STATE OF MICHIGAN

COURT OF APPEALS

3M COMPANY, Plaintiff-Appellee,	UNPUBLISHED September 19, 2025 12:08 PM
v	No. 364067 Court of Claims
DEPARTMENT OF ENVIRONMENT, GREAT LAKES, AND ENERGY, Defendant-Appellant.	LC No. 21-000078-MZ

ON REMAND

Before: GADOLA, C.J., and MURRAY and MALDONADO, JJ.

PER CURIAM.

In this Court's opinion resolving the prior appeal in this matter, *3M Co v Dep't of Environment, Great Lakes, and Energy*, 348 Mich App 28; 17 NW3d 121 (2023), a majority affirmed the trial court's holding that the Department of Environment, Great Lakes, and Energy (EGLE), violated Section 45 of the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*., which requires agencies to prepare a regulatory impact statement (RIS) that includes an estimate of how much compliance with the proposed rules will cost "businesses and other groups," MCL 24.245(3)(n).[1] On appeal, the Supreme Court vacated that opinion, and remanded for us to consider the following issues that were not previously raised in this Court:

> (1) whether the plaintiff-appellee's challenge to rule set 2019-35 EG, "Supplying Water to the Public," codified at and amending in part Mich Admin Code, R 325.10101 to 325.12820, became moot when the defendant-appellant promulgated

[1] Judge Maldonado dissented, concluding "that MCL 24.245(3)(n) requires the Department of Environment, Great Lakes, and Energy (EGLE) to provide estimated costs of compliance with the changes in the groundwater standards that were a ripple effect of the new rules governing drinking water." *3M Co*, 348 Mich App at 40 (MALDONADO, J., dissenting). MCL 24.245(3)(n) is now codified at MCL 24.245(3)(*l*). 2023 PA 104.

> rule set 2020-130 EQ, "Cleanup Criteria Requirements for Response Activity," codified at and amending in part Mich Admin Code, R 299.1 to 299.50; (2) whether any exception to the mootness doctrine is applicable; (3) whether the plaintiff-appellee failed to exhaust its administrative remedies by not requesting a declaratory ruling from the agency as to the validity of the challenged rule before commencing this lawsuit, MCL 24.264; and (4) if the administrative remedies were not properly exhausted, what effect, if any, that had on the justiciability of this lawsuit, including plaintiff-appellee's standing and the court's subject-matter jurisdiction over the claims presented. [*3M Co v Dep't of Environment, Great Lakes, and Energy*, ___ Mich ___; 17 NW3d 682 (2025).][2]

We now turn to resolving those issues, and in doing so we affirm the trial court's order.

I. MOOTNESS

This Court reviews de novo whether an issue is moot. *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019). An issue is moot when a decision of this Court will have no practical effect on the controversy or it is not possible for this Court to fashion a remedy. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016). Even if an issue is moot, this Court may consider a legal issue that is of public significance and likely to recur but evade judicial review. *Gleason v Kincaid*, 323 Mich App 308, 315; 917 NW2d 685 (2018).

The APA governs the creation of agency rules and regulations. *Mich Charitable Gaming Ass'n v State*, 310 Mich App 584, 594; 873 NW2d 827 (2015). Under the APA, "the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order" fits within several circumstances. MCL 24.306(1). One of these circumstances is when the decision or order is "[m]ade upon unlawful procedure resulting in material prejudice to a party." MCL 24.306(1)(c). "An agency's failure to follow the process outlined in the APA renders a rule invalid." *Mich Charitable Gaming*, 310 Mich App at 594. One of the processes that the agency must follow is the creation of an RIS that contains an estimate of the compliance costs that the proposed rule will impose on businesses and other groups. MCL 24.245(3)(n).

