

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (CINCINNATI)**

TRACIE HUNTER,	:	Case No. 1:10-CV-820
	:	
Plaintiff,	:	Judge Susan J. Dlott
	:	
vs.	:	<b>URGENT MOTION OF PLAINTIFF AND</b>
	:	<b>INTERVENOR-PLAINTIFFS</b>
HAMILTON COUNTY BOARD OF	:	<b>NORTHEAST OHIO COALITION FOR</b>
ELECTIONS, et al.,	:	<b>THE HOMELESS AND OHIO</b>
	:	<b>DEMOCRATIC PARTY TO ENJOIN</b>
Defendants.	:	<b>STATE-COURT PROCEEDINGS</b>

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Under the All Writs Act, 28 U.S.C. § 1651(a), and S.D. Ohio Civ. R. 7.1(b)(3), Plaintiff Tracie Hunter and Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless (“NEOCH”) and Ohio Democratic Party (“ODP”) (collectively “Plaintiffs”) respectfully submit this *urgent* motion to enjoin state-court proceedings initiated on December 20, 2010 by Intervenor-Defendant John Williams (and supported by an affidavit from Defendant Alex Triantafilou) in the case of *State ex rel. Painter v. Brunner*, Ohio S. Ct. Case No. 2010-2205. Williams has asked the Ohio Supreme Court to issue temporary injunctive relief that would bar Secretary of State Brunner from issuing directives *necessary to implement this Court’s preliminary injunction* issued on November 22, 2010 (Doc. No. 13). Because the *Painter* relators seek to collaterally attack this Court’s preliminary injunction, this Court should enjoin the *Painter* litigation.

This motion is urgent because the Ohio Supreme Court has required the respondents in the *Painter* litigation to respond to the motion for temporary injunctive relief by Monday, December 27, 2010 at 10:00 a.m. The Ohio Supreme Court could issue its ruling any time after those responses are submitted. Therefore, Plaintiffs request that this Court set an early hearing on either Friday, December 24 or Monday, December 27 at 8:30 a.m. to consider this motion.

A memorandum in support and proposed order are attached.

Respectfully submitted,

/s/ Jennifer L. Branch  
Jennifer L. Branch, Trial Attorney (0038893)  
Alphonse A. Gerhardstein (0032053)  
GERHARDSTEIN & BRANCH CO. LPA  
432 Walnut Street, Suite 400  
Cincinnati, OH 45202  
(513) 621-9100 / (513) 345-5543 Fax  
jbranch@gbfirm.com  
agerhardstein@gbfirm.com

*Attorneys for Plaintiff Tracie Hunter*

/s/ Donald J. McTigue  
Donald J. McTigue, Trial Attorney (0022849)  
Mark A. McGinnis (0076275)  
MCTIGUE LAW GROUP  
550 East Walnut Street  
Columbus, OH 43215  
(614) 263-7000 / (614) 263-7078 Fax  
mctiguelaw@rrohio.com

*Attorneys for Intervenor Ohio Democratic  
Party*

/s/ Caroline H. Gentry  
Caroline H. Gentry, Trial Attorney (0066138)  
PORTER, WRIGHT, MORRIS & ARTHUR LLP  
One South Main Street, Suite 1600  
Dayton, OH 45402  
(937) 449-6748 / (937) 449-6820 Fax  
cgentry@porterwright.com

and

Subodh Chandra (0069233)  
THE CHANDRA LAW FIRM, LLC  
1265 W. 6th Street, Suite 400  
Cleveland, OH 44113-1326  
(216) 578-1700 / (216) 578-1800 Fax  
Subodh.Chandra@StanfordAlumni.org

*Attorneys for Intervenor Northeast Ohio  
Coalition for the Homeless*

**MEMORANDUM IN SUPPORT OF *URGENT* MOTION OF  
PLAINTIFF AND INTERVENOR-PLAINTIFFS NORTHEAST OHIO  
COALITION FOR THE HOMELESS AND OHIO DEMOCRATIC  
PARTY TO ENJOIN STATE COURT PROCEEDINGS**

**I. INTRODUCTION AND STATEMENT OF FACTS.**

*1. Plaintiff filed this lawsuit under Section 1983 to redress alleged violations of the Due Process and Equal Protection Clauses.*

This case arose in the context of an extremely close race for Hamilton County Juvenile Court Judge. After Defendant Hamilton County Board of Elections (“Board”) counted certain provisional ballots, the Republican candidate, Intervenor-Defendant John Williams, had a slim 23-vote lead over his Democratic opponent, Plaintiff Tracie Hunter.

