

**IN THE DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT**

ETHICS NAPLES, INC,  
a Florida not-for-profit corporation,

*Petitioner,*

v.

CASE NO.

CITY OF NAPLES, FLORIDA,  
a Florida municipal corporation,

*Respondent.*

\_\_\_\_\_ /

**EMERGENCY PETITION FOR WRIT OF MANDAMUS**

Ethics Naples, Inc.—a grassroots political committee—presented an ethics reform charter amendment to the Naples City Council. Their amendment met all the statutory requirements for placement on the ballot including certification by the Supervisor of Elections. The Naples City Council at a noticed regular meeting refused to send the amendment to the Collier County Supervisor of Elections, hypothesizing that parts of the amendment would not withstand legal challenge.

Ethics Naples now petitions this Court for an emergency writ of mandamus ordering the Council to fulfill its ministerial duty under Florida Statutes Section 166.031(1), which says the Council “shall place the proposed amendment contained in the . . . petition to a vote of the electors at the next general election.”

Emergency relief is necessary because the Collier County Supervisor of Elections' deadline for placement on the next general election ballot is June 29, 2018.

## **I. BASIS FOR JURISDICTION**

Ethics Naples brings this petition for a writ of mandamus under Article V, Section 4(b)(3) of the Florida Constitution and under Rules 9.030(b)(3) and 9.100 of the Florida Rules of Appellate Procedure.

## **II. NATURE OF RELIEF SOUGHT**

Ethics Naples seeks a writ of mandamus ordering the Naples City Council to follow the requirements of Section 166.031, Florida Statutes. This statute says the Council "shall place" Ethics Naples' proposed city charter amendment "to a vote of the electors at the next general election held within the municipality." To date, the Council has refused to follow this clear ministerial duty.

## **III. ISSUES BEFORE THE COURT**

Does Florida Statutes Section 166.031(1) confer a ministerial duty on the Naples City Council to place a citizens' petition amending the city's charter to a vote of the people when the Council questions the legality of parts of the proposed amendment? And if this ministerial duty exists, does Ethics Naples have a clear legal right to mandamus relief with no other adequate remedy at law?

#### IV. STATEMENT OF THE FACTS

This case cuts to the heart of democracy. A group of citizens came to believe that their local government needed ethics reform. To address this problem, they proposed to amend the city's charter. They sought expert advice and ultimately formed an organization called Ethics Naples, Inc., a 501(c)(4) political committee. (App. 2 pg. 5)

It took the members of Ethics Naples about eighteen months of work to prepare its proposed charter amendment. (App. 3 pg. 7) During that time, members of the group studied other ethics laws throughout Florida and the nation. *Id.* They also consulted with a variety of legal and policy experts. *Id.* After it had a working draft of the proposed charter amendment, Ethics Naples shared it with members of the Naples City Council and received informal feedback from the City Attorney. (App. 4 pg. 8)

In the end, Ethics Naples prepared a petition with the following ballot title and summary:

**BALLOT TITLE:** Referendum amending charter, establishing an ethics commission, ethics office, and minimum requirements for ethics code.

**BALLOT SUMMARY:** Shall the Charter of the City of Naples be amended to establish an independent ethics commission, set minimum requirements for the ethics code, and establish an ethics office?

(App. 1 pg. 3) The actual petition and full text of the amendment are available in the Appendix. *Id.*

The proposed amendment aims to bring ethics reform to Naples in the form of an independent ethics commission, to develop minimum requirements for the ethics code, and to establish an ethics office. *Id.* Because a city charter is the local constitution, the amendment leaves many details about the operations of the provisions to the Ethics Commission—in conjunction with the City Council—to enact via ordinance. *Bush v. Holmes*, 886 So. 2d 340, 372 (Fla. 1st DCA 2004) (“A municipal charter is the constitution of a city.”); (App. 1 pg. 3).

With confirmation from local elections officials that the form of the petition was correct, Ethics Naples began collecting signatures to gain access to the ballot. (App. 5 pg. 10) Florida Statutes Section 166.031(1) required the group to have ten percent of the registered electors as of the last preceding municipal general election sign the petition. In Naples, this meant the group needed to collect almost 1,500 signatures.