When initially before this Court, 3M argued that EGLE's RIS for the drinking-water rule was insufficient because it did not account for how changes to the drinking-water rule would affect 3M's groundwater-cleanup costs, as the groundwater-cleanup rule incorporated the standards of the drinking-water rule. As a result, this Court addressed the "triggering effect" between the two rules and concluded that the drinking-water rule was invalid because it did not estimate the costs that the changes automatically imposed on groundwater cleanup. *3M Co*, 348 Mich App at 38-39. This Court also explicitly rejected EGLE's contention that it could propose a rule when it was factually incapable of estimating the costs of compliance. *Id*. at 40.

[2] After oral argument on the application for leave to appeal, the Supreme Court ordered supplemental briefing on these three issues, and then remanded the matter back to this Court. See *3M Co v Dep't of Environment, Great Lake,s and Energy*, ___ Mich ___; 13 NW3d 320 (2024).

We conclude that the promulgation of the groundwater-cleanup rule did not moot this case. First, as the parties recognize, if the drinking water standards contain standards for certain pollutants, then those standards apply to the groundwater rules as long as the drinking water standards are more restrictive. MCL 324.20120a(5). As the Court of Claims recognized, as a result of this statutory provision the more restrictive drinking water criteria established the groundwater criteria for PFOA and PFOS:

> Pertinent to 3M's third claim here, the Department recognized in the Part 201 RIS that the groundwater rules for PFOA and PFOS under Part 201 were already set as a result of the earlier SDWA rulemaking. This is because, under Part 201, if there were already existing-cleanup criteria for groundwater (which there were for PFOA and PFOS) and more stringent criteria are subsequently set for drinking water under the SDWA, then that more stringent drinking-water criteria would automatically become the new criteria for groundwater. See MCL 324.20120a(5). Given the SDWA rulemaking, the Department "replaced the existing generic cleanup criteria for [PFOA] and [PFOS] with the State Drinking Water Standards (SDWS), otherwise known as maximum contaminant levels, that were promulgated on August 3, 2020." *Id*. ¶ 1(A). In the words of the Department, "These criteria are effective and legally enforceable by operation of law." *Id*. Because there were not any then-existing groundwater criteria for the other five substances when the drinking-water rules were promulgated, the Department needed a separate rulemaking process under Part 201 to set the groundwater criteria for those other substances.

Thus, because the groundwater rules did not supplant the standards for all the pollutants addressed in the drinking water rules, 3M's challenge to the drinking water standards for at least the PFOA and PFOS is not moot, as those standards are by law imported into the groundwater rules.

Relatedly, because the subsequently enacted groundwater-cleanup rules built on the drinking-water rules, they contain the same alleged deficiency: there is no estimate of the costs of compliance. Indeed, when asked to identify additional costs that would be imposed on businesses and other groups in the RIS for 2020-130 EQ, EGLE indicated that it did not have the ability to quantify those costs. Therefore, the promulgation of the groundwater rules does not moot this appeal. There remains a practical effect on this controversy—EGLE has allegedly still failed to quantify the cleanup costs that businesses, including 3M, will be required to undertake to comply with the drinking-water rule. This issue is not moot.[3]

II. EXHAUSTION

The next question is whether 3M's claims were justiciable when it did not request a declaratory ruling from EGLE under MCL 24.264. For its part, 3M argues that it was not required

[3] Because the matter is not moot, we need not consider the second issue raised by the Supreme Court—whether an exception to the mootness doctrine applies.

to do so because it would have been futile to do so given EGLE's position, and its challenge is to the validity of the drinking-water rule, not to its applicability to a particular set of facts.

This Court reviews de novo issues of law. *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 574; 957 NW2d 731 (2020). "The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Connell v Lima Twp*, 336 Mich App 263, 282; 970 NW2d 354 (2021) (quotation marks and citation omitted). The exhaustion doctrine is a separation-of-powers doctrine. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 196; 631 NW2d 733 (2001). See also *United States v W Pac R Co*, 352 US 59, 63; 77 S Ct 161; 1 L Ed 2d 126 (1956).