Plaintiff filed this lawsuit after Defendant Board rejected approximately 980 provisional ballots (including approximately 849 “wrong precinct” ballots) without considering whether they were deficient because of poll-worker error, but counted similarly deficient ballots after concluding that they were deficient because of poll-worker error. Plaintiff asserted a single claim under 42 U.S.C. Section 1983, challenging Defendants’ actions under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

*2. This Court granted, and the Sixth Circuit declined to stay, a preliminary injunction requiring Defendant Board to investigate the 849 “wrong precinct” ballots and, if there was poll-worker error, to count them.*

On November 22, 2010, the District Court granted Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction and ordered the Board to “immediately begin an investigation into whether poll-worker error contributed to the rejection of the 849 provisional ballots now in issue and include in the recount of the race for Hamilton County Juvenile Court Judge any provisional ballots improperly cast for reasons attributable to poll worker error.” (Doc. No. 13). After initially dragging its feet on implementing the Court’s preliminary injunction—thereby necessitating Plaintiff’s motion to enforce that injunction (Doc. No. 20)—

Defendant Board finally began to take the steps necessary to comply with the injunction based on Directives issued by Secretary of State Brunner.

*3. Intervenor-Defendant Williams has collaterally attacked this Court's preliminary injunction by seeking contrary relief on an emergency basis in the Ohio Supreme Court.*

On December 20, Intervenor Williams and voter Jack Painter filed an original action in the Ohio Supreme Court seeking writs of prohibition and mandamus to stop Secretary Brunner from issuing Directives necessary to implement this Court's preliminary injunction, and to stop Defendant Board from contacting poll workers as part of its investigation. *State ex rel. Painter v. Brunner*, Ohio S. Ct. Case No. 2010-2205. Along with the Complaint (Ex. 1), Williams filed a motion for temporary injunctive relief (Ex. 2), a supporting affidavit from Defendant Alex Triantafilou (Ex. 3) and a motion for expedited issuance of an alternative writ (Ex. 4). He named Defendant Board and Secretary of State Brunner as respondents.

Although Williams weakly and conclusorily claims that he is not collaterally attacking this Court's preliminary injunction, his allegations, arguments and requested relief make it abundantly clear that he is attacking not only this Court's prior order (Doc. No. 13) but also the Sixth Circuit's orders denying his motion to stay this Court's order (Doc. No. 19) and denying his motion for rehearing (Doc. No. 27). Indeed, the latter order was issued Thursday, December 16, 2010, just *four short days* before Williams commenced his original state-court action.

First, Williams' allegations make it clear that he is seeking to attack, undermine, and frustrate the purposes of this Court's preliminary injunction:

- He seeks "a writ of mandamus correcting the misdirected ... instructions of the Secretary of State and *stopping the process* that is based on those instructions." (Ex. 1 at 3, ¶ 6) (emphasis added).

- He challenges Directive 2010-80—which directed the Board to investigate all 849 “wrong precinct” provisional ballots, as ordered by this Court in its preliminary injunction—as being “[c]ontrary to Ohio law.” (*Id.* at 8-9, ¶¶ 22-26).
- He alleges that changing “the level of scrutiny to be applied to provisional ballots after Election Day ... is nowhere provided for under Ohio law and is contrary to Ohio law.” (*Id.* at 15, ¶¶ 42-43).
- He repeats Defendants’ unsuccessful argument to this Court that the fate of these 849 ballots should be decided by an election contest. (*Id.* at 17-18, ¶ 49).
- He repeats his own unsuccessful argument to the Sixth Circuit that this Court’s order should be stayed with respect to opening the ballots. (*Id.* at 20-21, ¶ 57).
- He claims that the Ohio Supreme Court “must enter an ancillary injunction *to stop the Board from proceeding with its current form of investigation* so as to protect the rights of the Relators.” (Ex. 1 at 21, ¶ 60) (emphasis added).
- He also claims that unless an injunction is granted, “he will be unable to challenge whether any particular vote should have been counted” in an election contest. (*Id.*)

