoting D.C. Code § 47-709 which authorized judicial appeal from a tax assessment "[p]rovided, however, [t]hat such person shall have first made his complaint to the Board of Equalization and Review respecting such assessment."). The Court in *Keyes* determined that the mandatory language used in D.C. Code § 47-709 was sufficient to make the provision a prerequisite to the Court's jurisdiction. *See Keyes*, 362 A.2d at 732-33 ("Under the statutory procedure applicable to this case, the recovery of refunds through appeal to the Superior Court requires, as a first step, a complaint to the Board of Equalization and Review. Subject matter jurisdiction of the Superior Court does not attach until that prerequisite has been satisfied.") (footnote omitted). Conspicuously absent from Section 47-3310(b) is any use of mandatory language such as "provided that," that the Court found dispositive in *Keyes*. This language could have been utilized by the D.C. legislature in drafting D.C. Code § 47-3310(b), but it was not. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Accordingly, because the Superior Court's general jurisdiction under Section 11-921 encompasses tax refund actions absent an express and specific legislative withdrawal of that authority, and no such withdrawal exists here, Appellant's argument that the Superior Court lacked jurisdiction to order a tax refund is without merit. The burden rests on Appellant to identify a statute which specifically strips the Superior Court of its plenary jurisdiction over tax refund claims, and Appellant has failed to do so.

D. The "Broader Web" Of District Law Does Not Support A Finding That Section 47-3310(b) Is Jurisdictional

Perhaps recognizing the infirmity of its plain meaning argument with respect to Section 47-3310(b), as the plain meaning supports Judge Knowles' ruling here, Appellant argues that this code provision must be interpreted in light of other code provisions, namely D.C. Code § 47-2020(a) and § 47-2021(a). Br. at 14, 18-19. The fatal flaw with this argument is that neither provision mandates the exhaustion of administrative remedies before the Superior Court can assume jurisdiction over a tax refund suit.

Neither Section 47-2021(a) nor Section 47-2020(a) even mention the word jurisdiction and Section 47-2020 does not even refer to the Superior Court. Section 47-2021(a) simply provides for filing an appeal with the Superior Court within six months of denial of a claim for refund in the same manner as in other statutes. Thus, as Judge Epstein properly concluded, "[t]his provision authorizes judicial review of an administrative denial of a refund claim, but it does not state that a taxpayer must apply for an administrative refund before seeking judicial relief." JA 86. Appellant places great emphasis on Section 47-2020(a), but it merely sets forth the procedures for obtaining a tax refund from the Mayor and uses the same permissive "if" language as in Section 47-3310(b). It therefore does not, for the reasons discussed above, deprive an aggrieved taxpayer from pursuing his or her tax refund claim in the Superior Court.[4] Indeed, having two tracks for seeking a tax refund is consistent with affording one track that provides an expeditious means to obtain a relatively small tax refund possibly without a lawyer and another track to pursue more significant tax refunds in the Superior Court with a lawyer and having the benefit of a Superior Court Judge, and the Superior Court rules of civil procedure and evidence, and in which the OTR will be involved anyway, as was the case in the action subject to this appeal.

Appellant further argues that Judge Pittman's determination that the six-month requirement set forth in Section 47-3303 is jurisdictional is inconsistent with not imposing an administrative exhaustion precondition on Superior Court jurisdiction here. Br. at 24-25. This argument is incorrect for several reasons. First, Section 47-3303 is entirely different from 47-3310(b) as it uses the "provided[] that" language that was deleted from the current version of Section 47-3310(b). Second,

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[4] Moreover, the procedures for submitting a refund claim to the Mayor set forth in Section 2020(a) do not even apply to Plaintiffs or any Class member as this section requires the application to be made by "the person upon whom such tax was imposed and who has actually paid the tax." Sales taxes are imposed by law on vendors. *See* D.C. Code § 47-2002(a) ("A tax is imposed upon all vendors for the privilege of selling at retail certain tangible personal property and for the privilege of selling certain selected services.").

