

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA ex rel., )  
RUSS BARGER, )

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Relator, )

**VERIFIED PETITION FOR WRIT  
OF MANDAMUS AND  
DECLARATORY JUDGMENT**

v. )

ROBERT B. EVNEN, in his )  
official capacity as Nebraska )  
Secretary of State, )

**EMERGENCY AND EXPEDITED  
ADJUDICATION REQUESTED**

and )

DAVID J. SHIVLEY, in his official )  
capacity as Lancaster County )  
Election Commissioner, )

Respondents. )

COMES NOW, Russ Barger, candidate for the District 26 office of the Legislature, and for his causes of action and claims for relief against the Respondents, alleges that the Relator is entitled to a peremptory writ of mandamus requiring the Respondents, in their roles of supervising and conducting recounts of elections, to conduct a **hand recount** of the ballots cast for said Legislative office in the general election of November 8, 2022. In support of his Petition, Relator states and alleges as follows:

**PARTIES**

1. Relator, Russ Barger, is a citizen of Nebraska, resident of Lancaster County and a candidate for the District 26 office of the Legislature.
2. Respondent, Robert B. Evnen, is the duly elected Nebraska Secretary of State, with his principal place of business located at State Capitol, 1445 K Street, Suite 2300, Lincoln, NE 68508.

3. Respondent, David J. Shively, is the duly appointed Lancaster County Election Commissioner, with his principal place of business located at 601 North 46<sup>th</sup> Street, Lincoln, NE 68508.

### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over this matter as the Relator's causes of action arise under Neb. Rev. Stat. §§ 25-2156 to 25-2169 (mandamus) and Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (declaratory judgments).
5. Venue is proper in this Court as all the parties reside or do business in Lancaster County and these causes of action arose in Lancaster County.

### **EXPEDITED REVIEW REQUESTED**

6. The 2022 general election was conducted on November 8, 2022.
7. The final official vote tally, as certified by the Lancaster County Election Commissioner, was:

George C. Dungan, III	5,960
Russ Barger	5,736.

The vote difference between the two candidates was 224 votes and was more than one percent of the votes cast for the winning candidate. Therefore, the recount requested was not an automatic recount as provided by Nebraska law.

8. Pursuant to Neb. Rev. Stat. §32-1118, Barger filed his Petition for Recount, in duplicate, with Respondent Evnen on December 2, 2022. The Petition for Recount demanded a hand recount and not a machine-based tabulator or vote counting devices recount. The Petition for Recount was accompanied with corporate surety bond in the amount of \$6,000.
9. On December 5, 2022, Respondent Evnen denied Relator's request for a hand recount of the November 8, 2022 general election for the District 26 office of the Legislature.
10. Upon information and belief, Respondents intend to conduct a machine-based tabulator or vote counting devices recount on December 8, 2022.

11. Neb. Rev. Stat. §32-1118(4) states that “The Secretary of State shall, on or before December 20, certify the result of the recount to each of the parties to the recount and to the Clerk of the Legislature.”
12. The 108<sup>th</sup> Legislature, First Session, convenes on January 4, 2023.
13. An emergency exists and time is of the essence for this Complaint to be adjudicated before December 20, 2022.

**CLAIM FOR RELIEF**  
**Mandamus**  
**Violation of Neb. Rev. Stat. §32-1118**

14. Relator incorporates paragraphs 1 through 13 as if fully set forth herein.
15. Per Neb. Rev. Stat. §32-1118, as a candidate for the Legislature the Relator is entitled to a recount other than the recount method specified in Neb. Rev. Stat. §32-1119(6), that is, “The procedures for the recounting of ballots shall be the same as those used for the counting of ballots on election day.”
16. Respondents have a clear legal duty to conduct a recount of the November 8, 2022 election for the District 26 office of the Legislature in the manner requested and provided for by Neb. Rev. Stat. §32-1118, to-wit: a hand recount.

**CLAIM FOR RELIEF**  
**Uniform Declaratory Judgments Act**  
**Neb. Rev. Stat. §§ 25-21,149 – 25-21,164**

17. Relator incorporates paragraphs 1 through 16 as if fully set forth herein.
18. As a candidate for the office of District 26 of the Legislature, Relator is a person interested in the certified outcome of the recount prior to December 20, 2022.
19. Relator is a person whose rights and legal status is affected by Respondents’ interpretation of Neb. Rev. Stat. §32-1118.

20. Relator requests a declaration of his rights, status and other legal relations under Neb. Rev. Stat. §32-1118.

### PRAYER FOR RELIEF

WHEREFORE, the Relator prays for relief as follows:

1. For an expedited adjudication of this case prior to December 20, 2022.
2. That the Court issue a peremptory writ of mandamus compelling and requiring the Respondents to conduct a hand recount of the November 8, 2022 election for the District 26 office of the Legislature or, in the alternative, Relator requests that the Court issue an alternative writ of mandamus as described above compelling the Respondents to answer the allegations in this verified petition;
3. That the Court declare the rights, status and legal relations of Relator under Neb. Rev. Stat. §32-1118.
4. That the Court award Relator his cost and attorney's fees per Neb. Rev. Stat. §25-2165.
5. For such other and further relief as is just and equitable under the premises.

Dated this 5th day of December, 2022.

RUSS BARGER, Relator

/s/ David D. Begley

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Attorney for Relator

VERIFICATION

STATE OF NEBRASKA        )  
  ) ss.  
COUNTY OF DOUGLAS        )

RUSS BARGER, being first duly sworn upon oath, deposes and says that he is a resident of Lancaster County, Nebraska and a candidate for the District 26 office of the Legislature; that he has read the Verified Petition for Writ of Mandamus and Declaratory Judgment and knows the contents thereof; that he has conducted sufficient investigation into the facts alleged in said Verified Petition to enable him to swear to the truth of such allegations; and that the allegations contained therein are true.

/s/ Russ Barger  
Russ Barger

SUBSCRIBED AND SWORN to before me this 5th day of December, 2022.

/s/ David D. Begley  
Notary Public

### CERTIFICATE OF SERVICE

I, David D. Begley, hereby certify that on the 5<sup>th</sup> day of December, I electronically filed the foregoing document with the Clerk of the District Court using the Justice E-Filing System and also sent the foregoing by email to the attorneys I believe to represent the Respondents.

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