The relief that Williams requests from the Ohio Supreme Court also makes it clear that he is seeking to attack, undermine, and frustrate the purposes of this Court’s preliminary injunction. He seeks writs of mandamus compelling Secretary of State Brunner to rescind Directives 2010-80 and 2010-87 (Ex. 1 at 22, Prayer, ¶¶ A, B) and compelling Defendant Board to rescind its decision to subpoena poll workers to testify. (*Id.*, ¶ C). He seeks a writ of prohibition requiring Defendant Board “*to refrain from further contacts and questioning of poll workers.*” (*Id.*, ¶ D) (emphasis added). He seeks a temporary restraining order enjoining Defendant Board “from

opening and commingling any provisional ballots.” (*Id.* at 23, Prayer, ¶ F). And he seeks to drastically limit the scope and effect of this Court’s preliminary injunction by narrowly restricting the Board’s review of the 849 provisional ballots at issue in the Court’s Order:

Relators therefore prays [sic] that the Court: .... Issue a writ of mandamus directing Respondent Board of Elections *to follow Ohio law* and review the 849 provisional ballots *with exactly the same procedures* and the most stringent level of scrutiny that was applied to any provisional ballots during the Board’s review of those leading up to its votes on November 16. Specifically, the Board may not assume that poll worker error occurred in the absence of specific evidence to the contrary that is developed during the course of that review.

(*Id.* at 22-23, Prayer, ¶ E). Of course, if the Ohio Supreme Court also prohibits Defendant Board from contacting poll workers, then the Board will be left with the *exact same “evidence”* that it reviewed before deciding to reject these 849 provisional ballots. It is a foregone conclusion that it will come to the same result if additional evidence is not obtained by an investigation.

Finally, Williams’ arguments make it clear that he is seeking to attack, undermine, and frustrate the purposes of this Court’s preliminary injunction. He argues that the Ohio Supreme Court must enjoin the opening of the 849 ballots (Ex. 2 at 4-5), thereby directly contravening not only this Court’s preliminary injunction (ordering that the ballots be counted if there was poll-worker error) but also the Sixth Circuit’s orders denying his motion to stay. He argues that the Ohio Supreme Court must determine what level of scrutiny to apply to the provisional ballots because the processing and counting of such ballots is a matter of Ohio law. (*Id.* at 9). He argues that Secretary Brunner erred by ordering Defendant Board to examine all 849 provisional ballots—even though that is exactly what this Court’s preliminary injunction requires. (*Id.* at 10). And throughout his brief, he suggests that Defendant Board’s investigation is driven not by this Court’s preliminary injunction, but rather by Secretary Brunner’s Directives. (*Id.*, *passim*).

4. ***Because the Ohio Supreme Court may rule as soon as Monday, December 27, 2010, this Court's immediate intervention is required.***

The Ohio Supreme Court promptly issued an order requiring the respondents in the *Painter* litigation to file their responses to Williams' motions for temporary injunctive relief and expedited issuance of an alternative writ by **Monday, December 27 at 10:00 a.m.** (Ex. 5). The Ohio Supreme Court could issue its ruling anytime after Monday morning.

Therefore, under S.D. Ohio Civil Rule 7.3(b), Plaintiff Hunter and Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless ("NEOCH") and Ohio Democratic Party ("ODP") (collectively "Plaintiffs") have denominated this motion as *urgent* and request that this Court set an early hearing on either **Friday, December 24 or Monday, December 27 at 8:30 a.m.**, with or without the filing of briefs, to consider and rule on this motion.

## **II. LAW AND ARGUMENT.**

The foregoing facts establish, beyond any doubt, that Williams and Painter are brazenly seeking to attack, undermine, frustrate and effectively vitiate this Court's preliminary injunction by obtaining the requested temporary injunctive relief and writs of prohibition and mandamus from the Ohio Supreme Court. This Court can and should stop them from undoing its order.