Judge Pittman relied on two decisions – one from 1957 and one from 1975 – concerning the predecessor statute to Section 47-3303 which held that time limits are jurisdictional. JA 106-07. More recent decisions from the Supreme Court and United States Court of Appeals for the D.C. Circuit and even this Court have concluded that time deadlines such as in Section 47-3303 are not jurisdictional. *See*, *e.g.*, *Henderson*, 562 U.S. at 441-42 (holding that a 120-day statutory deadline for filing appeals to the Veterans Court was not jurisdictional); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 152 (2013) (holding that the Medicare statute's 180-day limit for filing appeals to the Provider Reimbursement Review Board was not jurisdictional); *United States v. Wong*, 575 U.S. 402, 414-20 (2015) (holding that the Federal Tort Claims Act's time limitations were non-jurisdictional and subject to equitable tolling and explaining that jurisdictional statutes speak about jurisdiction or about a court's powers, and that the FTCA's filing deadlines spoke only to a claim's timeliness – the hallmark of a claims-processing rule, not a jurisdictional bar).[5] Judge Pittman's contrary conclusion therefore simply cannot be relied on by this Court.[6]

The statutory scheme therefore does not, as Appellant argues, preclude a Superior Court alternative to administratively seeking a tax refund. *See* Br. at 19.[7]

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[5] *See also Menominee Indian Tribe of WI v. United States*, 614 F.3d 519, 523 (D.C. Cir. 2010) (holding that the six-year limitations period in the Contract Disputes Act was not jurisdictional in nature and was subject to equitable tolling and further stating that "[f]iling deadlines, statutory or not, are generally nonjurisdictional"); *Baldwin v. District of Columbia Off. of Emp. Appeals*, 226 A.3d 1140, 1143-44 (D.C. 2020) (holding that the 35-day filing limit for appeals to the Office of Employee Appeals was a claims-processing rule, not a jurisdictional requirement); *Wilson*, 330 A.3d at 999-1000 (holding that a statute permitting a qualified elector to seek court review within ten calendar days from the date the Board of Elections publishes proposed initiative formulations was a claims-processing rule rather than a jurisdictional rule).

[6] This District acknowledges the existence of this recent authority (Br. at 31) but ignores the impact of that authority on this portion of Judge Pittman's decision, on which it relies.

[7] Appellant also argues that exhaustion of a refund claim before the OTR should be required, as a matter of policy, so the District will know its potential liability. Br. at 25-26. That may be an admirable policy, but the legislature has determined that pre-notice of a lawsuit against the District for this very purpose only applies to certain limited types of cases and not to tax refund suits. This Court therefore cannot be guided by a policy the legislature has already determined does not apply to a tax refund claim. *See* D.C. Code § 12-309 (pre-suit notice only required for personal injury or property damage claims).

Appellant also contends that having tax refund claims processed by the OTR first is desirable to avoid the burden falling on a Superior Court Judge. Br. at 26. That is also a fallacy. In this case, the OTR did review all the claims submitted by class members and in fact agreed to 75% percent of them. The Superior Court only had to resolve claim disputes as to eighteen total claims; the same as it would have had to do if claims were submitted first to the OTR, assuming the OTR found Section 47-2005(3) to be unconstitutional, which there is no record it has ever done with regard to any District Code provision. If it found the law constitutional, and the

None of the District's arguments therefore support reversal of the three Superior Court decisions that have soundly rejected the District's jurisdictional arguments.[8]

E. Any Administrative Exhaustion Requirement Here Should Be Excused Due To Futility

Even if Section 47-3310(b) did require Plaintiffs to exhaust their administrative remedies prior to filing suit (which for the many reasons discussed above, it does not) such requirement should be excused under the circumstances of this case. This Court has recognized three categories of exceptions to exhaustion requirements: (1) inadequacy of the administrative remedy; (2) unavailability of the administrative remedy; and (3) futility of pursuing the administrative process. *Davis & Assocs. v. Williams*, 892 A.2d 1144 (D.C. 2006); *Dano Res. Recovery, Inc. v. District of Columbia*, 566 A.2d 483 (D.C. 1989). Here, the futility of pursuing the

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Superior Court did not, the OTR would have had the same role in reviewing claims it did here.