In pertinent part, MCL 24.264 provides that a party may not commence a declaratory-judgment action, including one that asserts that the agency failed to accurately assess costs in its RIS, unless the party first requested a declaratory ruling from the agency and the agency denied it (or did not timely decide it):

> Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule, including the failure of an agency to accurately assess the impact of the rule on businesses, including small businesses, in its regulatory impact statement, may be determined in an action for declaratory judgment if the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff. . . . *An action for declaratory judgment may not be commenced under this section unless the plaintiff has first requested the agency for a declaratory ruling and the agency has denied the request or failed to act upon it expeditiously*. This section shall not be construed to prohibit the determination of the validity or applicability of the rule in any other action or proceeding in which its invalidity or inapplicability is asserted. [Emphasis added.]

As noted, 3M is challenging the validity of the rule on the basis that EGLE failed to account for the impact of the rule on businesses in the RIS, an issue falling squarely within MCL 24.264. To support its argument that MCL 24.264 should not be applied, 3M argued before the Supreme Court that requesting a declaratory ruling from EGLE was not required by statute and would have been futile because EGLE never would have ruled that its own rule was invalid. See *Hendee v Putnam Twp*, 486 Mich 556, 574; 786 NW2d 521 (2010) (the futility doctrine may apply to excuse a party from exhausting its administrative appeals).

The plain language of MCL 24.264 requires 3M to first file with the DEQ a request for a declaratory ruling before bringing suit in circuit court. The statutory language could not be clearer, and when a statute contains an exhaustion requirement, the exhaustion requirement must be complied with before filing suit. See, e.g., *True Care Physical Therapy, PLLC v Auto Club Group Ins Co*, 347 Mich App 168, 187; 14 NW3d 456 (2023).

3M argues that, despite the language contained within MCL 24.264, *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106; 807 NW2d 866 (2011), supports its position that it need not comply with any applicable exhaustion procedure under MCL 24.264. In *Mich Farm Bureau*, 292 Mich App at 108, the plaintiffs argued that the promulgated administrative rule

fell outside the scope of the statutory rulemaking authority of the Department of Environmental Quality (DEQ). In a motion for summary disposition, the DEQ argued that the plaintiffs were required to seek judicial review of a declaratory ruling under MCL 24.263. *Id*. at 118. In discussing the procedural background of the case, this Court rejected that argument because MCL 24.263 concerns challenges regarding the application of a rule to the specific state of facts, and therefore MCL 24.263 could not authorize the DEQ to issue a declaratory ruling regarding its *statutory authority* to make rulings. *Id*. at 119. This Court also noted that MCL 24.264 did not apply because the plaintiffs had not requested a declaratory ruling regarding the application of a state of facts but instead had argued that the rule was entirely invalid. *Id*. at 119 n 7. In that circumstance, where the challenge was to the legal validity of a rule, as opposed to the improper application of a rule to a set of circumstances, exhaustion was not required under the APA:

> We perceive no error in the circuit court's ruling on this matter. As the circuit court properly concluded, plaintiffs did not truly request "a declaratory ruling as to the applicability to an actual state of facts of a . . . rule . . . of the agency" within the meaning of MCL 24.263. Instead, and more accurately, what plaintiffs actually requested was a simple declaration that Rule 2196 was invalid. As Dean LeDuc has explained in his treatise on Michigan administrative law, MCL 24.263 "empowers an agency to issue a declaratory ruling only as to the *applicability* of a rule, not as to its *validity*." LeDuc, Michigan Administrative Law (2001), § 8:13, p. 576 (emphasis added). "The reason for this is obvious, an agency is unlikely to find its own rules invalid and those rules are presumed to be valid anyway. Courts will ultimately determine the validity of a rule." *Id*. Because plaintiffs sought to challenge the *validity* of Rule 2196 rather than its *applicability* to a particular state of facts, they were not required to ask the DEQ for a declaratory ruling under MCL 24.263 in the first instance, and were instead entitled to directly commence this declaratory judgment action in the circuit court pursuant to MCL 24.264. *Nor did the exhaustion requirement of MCL 24.264 apply to plaintiffs given that they sought to challenge the validity of Rule 2196 rather than its applicability. See LeDuc, § 8:13, p. 577. "The exhaustion requirement of [MCL § 24.264] (requiring resort first to the submission of a [request for a] declaratory ruling) applies only when a plaintiff wishes to challenge the applicability of a rule to an actual state of facts." Id*. [*Id*. (last emphasis added).]