As shown below, this Court has the authority to issue all writs necessary to protect its prior orders under the All Writs Act, 28 U.S.C. § 1651(a), and the requested injunction of state-court proceedings is not barred by the Anti-Injunction Act, 28 U.S.C. § 2283, because two of its exceptions apply here. Moreover, to the extent that Williams seeks to raise the issue, *Younger* abstention does not apply. Finally, this Court should exercise its discretion to enjoin the state-court proceedings because such action is necessary to protect not only its prior order but also Plaintiffs' constitutional rights. Accordingly, Plaintiffs respectfully request that the Court immediately enter an order enjoining the state-court proceedings.

**A. The All Writs Act Authorizes The Requested Injunction.**

The All Writs Act, 28 U.S.C. § 1651(a), authorizes federal district courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” The Supreme Court has “repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued.” *Sable v. Gen. Motors Corp.*, 90 F.3d 171, 175 (6<sup>th</sup> Cir. 1996). That is exactly the situation here.

When issuing an injunction under the All Writs Act, the Court need not make any findings regarding the four factors that govern issuance of a preliminary injunction under Rule 65. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097-1100 (11<sup>th</sup> Cir. 2004). An All Writs Act injunction is not predicated on any party’s cause of action; instead, “[i]t must simply point to some ongoing proceeding, or some past order or judgment, the integrity of which is being threatened by someone else’s action or behavior.” *Id.* at 1100. The requirements for issuing a preliminary injunction under Rule 65 do not apply “because a court’s traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns.” *Id.*

Notably, the All Writs Act allows this Court to issue orders to non-parties who “are in a position to frustrate the implementation of a court order.” *United States v. City of Detroit*, 329 F.3d 515, 523 (6<sup>th</sup> Cir. 2003) (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 174, 98 S. Ct. 364, 373 (1977)). Therefore, this Court can not only enjoin Intervenor Williams from prosecuting the state-court proceedings, but can also enjoin non-party Painter, and their respective counsel, from doing so.

**B. The Anti-Injunction Act Does Not Bar The Requested Injunction.**

Although the Anti-Injunction Act, 28 U.S.C. § 2283, generally prohibits federal courts from enjoining state-court proceedings, that Act has three exceptions, two of which apply here.

The statute provides as follows:

A court of the United States may not grant an injunction to stay proceedings in a State court *except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction*, or to protect or effectuate its judgments.

28 U.S.C. § 2283 (emphasis added). Here, the requested injunction is both “expressly authorized by Act of Congress” and “necessary in aid of [this Court’s] jurisdiction.” Accordingly, the Anti-Injunction Act does not bar this Court from enjoining the state-court proceedings.

*1. The “expressly authorized” exception applies.*

The United States Supreme Court has held that Section 1983 “expressly authorize[s]” federal courts to enjoin state-court proceedings within the meaning of the Anti-Injunction Act. *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151 (1972). The Court explained:

Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts’ failure to secure federal rights.... This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.... The very purpose of s[ection] 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law ....

*Id.*, 407 U.S. at 242.

Here, Plaintiff Hunter has asserted a single claim under Section 1983, alleging violations of the Equal Protection and Due Process Clauses. This Court has already held that Plaintiff has

shown a likelihood of success on the merits of her Equal Protection Claim. (Doc. No. 13). Therefore, the first exception to the Anti-Injunction Act applies and allows this Court to enjoin the state-court proceedings.

**2. The “in aid of its jurisdiction” exception applies.**

The second exception of the Anti-Injunction Act also applies. As shown above, by seeking temporary injunctive relief and writs of prohibition and mandamus in the Ohio Supreme Court, Intervenor Williams and Relator Painter are plainly attempting to attack, undermine, and frustrate the purposes of this Court’s preliminary injunction. This Court is authorized by the “in aid of its jurisdiction” exception to enjoin those proceedings, so as to protect its prior order.