[8] Additionally, Appellant argues that because the federal requirements for a tax refund require exhaustion, so must Section 47-3310(b). Br. at 24. The federal statute, however, is not comparable to Section 47-3310(b) or any of the other D.C. Code provisions on which Appellant relies. The statutory provisions governing federal tax refunds specifically state that: "[n]o suit may be maintained under this section for the credit or refund of any tax imposed under … with respect to any act (or failure to act) giving rise to liability for tax under such sections, <u>unless</u> no other suit has been maintained for credit or refund of, <u>and no petition has been filed in the Tax Court with respect to a deficiency in, any other tax imposed by such sections with respect to such act (or failure to act)</u>," 26 U.S.C. § 7422(g)(2) (emphases added). Section 47-3310(b) has no "unless" language.

administrative process supports an exception to any requirement of administrative exhaustion.

An administrative exhaustion requirement may be waived as futile "because of certainty of an adverse decision." *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 105 (D.C. Cir. 1986). To invoke the futility ground for waiver successfully, the plaintiff must show that the agency "evidenced a strong stand on the issue in question and an unwillingness to reconsider the issue." *Id.* at 106. In short, "[w]hen an agency has committed itself not to change its rules unless judicially compelled to do so, has made known that its general views are contrary to those of the complainant, and has never given an inkling that it would consider a matter afresh, . . . a complainant need not make a pro forma request that the agency redo its system." *Etelson v. Office of Pers. Mgmt.*, 684 F.2d 918, 925 (D.C. Cir. 1982) (footnotes omitted).

This is the paradigmatic case for waiver based on futility. The District has made abundantly clear that it intends to continue enforcing Section 47-2005(3), despite Plaintiffs having obtained a judgment holding it is unconstitutional. It has litigated this case for nine years and shows no intention of relenting, given its remand request on this appeal. Under these circumstances, no out-of-state semipublic institution seeking a refund on the ground that Section 47-2005(3) is unconstitutional could possibly expect to obtain one through administrative channels. This is precisely the alternative ground on which Judge Epstein rejected the District's administrative exhaustion argument. *See* JA 87 ("Moreover, all indications are that any application to OTR for a refund would be futile. The District takes the position that limiting the sales tax exemption for resident semipublic institutions is fully consistent with the Commerce Clause, . . . and the District does not suggest that its tax agency will disagree with the legal opinion of its Attorney General.").

The OTR can also be fully expected to act in the interest of the District in not finding any District tax revenue stream unconstitutional. Indeed, there is not a single reported instance of the OTR ever concluding that any provision of the D.C. Code is unconstitutional. In the few reported cases in which a constitutional issue was raised before the OTR, it denied the refund claim and in all but one case, avoided ruling on the constitutional question presented. *See Craig*, 930 A.2d at 951 (although it was alleged that the District's assessment methodology was unconstitutional, "[t]he [Board of Real Property Assessments and Appeals] [only] concluded that the District's assessment methodology . . . had produced a flawed result as to Craig's property."); *Bishop v. District of Columbia*, 401 A.2d 955, 961 (D.C. 1979) (although a constitutional claim was asserted, the Superior Court proceedings all concerned whether the District's adoption of an unincorporated business tax on non-resident businesses, which eliminated a professional exemption, was "an invalid exercise of the City Council's legislative authority under the Home

Rule Act"); *Bechtel v. Office of Tax & Revenue*, 2019 DCOAH 00017 (D.C.O.A.H.), 2019 WL 13160271 (D.C. Off. of Admin. Hearings Oct. 8, 2019) (rejecting a commerce clause challenge).

Where the pursuit of administrative remedies would be "clearly useless," as they unquestionably would be here, a finding of futility is appropriate. *Randolph-Sheppard*, 795 F.2d at 105.