In *Mich Farm Bureau v EGLE*, 343 Mich App 293, 316-317; 997 NW2d 467 (2022), this Court considered the footnote dicta, stating:

> The footnote cites statements from a treatise that neither has precedential value nor reflects the primacy of Michigan law regarding statutory interpretation, which requires courts to enforce the unambiguous legislative intent as expressed in the plain language of a statute. The prerequisite in MCL 24.264 to commencing a declaratory-judgment action cannot be ignored even if an agency is unlikely to find its own rules invalid. The footnote is dicta and, therefore, not binding precedent . . . .

We agree that footnote 7 was dicta, but not for the reasons outlined above, for the legal rationale behind a statement is not relevant to whether a judicial statement is dicta.[4] Instead, the footnote was dicta because no party to the appeal argued about exhaustion under MCL 24.264, and the Court's footnote was made in passing while describing the procedural history of the case. See *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 119 n 7. Discussion of what was required under MCL 24.264 was unnecessary to the disposition of the appeal, and thus dicta. *Hett v Duffy*, 346 Mich 456, 461; 78 NW2d 284 (1956) (Obiter dicta are defined as "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand . . . ."), overruled on other grounds *Weller v Mancha (On Rehearing)*, 353 Mich 189, 194; 91 NW2d 352 (1958) (citation omitted).

Even if MCL 24.264 did require exhaustion, according to 3M it would have been futile to comply with the exhaustion requirement under the statute because it was apparent that EGLE would have declined to issue a declaratory ruling that 2019-35 EG was invalid, as its position was that it did not have to comply with MCL 24.245(3)(n) when it was not practical to do so. With respect to the futility doctrine, it has long been the law that a party is excused from pursuing administrative remedies before filing in court when pursuing the administrative remedies would be futile. See *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358-359; 733 NW2d 107 (2007) (recognizing an exception to the exhaustion requirement where exhaustion before the administrative agency would be futile); *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7, 10 n 2; 703 NW2d 474 (2005) (rejecting the insurer's claim that the plaintiff was required to exhaust administrative remedies because to do so would have been futile); *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52-54; 620 NW2d 546 (2000) (recognizing the futility exception where exhaustion before the administrative agency would be futile); *Manor House Apartments v City of Warren*, 204 Mich App 603, 605-606; 516 NW2d 530 (1994) (holding that the taxpayer was not required to exhaust administrative remedies before the Tax Tribunal because such action would have been futile).

[4] Even if we didn't agree that the footnote was dicta, the Supreme Court vacated that portion of this Court's opinion in *Mich Farm Bureau v EGLE*, applying MCL 24.264, because "the Court of Claims correctly concluded [there] that it lacked subject-matter jurisdiction under MCL 24.264 . . . ." *Mich Farm Bureau v EGLE*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 165166); slip op at 54. As the dissent recognizes, the Supreme Court held that the permit conditions challenged in *Mich Farm Bureau v EGLE* were not "rules" for purposes of the APA, and thus the Court of Claims had no jurisdiction to proceed under MCL 24.264, until the contested case proceeding was finalized. Because this Court's discussion in *Mich Farm Bureau v EGLE* of the prerequisites to challenging a rule under MCL 24.264 was premised upon its holding that the permit conditions were a rule, any discussion of MCL 24.264 by the *Mich Farm Bureau v EGLE* Court fell within the Supreme Court order vacating this Court's rule analysis. See *Bentley v Dep't of Corrections*, 169 Mich App 264, 269-271; 425 NW2d 778 (1988) (recognizing that relief under MCL 24.264 is only for promulgated rules). Thus, MCR 7.215(J)(1) does not require that we follow the *Mich Farm Bureau v EGLE* Court's now-vacated reading of footnote 7 from *Mich Farm Bureau v Dep't of Environmental Quality*. We are free to determine for ourselves whether that footnote is dicta.