The Sixth Circuit recently applied this exception in a case where, as here, a party sought to undermine the district court’s prior order by filing a state court action. In *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe*, 589 F.3d 835 (6<sup>th</sup> Cir. 2009), the Sixth Circuit affirmed Judge Sargus’ order enjoining a party from continuing to litigate state-court claims that were directly contrary to a prior settlement agreement that the Court retained jurisdiction to enforce. The Sixth Circuit explained that federal district courts are empowered by this second exception to the Anti-Injunction Act to protect their prior orders:

We must next consider whether the injunction against the state-court litigation nevertheless violates the Anti-Injunction Act .... Fant contends that the injunction was permissible under the “necessary in aid of its jurisdiction” exception to the Anti-Injunction Act. We agree ....

As detailed above, the district court in its final judgment enjoined the parties from bringing any claim related to the subject matter of the Settlement Agreement. And “[w]hen a court issues an injunction, it automatically retains jurisdiction to enforce it.” *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11<sup>th</sup> Cir. 1993); *see also Peacock v. Thomas*, 516 U.S. 349, 356-57, 116 S. Ct. 862 (1996) (describing “a federal court’s inherent power to enforce its judgments”); ... The district court’s enjoining of the state-court

litigation, therefore, is a proper means of enforcing its previously entered permanent injunction.

*Lorillard Tobacco Co.*, 589 F.3d at 847. Therefore, this exception to the Anti-Injunction Act also authorizes this Court to issue the requested injunction.

**C. *Younger* Abstention Does Not Apply.**

Plaintiffs anticipate that Williams or Defendants will argue that because there is now a state-court proceeding, this Court must abstain from any further proceedings under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). Given the expedited nature of this Motion, Plaintiffs will respond to this potential argument.

*Younger* abstention will only apply if “there are state proceedings that are (1) currently pending; (2) involve an important state interest; and (3) will provide the federal plaintiff with an adequate opportunity to raise his or her constitutional claims.” *Habich v. City of Dearborn*, 331 F.3d 524 (6<sup>th</sup> Cir. 2003). *Younger* abstention is not proper here for at least three reasons.

First, the original action in the Ohio Supreme Court does not provide Plaintiffs with an adequate opportunity to raise their constitutional claims. Williams failed to name Plaintiffs as Defendants in that action. Moreover, the unique nature of an original proceeding in the Ohio Supreme Court would not allow Plaintiffs to assert and prosecute their claims under Section 1983 even if they are allowed to intervene, which is uncertain. Therefore, *Younger* abstention is not appropriate. *Habich*, 331 F.3d at 530-32 (holding that *Younger* abstention was inappropriate where the plaintiff would be unable to raise her constitutional claims in the state proceedings, and stating that *Younger* will not apply if the plaintiff must file a new complaint in state court).

Second, the United States Supreme Court has cautioned that *Younger* abstention is only appropriate if state-court proceedings are initiated “before any proceedings of substance on the merits have taken place in the federal court.” *Hicks v. Miranda*, 422 U.S. 332, 349, 95 S. Ct.

2281 (1975). Where, as here, the federal court issued a preliminary injunction before the state-court proceedings were filed, “proceedings of substance” have taken place and the federal court should not abstain under *Younger*. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 238, 104 S. Ct. 2321 (1984) (holding that issuance of a preliminary injunction “certainly was” a substantial federal court action that counseled against *Younger* abstention).

Third, *Younger* abstention is inappropriate because it would allow Intervenor Williams to perform an end-run around this Court’s preliminary injunction and obtain state-court relief that wholly ignores Plaintiffs’ constitutional rights. “The *Younger* doctrine cannot apply where the effect of abstention is, as a practical matter, the effective defeat of guaranteed federal civil rights.” *EEOC v. Levi Strauss & Co.*, 515 F. Supp. 640, 643 (N.D. Ill. 1981).

For all of these reasons, this Court should not abstain from exercising jurisdiction over this case under *Younger* merely because Williams has elected to challenge the implementation and effectiveness of its preliminary injunction in the Ohio Supreme Court.