On April 24, 2018, the Supervisor of Elections informed Ethics Naples that it had verified the 1,481 signatures necessary for placement on the August 28, 2018, ballot. (App. 6 pg. 12) The only remaining hurdle, which should not have been a hurdle at all, was for the Naples City Council to inform the local elections officer to put the amendment on the August ballot so the people could vote on it.

Section 166.031(1) of the Florida Statutes says that “[t]he governing body of the municipality shall place the proposed amendment contained in the . . . petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose.” Unfortunately, what should have been the performance of an uncomplicated ministerial duty became an insurmountable obstacle. (*See* App. 12 pg. 36)

The Naples City Council consists of the mayor and six council members. Art. 2 Sec. 2.1(1), Naples Code Ord. As it became clear that Ethics Naples would succeed in gathering enough signatures to get on the ballot, the City Council set a “workshop” on the amendment for April 16, 2018. (App. 7 pg. 13) There, the City Attorney outlined “preliminary” concerns about certain parts of the amendment—even though the amendment had been public for six months. *See* video of workshop, Agenda Item 5(A), at [http://naples.granicus.com/MediaPlayer.php?view\\_id=14&clip\\_id=3088](http://naples.granicus.com/MediaPlayer.php?view_id=14&clip_id=3088) (accessed May 7, 2018). Ethics Naples declined to appear at the workshop, as advised by counsel, but did offer to meet with the each member of the Council individually.

The Council then set the matter for a vote at its meeting on May 2, 2018. (App. 8 pg. 16) Three days before the Council’s meeting, on Sunday evening, the City Attorney circulated a memo outlining a litany of possible legal problems with the amendment. (App. 9 pg. 21) The memo concluded that if the Council had a

“good faith” belief that the amendment was “invalid,” it did not have to fulfill its statutory obligation under Section 166.031(1) to place the amendment to a vote of the people. (App. 10 pg. 22)

Counsel for Ethics Naples sent a letter urging the City Attorney to reconsider his position. (App. 11 pg. 33) The letter pointed out the Council’s ministerial duty under Section 166.031(1), an Attorney General’s opinion directly on point, and case law explaining that it is not the role of the Council to determine the legality of a proposed charter amendment. *Id.* The letter stressed that the people had the right to vote on the amendment. *Id.*

At its May 2 meeting, four of seven members of the Naples City Council disagreed with this position. (App. 12 pg. 36) They refused to let the people vote on Ethics Naples’ amendment. *Id.* Instead, the Council voted to sue Ethics Naples. *Id.* To formalize these actions, the Council tabled the motion to put the amendment to a vote of the people and ordered the City Attorney to file a declaratory judgment action in the circuit court. *Id.*; *see also* video of meeting, Agenda Item 9(B), at [http://naples.granicus.com/MediaPlayer.php?view\\_id=14&clip\\_id=3101](http://naples.granicus.com/MediaPlayer.php?view_id=14&clip_id=3101) (accessed May 7, 2018).

On May 3, one day after the Council meeting, the City Attorney filed the circuit court action, seeking a declaration “regarding the facial statutory and constitutional validity of a proposed amendment (by initiative petition) to the City

of Naples Charter.” (App. 13 pg. 40) Currently, the matter is not under an expediated scheduling order.

The Collier County Supervisor of Elections has informed the parties the deadline for placing the amendment on the August 28, 2018, ballot is June 29, 2018. (*Id.* at 45)

## **V. ARGUMENT**

To obtain a writ of mandamus the petitioner must met three elements:

1. The respondent must have an indisputable legal duty to perform the requested action;
2. The petitioner must have a clear legal right to the requested relief; and
3. The petitioner must have no other adequate remedy available.

*See Pleus v. Crist*, 14 So. 3d 941, 945 (Fla. 2009). What follows details the way Ethics Naples satisfies each of these elements.

### **A. Section 166.31(1) sets forth a ministerial duty for the Council to place Ethics Naples’ amendment to a vote of the people.**

The Florida Constitution gives the Legislature authority over municipal charter amendments. Art. VIII §2(a)(3), Fla. Const. (“Municipalities may be established or abolished and their charters amended pursuant to general or special law.”) The Legislature exercises this authority through Section 166.031 of the

Florida Statutes. In that statute, the Legislature describes the process that municipalities must follow to amend a local charter.

Section 166.031(1) defines the local government's ministerial duty for citizen-proposed charter amendments like the one in this case. It reads:

The governing body of a municipality may, by ordinance, or the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality. *The governing body of the municipality shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose.*

§ 166.031, Fla. Stat. (2017) (emphasis added).