Furthermore, under OTR's current tax refund request procedures, it is not possible for semipublic institutions such as Plaintiffs and Class members to comply with OTR's requirements. Both OTR's refund requirements and OTR's form for making a refund claim reflect the OTR's position that refunds are available only to parties aggrieved by a Notice of Assessment or that directly and periodically remit sales and use taxes to the District. OTR's requirements and form do not contemplate that parties like Plaintiffs and Class members – who paid sales and use taxes to third-party hotels – may seek a refund.

With respect to the refund requirements, OTR's Tax Notice 2008-02 provides that any appeal to this Court requires two prerequisites: first, the taxpayer must have received a "Notice of Proposed Assessment of Tax Deficiency" (Notice § I(B)(7), (16)); and second, the taxpayer must have received a "Notice of Final Assessment (*id.* § I(B)(17)). JA 71-81. This procedure, which is expressly rooted in D.C. Code § 47-3303, is inapplicable here. Plaintiffs' refund claims do not arise from OTR's issuance of a "Notice of Proposed Assessment of Tax Deficiency" and therefore, by definition, cannot result in OTR's issuance of a "Notice of Final Assessment." Furthermore, OTR's rules require the taxpayer to pay the assessed amounts after receiving the Notice of Final Assessment – an impossibility for the taxpayers here, who paid their taxes to the hotels at which they held and attended meetings. That the taxpayer must pay the assessed amounts after receiving the Notice of Final Assessment undermines the District's contention (Br. at 32-34) that Plaintiffs' claims could possibly be presented to the OTR before filing suit in the Superior Court.

Furthermore, OTR's form for requesting a refund does not contemplate that taxpayers such as Plaintiffs and class members here might seek a refund. JA 82-83. Form FP-331 demands, for each tax period, the total tax paid to the District, the date of payment, and the amount of refund claimed. Plaintiffs neither submitted tax returns to the District nor paid taxes corresponding to any returns for any tax period. Nor could Plaintiffs know when the hotels remitted tax payments, which included Plaintiffs' sales tax payments to the hotels, to the District. Only the hotels, as the direct remitters of the sales and hotel taxes, would submit such tax returns. Moreover, the Form's Instructions require documentation that only vendors and service providers collecting and remitting sales or use taxes would possess, such as invoices, Certificates of Resale, or credit memos for returned sales or refunded taxes.

The very procedure the District has established thus belies its contention that it applies to the claims of Plaintiffs and Class members here. Thus, both the OTR's procedures and its own forms demonstrate the futility of Plaintiffs and Class members seeking an administrative refund.

The District attempts to resist this conclusion by arguing that the statute itself recognizes that organizations like Plaintiffs and Class members are entitled to submit a refund claim to the OTR because the tax is imposed on Plaintiffs and paid by Plaintiffs. However, all Appellant does is hesitatingly maintain that Section 47-2020(a) *may* apply to individuals other than vendors; not that it does. Appellant makes this "maybe" argument because it clearly knows that it is only half right; the taxes at issue are paid by the Plaintiffs, but, by statute, they are imposed on the vendors, who are in this case, hotels in the District. *See* page 28, *supra*, n. 5

Ignoring this, Appellant argues that this code provision draws a distinction between vendors and others in specifying that "[w]hen an application is made by a vendor who has collected reimbursement of such tax,' the vendor cannot receive a refund until he establishes to OTR's satisfaction that he 'has repaid to the purchaser the amount for which the application for refund is made.'" Br. at 32. This argument is fundamentally flawed as this code section in no way allows the purchasers from vendors to make their own claims. Rather, given that Section 47-2020(a) does not even apply to Plaintiffs, it contemplates that vendors – not those making purchases from the vendor – will make refund requests directly to the OTR. To the extent that Section 47-2020(a) applies to entities other than vendor tax payments collected from purchasers, it can be interpreted to apply to, for example, to a vendor or anyone else's overpayment of taxes due to a miscalculation. Moreover, to interpret this phrase as the District argues it should be interpreted – that the tax is imposed on Plaintiffs – vendors would not qualify to obtain a tax refund which would render a significant part of this Code provision irrelevant.