Futility can result, for example, if the challenge is premised upon a purely legal issue that can only be resolved by the courts, see *Bruley Trust v Birmingham*, 259 Mich App 619, 627; 675 NW2d 910 (2003) (holding that litigants will not be made to pursue an administrative process when only the courts have the authority to resolve the controlling issue), or when there is no doubt as to the agency's position and proceeding through the administrative procedures is merely a formal step in the process of getting to court, see *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981) (holding exhaustion of administrative remedies is not required where it is clear that appeal to an administrative agency is "an exercise in futility and nothing more than a formal step on the way to the courthouse"), and *Sterling Secret Service, Inc v Dep't of State Police*, 20 Mich App 502, 511; 174 NW2d 298 (1969) (holding that requiring the plaintiff to utilize the APA to have the defendant revoke its rules "would have been a vain and useless act").

As argued by 3M, courts are the sole determiner of the legal validity of an APA rule. See e.g., *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008) (recognizing that a court is not bound by, and owes no deference to, an agency's interpretation of a statute). And, EGLE had already squarely provided its answer to 3M's position, as EGLE articulated that position throughout the pre-rule adoption process. Because of this extended process, where EGLE had already received input from all concerned, including 3M, and afterwards took the position that it maintains to this day, it was more than just an expectation that EGLE would not alter its position had a declaratory ruling been sought. *Huron Valley Sch v Secretary of State*, 266 Mich App 638, 649-650; 702 NW2d 862 (2005). Because 3M's challenge was focused on the legal validity of the rule relative to the requirements of a statute, and EGLE's position was clearly and previously delineated, 3M did not have a duty to exhaust its remedies prior to bringing this declaratory judgment action, as it would have been futile to do so.[5]

III. REMAINING ISSUES

In the event we are incorrect in our assessment that 3M did not need to exhaust any administrative remedies, we will address the remaining issues the Court ordered us to consider if 3M improperly failed to comply with MCL 24.264: standing and subject-matter jurisdiction. As

[5] We separately note that MCL 24.264 appears to have its own futility exception, that being if the agency fails to act expeditiously on the request for a declaratory ruling. The federal courts have long held that when the legislature provides a statutory exhaustion requirement, courts cannot excuse compliance by use of judge-made exceptions to exhaustion requirements. See, e.g., *Gray Television, Inc v FCC*, 130 F4th 1201, 1214 (CA 11, 2025) ("We doubt that we can engraft a judge-made exception onto an exhaustion statute that does not contain that exception."), citing *Ross v Blake*, 578 US 632, 639; 136 S Ct 1850; 195 L Ed 2d 117 (2016) ("Time and again, this Court has taken [exhaustion] statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements."); *Booth v Churner*, 532 US 731, 741 n 6; 121 S Ct 1819; 149 L Ed 2d 958 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). Since defendant has not argued that judicial exceptions to exhaustion requirements should not be imposed onto MCL 24.264, we have no need to decide that issue.

discussed below, 3M's failure to exhaust its administrative remedies does not affect its standing to bring this lawsuit, or the subject-matter jurisdiction of the Court of Claims.

A. STANDING

When considering issues of standing, this Court engages in de novo review. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011). A party has standing when the party is the proper party to request adjudication of the issue. *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010). Standing doctrine focuses on whether the *party* is the correct one to challenge a particular act in court, as opposed to whether a particular claim is justiciable. *Id*. "[A] litigant has standing whenever there is a legal cause of action." *Id*. at 372. Further, a party must have sustained an actual injury to have standing to bring a claim. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017).