Here, there is no dispute that Ethics Naples consists of “electors of [the] municipality” of Naples. *Id.* Further, there is no dispute that Ethics Naples presented to the Council a “petition signed by 10 percent of the registered electors as of the last preceding municipal general election” and then asked that the Council “submit to the electors of said municipality a proposed amendment to its charter.” *Id.* So it is indisputable that Ethics Naples fulfilled its statutory obligations.

Next, the Florida Legislature commands that “[t]he governing body of the municipality *shall* place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the



municipality.” *Id.* (emphasis added). Thus, as the “governing body of the municipality” of Naples, the Legislature requires the Council to “place the proposed amendment contained in the . . . petition to a vote of the electors at the next general election.” Despite this clear statutory directive, the Council refused.

Although this language is unambiguous, one City Attorney did seek confirmation of the ministerial duty under Section 166.031(1) from the Florida Attorney General. The Attorney General confirmed that the city has a mandatory duty to put such a measure on the ballot. He found that “[t]he word ‘shall’ as opposed to ‘may’ connotes a mandatory duty. The statute vests no discretion in the governing body of the city. The duty to place the proposal on the ballot is purely ministerial.” The Attorney general then warned, “[I]t would be improper for an administrative officer to rule on the validity or legality of a proposed charter amendment. This is a function reserved to the courts.” Op. Att’y Gen. Fla. 74-69 (1974).

In other statutes, the Florida Supreme Court has found that the Legislature’s use of the word “‘shall’ is normally meant to be mandatory in nature.” *State v. Goode*, 830 So. 2d 817, 823 (Fla. 2002) (quoting *S.R. v. State*, 346 So. 2d 1018, 1019 (Fla. 1977)). Similarly, this Court has held that “[t]he use of the mandatory term ‘shall’ normally creates an obligation impervious to judicial discretion.” *City of St. Petersburg v. Remia*, 41 So. 3d 322, 326 (Fla. 2d DCA 2010). If the word

“shall” is “impervious to judicial discretion,” it is equally impervious to the whims of a local political body.

The Third District further explained that “shall” is mandatory when it “refers to some required action preceding a possible deprivation of a substantive right, or the imposition of a legislatively-intended penalty, or action to be taken for the public benefit, it is held to be mandatory.” *Allied Fid. Ins. Co. v. State*, 415 So. 2d 109, 111 (Fla. 3d DCA 1982) (internal citations and quotations omitted). In contrast, “where no rights are at stake, and only a non-essential mode of proceeding is prescribed, the word ‘shall’ is said to be advisory or directory only.” *Id.* (internal citations and quotations omitted).

Here, the right of the people to present an amendment to their city charter is both a “substantive right” and an “action to be taken for the public benefit.” Thus, the Legislature’s use of the word “shall” in Section 166.031 is mandatory, and the Council had a ministerial duty to put the amendment to a vote of the people.

**B. Ethics Naples has a clear legal right to have its proposed amendment voted on by the people.**

A single overarching principle guides the decision in this case: “All political power is inherent in the people.” Art. 1, § 1, Fla. Const. Indeed, the reservation of power to the people is the essence of constitutional democracy. *See* U.S. Const. Amend. X (“The powers not delegated to the United States by the Constitution, nor

prohibited by it to the States are reserved to the States respectively, or to the people.”)

The United States Supreme Court has explained that a citizens’ “referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create.” *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) (citation omitted). Because all political power belongs first to the people, courts are loath to block a citizens’ petition from the ballot. Only when the proposed amendment is clearly illegal on its face—and in its entirety—will a court do so.

As the Florida Supreme Court explained sixty years ago, “the courts will not interfere if upon ultimate approval by the electorate such proposal can have a valid field of operation even though segments of the proposal or its subsequent applicability to particular situations might result in contravening the organic law.” *Dade County v. Dade County League of Municipalities*, 104 So. 2d 512, 515 (Fla. 1958). The Court further explained, “[I]f an examination of the proposed amendment reveals that if adopted it would be legally operative in part, even though it might ultimately become necessary to determine that particular aspects violate the Constitution, then the submission of such a proposal to the electorate for approval or disapproval will not be restrained.” *Id.*

Indeed, this Court has emphasized that where the claimed illegality is not with the entirety of the proposal, but is based on individual elements of the proposal, the question must be placed on the ballot. *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1146-47 (Fla. 2d DCA 2006). Similarly, the Third District reached the same conclusion in *Rivergate Restaurant Corp. v. Metropolitan Dade County*, 369 So. 2d 679 (Fla. 3d DCA 1979). The court warned against a “piecemeal attack upon a portion of the proposal, as opposed to an attack on the proposal in toto.” *Id.* at 683.