Appellant next points to one instance in which an entity pursued a claim directly with the OTR even though it paid the tax to a vendor. Br. at 33. However, the decision on which Appellant relies – *District Hospital Partners, LP v. District of Columbia*, 290 A.3d 45 (D.C. 2023) – does not indicate what form of claim the plaintiff submitted to the OTR for a refund of over $1 million, and as Appellant concedes, there is no evidence the standing of the plaintiff to pursue a claim was at issue. Based upon this lone case, Appellant proclaims that purchasers routinely file applications with the OTR for refunds of sales taxes they paid (Br. at 34), but there is nothing in *Hospital Partners* or the record in this case that supports Appellant's claim. This unsubstantiated contention should therefore be disregarded.

Appellant further argues that if this Court determines that if it is ambiguous whether Plaintiffs could bring a refund claim before the OTR, this Court should, in accordance with tax statutory interpretation principles, find that it is in the interest of a "general taxpayer" to be able to do so. Br. at 34. There is, however, nothing ambiguous about the requirements of Section 47-2020(a), the OTR's form or the OTR's instructions for completing the form – neither even mentions the possibility of an entity such as Plaintiff being able to use the form. Moreover, it is the OTR, not the taxpayer, who will benefit if this Court concludes that all purchasers who pay taxes through vendors are required to submit a refund claim to the OTR. Indeed, that is the principal purpose of the District's appeal. It is disingenuous for Appellant to claim otherwise and there is hardly a general taxpayer whose interests are aligned with that of the OTR, which will be adversarial to any taxpayer pursing a tax refund.

Finally, Appellant incredibly argues that the Court should defer to the OTR's interpretation of Section 47-2020(a). Br. at 34. But the OTR's interpretation of this statute but that interpretation is contrary to the District's own sales tax laws. Deferring to the OTR's interpretation therefore defeats the District's own argument here. Ignoring its own tax refund instructions, Appellant additionally argues that its own form need not be completed, but the OTR nowhere indicates that its form can be ignored.

For these reasons, even if the Court concludes that administrative exhaustion is required and that the District has not waived its opportunity to raise its argument based on Section 47-3310(b), it should nonetheless conclude that any exhaustion requirement is waived for reasons of futility.

F. Requiring The Exhaustion Of Administrative Remedies Is Also Unwarranted Because The OTR Has Already Reviewed Every Claim Submitted In This Case

There has already been an extensive claims process in this case through which the OTR has reviewed every claim submitted and approved a substantial majority of them. *See* Joint Submission of Undisputed Claims (Aug. 8, 2025). To the extent there were disputes, the few that arose were resolved by the Superior Court, just as it would have had to do had the claims been first submitted to the OTR. If this Court were to hold that claims have to be first submitted to the OTR, every approved claimant from the case will now do so, and once the OTR denies all the claims on the grounds there is no constitutional violation, as it will clearly do, the case will be back before the Superior Court for years of additional proceedings added on to the nine years this case has already been pending. A true waste of judicial resources will therefore result. And the adage justice delayed is justice denied will resoundingly apply. This Court should not countenance such a perverse result.

II. The Superior Court Properly Awarded Pre-Judgment Interest

The Superior Court correctly awarded pre-judgment interest to the class members in this case. The court's calculation was consistent with the governing statute in the circumstances presented here.

D.C. Code § 47-3310(c)(1) provides that "[i]nterest shall be allowed and paid only from the date of filing a claim for refund or a petition to the Superior Court, as the case may be, on that part of any overpayment that was not assessed and then paid as a deficiency or as additional tax." Here, Plaintiffs and class members filed no claims for refund, nor were they required to do so, as the court below repeatedly and correctly held. The statute therefore directs that pre-judgment interest run from the filing of "a petition to the Superior Court, as the case may be." Applying that rule, the court below awarded pre-judgment interest on a disparate basis to three categories of claimants. JA 156. The lead Plaintiffs, who were named in the Complaint, would receive pre-judgment interest from June 12, 2017, the date the Complaint was filed. *Id.* Claimants who paid the tax before Plaintiffs moved for Class certification would receive pre-judgment interest from March 29, 2019, the date of that motion. *Id.* And claimants who paid the tax after March 29, 2019, would receive pre-judgment interest beginning on the date of their overpayment. *Id.*