**D. To Protect Its Prior Order And Plaintiffs’ Rights, This Court Should Exercise Its Discretion In Favor Of Issuing The Requested Injunction.**

It is well settled that even if this Court has the authority to issue injunctive relief under the All Writs Act, and to enjoin state-court proceedings under the Anti-Injunction Act, it still must decide to exercise its discretion to do so. Plaintiffs respectfully submit that the Court should elect to exercise its discretion in favor of issuing an injunction. The requested relief is necessary to protect not only its prior order, but also the Plaintiffs’ rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. Accordingly, this Court should grant this Motion, enter the attached proposed order, and enjoin the state-court proceedings.

### III. CONCLUSION.

For all of the foregoing reasons, Plaintiffs' Motion to Enjoin State-Court Proceedings should be granted.

Respectfully submitted,

/s/ Jennifer L. Branch  
Jennifer L. Branch, Trial Attorney (0038893)  
Alphonse A. Gerhardstein (0032053)  
GERHARDSTEIN & BRANCH CO. LPA  
432 Walnut Street, Suite 400  
Cincinnati, OH 45202  
(513) 621-9100 / (513) 345-5543 Fax  
jbranch@gbfirm.com  
agerhardstein@gbfirm.com

*Attorneys for Plaintiff Tracie Hunter*

/s/ Donald J. McTigue  
Donald J. McTigue, Trial Attorney (0022849)  
Mark A. McGinnis (0076275)  
MCTIGUE LAW GROUP  
550 East Walnut Street  
Columbus, OH 43215  
(614) 263-7000 / (614) 263-7078 Fax  
mctiguelaw@rrohio.com

*Attorneys for Intervenor Ohio Democratic Party*

/s/ Caroline H. Gentry  
Caroline H. Gentry, Trial Attorney (0066138)  
PORTER, WRIGHT, MORRIS & ARTHUR LLP  
One South Main Street, Suite 1600  
Dayton, OH 45402  
(937) 449-6748 / (937) 449-6820 Fax  
cgentry@porterwright.com

and

Subodh Chandra (0069233)  
THE CHANDRA LAW FIRM, LLC  
1265 W. 6th Street, Suite 400  
Cleveland, OH 44113-1326  
(216) 578-1700 / (216) 578-1800 Fax  
Subodh.Chandra@StanfordAlumni.org

*Attorneys for Intervenor Northeast Ohio Coalition for the Homeless*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION (CINCINNATI)**

<p>TRACIE HUNTER,</p> <p style="padding-left: 40px;">Plaintiff,</p> <p style="padding-left: 80px;">vs.</p> <p>HAMILTON COUNTY BOARD OF ELECTIONS, et al.,</p> <p style="padding-left: 40px;">Defendants.</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>Case No. 1:10-CV-820</p> <p>Judge Susan J. Dlott</p> <p><b>[PROPOSED] ORDER GRANTING URGENT MOTION OF PLAINTIFF AND INTERVENOR-PLAINTIFFS NORTHEAST OHIO COALITION FOR THE HOMELESS AND OHIO DEMOCRATIC PARTY TO ENJOIN STATE-COURT PROCEEDINGS</b></p>
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This matter comes before this Court on the Urgent Motion of Plaintiff Tracie Hunter and Intervenor-Plaintiffs Northeast Ohio Coalition for the Homeless and Ohio Democratic Party to Enjoin State-Court Proceedings (Doc. No. 29). For good cause shown, and based on the exhibits to the Motion and the relevant statutory and case law, the Motion is GRANTED.

It is ORDERED that the pending state-court proceedings in the case captioned *State ex rel. Painter v. Brunner*, Ohio S. Ct. Case No. 2010-2205, be and are ENJOINED from proceeding under the All Writs Act, 28 U.S.C. § 1651(a).

It is further ORDERED that Intervenor-Defendant Williams and non-party Jack Painter, and their counsel, are ENJOINED from further prosecuting said proceedings.

IT IS SO ORDERED.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that on December 23<sup>rd</sup>, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this case.

s/ Caroline H. Gentry  
Caroline H. Gentry  
PORTER, WRIGHT, MORRIS & ARTHUR LLP  
One South Main Street, Suite 1600  
Dayton, OH 45402  
(937) 449-6748 / (937) 449-6820 Fax  
cgentry@porterwright.com

*Attorney for Intervenor Northeast Ohio Coalition  
for the Homeless*