A case decided in March of this year by the Third District is a good example of when a citizens’ proposal is so flawed in its entirety that it cannot reach the ballot. In *Mullen v. Bal Harbour Village*, 43 Fla. L. Weekly D 634 (3d DCA 2018), a citizens’ group proposed a charter amendment that mandated a citywide vote before the local government could enter a development order increasing the commercial space of certain buildings. *Id.* But Section 163.3167(8)(a) of the Florida Statutes says, “An initiative or referendum process in regard to any development order is prohibited.” So the proposed amendment was clearly in direct conflict with state law on its face. Further, the state statute conflicted with the entire proposed amendment. In that situation, the Third District had no choice but to find that the citizens’ group had no clear legal right to the remedy requested. *See Id.*

Regarding Ethics Naples' amendment, the City Attorney relied heavily on the *Mullen* decision in his advice to the Council. But the proposed amendment in *Mullen* is much different from the one in this case. Ethics Naples' amendment presents no clear conflict with state or federal law. And it has parts that are indisputably legal—unlike the amendment in *Mullen*. To be sure, good lawyers can craft an argument against the legality of almost any law, including Ethics Naples' amendment. But if possible illegality was the standard, no citizens' petition would ever make it to the ballot.

Instead, this Court should follow the standard it adopted in *Citizens for Responsible Growth*. This Court said that “all political power is inherent in the people and that we must, if possible, interpret the amendment as constitutional.” *Id.* at 1146-1147. In other words, courts should make every effort to see the legality of citizens' petitions and allow the people to vote on them. Only when the people are trying to do something that is patently illegal in its entirety should a court strike the amendment.

**C. Ethics Naples has no adequate alternative remedy.**

The Naples City Council is not going to fulfil its ministerial duty to place Ethics Naples amendment to a vote of the people without a court order. The Council voted against sending the amendment to a vote of the people at its May 2

meeting. Moreover, it held that vote with full knowledge of its ministerial duty under Section 166.031(1).

Nevertheless, the Council sought a declaratory judgment in the trial court to test the “facial statutory and constitutional validity” of the proposed amendment. That action cannot offer an adequate remedy because it seeks a prohibited advisory opinion. The Florida Supreme Court has held “there is no jurisdiction in any circuit court to render in the form of a declaratory judgment a determination with regard to the impact of a citizen initiative, which pre-election would be an advisory opinion addressing merely the possibility of legal injury based on purely hypothetical facts which have not arisen and are only contingent, uncertain and rest entirely on future possible facts.” *Roberts v. Brown*, 43 So. 3d 673, 680 (Fla. 2010). Based on this Supreme Court precedent, it is unlikely the trial court will even decide the matter because the issue presented is not ripe.

But even if the trial court were to issue the declaratory judgment sought by the Council, it will simply declare the rights of the parties. The only remedy available for the City Council’s refusal to fulfill its ministerial duty is a writ of mandamus commanding it to place the amendment to a vote of the people, as Ethics Naples seeks here.

Finally, it sets a dangerous precedent to require a full trial court proceeding and possible appeal when a government actor has a clear ministerial duty to

perform an act. The Council has unlimited government funds. Ethics Naples is a group of citizens volunteering their time and raising money where they can. To allow any government to obstruct the citizens' petition process in this way could lead other local governments to use hypothetical legal issues as a pretext to prevent people from voting on proposed amendments disagreeable to that government. One purpose of mandamus relief is to avoid this type of political chicanery and subversion of a healthy democracy.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this Emergency Petition for Writ of Mandamus  
has been furnished by eService on May 8, 2018 to the following:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this petition is being submitted in Times New  
Roman 14-point font in compliance with the font requirements of Rule 9.210(a)(2),  
Florida Rules of Appellate Procedure.

/s/ C.B. Upton \_\_\_\_\_  
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