The lower court's approach is consistent with the statutory language. For Class members who had already paid the tax before Class certification was sought, the motion for Class certification was the first filing that asserted their claims in Superior Court and gave the District notice that Plaintiffs sought relief on their behalf. It was therefore reasonable to treat that filing as the operative "petition to the Superior Court" for those absent Class members. For semipublic institutions who paid the tax after Plaintiffs moved for Class certification, the court sensibly required the District to pay pre-judgment interest only from the date of each overpayment. By then, the District was already on notice that Plaintiffs sought certification of a Class encompassing taxpayers who paid the challenged tax. Interest therefore began to accrue on the date the claimant made an overpayment. That approach tracks the statutory text, which allows interest on "any overpayment," while avoiding an unwarranted award for any period before the District had received the money at issue.

The District does not dispute that, under DC law, a prevailing plaintiff in a case seeking a refund for an overpayment of tax is entitled to pre-judgment interest. Instead, the District's sole objection is that the court below calculated pre-judgment interest from the wrong dates. According to the District, for all claimants except for the named Plaintiffs, pre-judgment interest should be calculated from the date the claims period closed. This argument is without warrant in the statutory language or the case law.

In support of its position, the District relies principally on *Kleiboemer v. District of Columbia*, 458 A.2d 731 (D.C. 1983), but *Kleiboemer* is fully consistent with the Superior Court's decision. In *Kleiboemer*, taxpayers who paid an unlawfully collected tax attempted to seek pre-judgment interest pursuant to D.C. Code § 47-2413(c) (the predecessor to Section 47-3310(c)) from the date they paid the tax, rather than the date on which they first sought a refund. 458 A.2d at 736-37. This was obviously inconsistent with the language of the statute. The taxpayers additionally attempted to claim that pre-judgment interest should run from the date of overpayment for taxes that were paid after the filing of the petition, because the District was on notice of its potential liability for collecting an unlawful tax on that date. This Court rejected that position, holding that the date of the filing of the petition did not adequately notify the District of each claim.

Kleiboemer does not apply to these facts. The plaintiffs in *Kleiboemer* sought refunds under a different statute, which the Court of Appeals determined required them to file refund claims before bringing suit in the Superior Court. Therefore, under Section 47-3310(c), pre-judgment interest ran from the date each Class member sought a refund, since that date necessarily preceded the filing of their refund claims. Here, by contrast, Plaintiffs and Class members were not required to file refund claims prior to filing suit. Therefore, *Kleiboemer*'s holding that the filing date of a refund claim governs the start of pre-judgment interest is inapplicable. Instead, the relevant date is the date of the "petition to the Superior Court, as the case may be." As the Superior Court concluded, "in this case," that date should be the date of the motion for Class certification for Class members, as that was the date on which Class members first petitioned the court for refunds. JA 156.

The District urges that pre-judgment interest can only run from the date the District "learned the specifics of each class member's refund claim", Br. at 40, but nothing in the language of the statute supports that position. This is the same argument the District raised below, where it claimed that the statute's reference to the date of the "filing of a claim for refund" should be analogized to the filing a Proof of Claim with the claims administrator. But the ordinary sense and common meaning of the term "filing a claim for a refund" is filing a claim with the OTR; not a procedure in which Proof of Claims are submitted to a claims administrator – indeed, such claims are not filed at all. And as discussed above, and as the court below repeatedly held, no claim for a refund was necessary for Plaintiffs and Class members to file suit under the circumstances of this case.

Finally, the District's position is at odds with simple principles of good sense and fairness. The D.C. Code specifically authorizes pre-judgment interest to compensate taxpayers for the time value of money wrongfully retained by the District. The District seeks to avoid years of pre-judgment interest that Class members would be entitled to if they filed individual cases simply because those Class members had to wait through years of litigation before the claims process was established. The District seeks a windfall of tax dollars collected in violation of the U.S Constitution that it was permitted to retain simply by virtue of the length of these proceedings. That is precisely the inequitable result that the pre-judgment interest provision of Section 47-3310(c) is intended to prevent.