Here, a legal cause of action exists to challenge a rule as invalid, including when the agency has failed to assess costs in an RIS. See MCL 24.264. Under *Lansing Schools*, that is enough to grant a party standing. *Lansing Sch*, 487 Mich at 372. In addition to having a cause of action, 3M has a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." *Id*. Specifically, 3M alleged that it is a corporation with a Detroit facility that is subject to the rule and, to the extent that PFAS exist at the facility above the regulatory limits, would be required to engage in remediation. 3M asserted that the Attorney General had filed lawsuits against 3M regarding the historical uses of PFAS for damage to natural resources, and 3M alleged that the standards for regulating PFAS "are relevant to the lawsuits already filed against 3M because they establish drinking water standards and, by default, groundwater cleanup standards." EGLE admitted that it had filed lawsuits against 3M alleging natural-resources damage and that the levels "are relevant to the lawsuits filed because they establish drinking water standards, and by default due to statutory language, groundwater cleanup standards." No party has disputed that 3M has suffered an injury because of the promulgation of the PFAS-related drinking-water rules, or that the injury is not different than any suffered by the public at large (if any). 3M's failure to comply with MCL 24.264 did not affect its standing.

B. SUBJECT-MATTER JURISDICTION

We next address what affect, if any, there would be on the court's subject-matter jurisdiction if 3M had failed to exhaust its administrative remedies.

This Court reviews de novo whether a court has subject-matter jurisdiction. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). This Court has described the exhaustion doctrine as a jurisdictional doctrine. See *Connell*, 336 Mich App at 282; *In re Harper*, 302 Mich App 349, 356; 839 NW2d 44 (2013). However, our Supreme Court has described the exhaustion doctrine as one of the doctrines that is *not* jurisdictional in nature. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 491 n 23; 697 NW2d 871 (2005). More recently, the Supreme Court has cautioned this Court *against* viewing the exhaustion doctrine as a jurisdictional requirement, particularly as it relates to MCL 24.264. *Mich Farm Bureau v EGLE*, ___ Mich ___, ___; ___ NW3d ___ (2024) (Docket No. 165166); slip op at 24 n 25.

It is well established that subject-matter jurisdiction is the power of the court to decide the *type* of case—not the particular case before it. *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992). Generally, the Court of Claims has jurisdiction to hear any claim for equitable or declaratory relief against the state, its departments, and its officers. MCL 600.6419(1)(a). As the Supreme Court said last year in *Mich Farm Bureau*, "[t]here is no dispute [ ] that MCL 24.264 delineates a class of cases over which the Court of Claims has subject-matter jurisdiction." *Mich Farm Bureau*, ___ Mich at ___; slip op at 22. "MCL 24.264 gives a court power to adjudicate a declaratory-judgment action challenging the validity or applicability of an agency rule '[u]nless an exclusive procedure or remedy is provided by a statute governing the agency . . . .' " *Id*. at ___; slip op at 25. Here, there is no other statute governing EGLE that provides an exclusive procedure or remedy to challenge the rule. Thus, the Court of Claims had jurisdiction over the subject of the lawsuit. Whether any given challenger complied with the exhaustion part of MCL 24.264 before commencing its action concerns the court's power to decide the particular case before it, not the court's power to decide a declaratory-judgment action against a state department in general. See *id*. at ___; slip op at 24 n 25 (questioning the assumption that an exhaustion or remedy provision affects subject-matter jurisdiction).[6]

For these reasons, and those contained in our prior opinion, we again affirm the Court of Claims' order granting 3M's motion for summary disposition.

Affirmed.

/s/ Michael F. Gadola
/s/ Christopher M. Murray

[6] At least the Second Circuit Court of Appeals has held that a court is not deprived of subject-matter jurisdiction when a litigant fails to engage in statutorily-prescribed administrative procedures. See, e.g., *Fowlkes v Ironworkers Local 40*, 790 F3d 378, 384 (CA 2, 2015) (holding that "administrative exhaustion is not a *jurisdictional* requirement [for a Title VII action]; rather, it is merely a precondition of suit and, accordingly, it is subject to equitable defenses"); *Paese v Hartford Life & Accident Ins Co*, 449 F3d 435, 439, 446 (CA 2, 2006) (clarifying in context of ERISA that failure to exhaust administrative remedies "does not mean we lack subject matter jurisdiction, but rather is an affirmative defense, subject to waiver, estoppel, futility, and similar equitable considerations").