III. Remand Is Improper Both Due To Waiver And On the Merits

The District's argument that this Court should remand for further consideration of the constitutional issue in this case is waived. Judge McCabe ruled in his opinion on summary judgment that D.C. Code § 47-2005(3)(C) violates the Commerce Clause of the Constitution. JA 134-37. The District does not challenge any aspect of the holding or reasoning of Judge McCabe's opinion, which was solidly based on well-established Supreme Court precedent.

Instead, the District asks this Court to remand for consideration of an argument that it raised only in a footnote to its summary judgment brief, namely that Council-passed legislation that Congress has not explicitly disapproved cannot violate the Dormant Commerce Clause. But the District did not properly raise and preserve this argument below. It is well-established that arguments raised only in footnotes, rather than developed in the body of a brief, are waived. *See*, *e.g.*, *George Washington Univ. v. Violand*, 940 A.2d 965, 977 (D.C. 2008) (where defendant made an argument only in a footnote in its motion for summary judgment, and did not move for reconsideration of the argument, the defense was "waived or abandoned"); *see also Wagner v. Georgetown Univ. Med. Ctr.*, 768 A.2d 546, 554 n.9 (D.C. 2001) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived . . . . It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

Furthermore, the District never moved for reconsideration of Judge McCabe's ruling on the grounds it raises now. Having failed to do so, the District has waived any further challenge to the merits of Judge McCabe's summary judgment ruling on this issue. *See* D.C. Super. Ct. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.").

Even absent the District's waiver, remand would be improper here as it is well-settled that Congress must do something more than simply not disapprove a District Code provision in order to shield the law from scrutiny under the Dormant Commerce Clause. Enactments of the D.C. Council are subject to "the same interstate commerce analysis" as applies to state law. *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198 (D.C. Cir. 1996) ("Our precedents dictate that we apply *to local legislation of the* District the same interstate commerce analysis as we would to state laws.") (emphasis added). It is true that Congress may authorize the states to engage in regulation that the Dormant Commerce Clause would otherwise forbid. However, no court has ever held that Congress's choice not to disapprove of a D.C. Council-passed law is sufficient to shield that law from constitutional scrutiny. For such immunity to apply to a local law, the law must have been enacted pursuant to a specific congressional mandate. *See id.* at 200-01 (statutes which are "creature[s] of the enactment by the District of Columbia Council and not the Congress" are subject to the Commerce Clause); *see also Sprint Commc'ns Co. v. Kelly*, 642 A.2d 106, 108, 110 (D.C. 1994) (per curiam).

Here, the 1982 modifications to Section 47-2005(3) originated entirely with the District, and not with Congress. Section 47-2005(3) was originally proposed by the Mayor and was subsequently approved by the District Council. *See* Exs. J, K to Plaintiffs' Memorandum ISO Their Motion for Summary Judgment (Apr. 7, 2022). The same is true of the 2000 amendment to this law. *See* Ex. A to Plaintiffs' Reply Memorandum ISO Their Motion for Summary Judgment (Apr. 24, 2023). Congress neither passed nor expressly approved Section 47-2005(3). A remand is therefore neither appropriate nor necessary.

In opposition to this Court's binding precedent, the District points to two cases in which this Court suggested in footnotes that there "may be some debate" about the applicability of the Dormant Commerce Clause to law passed by the D.C. Council and not disapproved by Congress. *DC Winery, LLC v. D.C. Alcoholic Beverage Control Bd.*, 299 A.3d 574, 579 n.6 (D.C. 2023); *American Bus Ass'n, Inc. v. District of Columbia*, 2 A.3d 203, 213 n.19 (D.C. 2010) (same). The Court's dicta is insufficient to support remand here, in the face of controlling precedent and the fact that the District forfeited the argument below. Dicta expressing mere uncertainty in a footnote cannot displace this Court's binding holdings on the point, and it certainly cannot excuse the District's failure to raise the argument in the proceedings below.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 7, 2026, this brief was served through this Court's electronic filing system to:

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