

1 GIBSON, DUNN & CRUTCHER LLP
2 PETER S. MODLIN, SBN 151453
3 pmodlin@gibsondunn.com
4 555 Mission Street, Suite 300
5 San Francisco, CA 94105-0921
6 Telephone: 415.393.8200
7 Facsimile: 415.393.8306

8 MEGAN COONEY, SBN 295174
9 mcooney@gibsondunn.com
10 AMBER D. MCKONLY, SBN 317117
11 amckonly@gibsondunn.com
12 3161 Michelson Drive
13 Irvine, CA 92612-4412
14 Telephone: 949.451.3800
15 Facsimile: 949.451.4220

16 DIONE GARLICK, SBN 293012
17 dgarlick@gibsondunn.com
18 333 South Grand Avenue
19 Los Angeles, CA 90071-3197
20 Telephone: 213.229.7000
21 Facsimile: 213.229.7520

22 Attorneys for Petitioner and Plaintiff
23 PLANNED PARENTHOOD/ORANGE AND
24 SAN BERNARDINO COUNTIES, Inc.

25 SUPERIOR COURT OF THE STATE OF CALIFORNIA
26 FOR THE COUNTY OF SAN BERNARDINO

27 PLANNED PARENTHOOD/ORANGE AND
28 SAN BERNARDINO COUNTIES, INC.,

Petitioner and Plaintiff,

v.

CITY OF FONTANA, a municipal corporation; THE CITY COUNCIL OF FONTANA; ACQUANETTA WARREN, in her official capacity as Mayor and City Council Member for Fontana; PETER A. GARCIA, in his official capacity as City Council Member for Fontana; JOHN B. ROBERTS, in his official capacity as City Council Member for Fontana; and PHILLIP W. COTHRAN, in his official capacity as City Council Member for Fontana,

Respondents and Defendants.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION
DEC - 4 2023
BY: VERONICA GONZALEZ, DEPUTY

Case No. CIV SB 2328945

VERIFIED PETITION FOR WRIT OF TRADITIONAL MANDAMUS [CCP SECTION 1085] AND ADMINISTRATIVE MANDAMUS [CCP SECTION 1094.5], REQUEST FOR STAY; AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

ORIGINAL

FAXED

1 Petitioner PLANNED PARENTHOOD/ORANGE AND SAN BERNARDINO COUNTIES,
2 INC. (“PPOSBC”) hereby petitions this Court for a writ of mandate pursuant to Code of Civil Procedure
3 Section 1085 and Code of Civil Procedure Section 1094.5 directed to Respondent City of Fontana, the
4 City of Council of Fontana, Acquanetta Warren, Peter A. Garcia, John B. Roberts, and Phillip W.
5 Cothran (collectively “City” or “Respondents”), for an immediate stay, for injunctive relief and
6 declaratory relief, and for damages, and by this Verified Petition represents and alleges as follows:

7 **I. INTRODUCTION**

8 1. PPOSBC brings this Petition to challenge an unconstitutional and procedurally
9 defective so-called “urgency ordinance” adopted by the City on September 5, 2023, which effectively
10 prohibits patients from accessing their constitutionally-guaranteed right to abortion and contraceptives,
11 among other constitutional violations.

12 2. After extensive consideration, planning, and expenditures, PPOSBC selected a location
13 in downtown Fontana to open a new clinic to provide essential reproductive healthcare, including
14 abortion and contraceptives, to the patients in the area regardless of their ability to pay for such services.
15 PPOSBC selected this location based on its assessment of a significant need for the provision of these
16 services, particularly to lower-income individuals. PPOSBC entered into a lease for the clinic on May
17 31, 2022, with the explicit intention of preparing the space for its use as a clinic.

18 3. In order to begin its operations in the City of Fontana, PPOSBC was required to obtain
19 certain permits in order to provide the reproductive healthcare that is the fundamental nature of its
20 operations. PPOSBC spent over a year completing all the necessary steps to obtain the permits to open
21 its Fontana Clinic. However, before the City approved the necessary permit for the Clinic, members
22 of the community began to protest the addition of PPOSBC to the community based on their political
23 and religious viewpoints. Members of the City Council repeatedly heard inflammatory arguments—
24 even at City meetings where the Fontana Clinic was not intended to be discussed—by anti-abortion
25 advocates seeking to deprive women of essential healthcare. Indeed, the City appeared to invite certain
26 participants to voice their opposition to PPOSBC and abortion generally, as their invited Chaplain at
27 one meeting was one of the anti-abortion activists who made statements in opposition to PPOSBC and
28 abortion services, including in his capacity as the person invited to open the meeting with an invocation.

1 4. Rather than simply denying PPOSBC its necessary permits to operate or banning
2 abortion providers in the area, a plainly unconstitutional act, the City sought to effectuate a prohibition
3 on a new abortion clinic by adopting an ordinance placing a moratorium on *any* permits for certain
4 “service based, non-entertainment uses” in a specific area that includes the location for PPOSBC’s
5 property. But the City may not do indirectly what it cannot do directly. Media reports directly connect
6 the adoption of the ordinance with the City’s effort to halt PPOSBC’s establishment of a clinic in
7 Fontana.¹ Indeed, in the initial review of materials produced in response to PPOSBC’s Public Records
8 Act Request, the City has not produced any evidence that any other business has been impacted aside
9 from PPOSBC. Such an effort to prohibit PPOSBC’s new abortion clinic is contrary to the
10 constitutional right to access abortion and contraceptive healthcare.

11 5. The City’s current ordinance, adopted on September 5, 2023 after an earlier interim
12 ordinance, places a 10-month moratorium (that may easily be extended) on any permits for non-
13 entertainment service-based uses within certain areas of downtown Fontana (the “Urgency
14 Ordinance”). Plainly, there is no urgency that supports the adoption of this ordinance, as it purports to
15 enforce a General Plan adopted five years earlier. It is inconceivable that service uses expressly
16 contemplated by the General Plan could pose a current and immediate threat to public health, safety,
17 and welfare to justify an urgency ordinance.

18 6. Respondents’ claimed basis for passing this Urgency Ordinance is further undermined
19 by the fact that the Urgency Ordinance deliberately exempts properties and geographic areas where
20 certain Respondents have personal or financial interests, drawing arbitrary and indefensible lines
21 around what falls in or out of the Ordinance’s moratorium. This manipulation of a map that is otherwise
22 two straight lines reveals the City’s intention to target PPOSBC and prevent it from opening its planned
23 clinic in response to limited (but vocal) religious and political advocacy. In doing so, Respondents
24 have acted without statutory authority and have violated the constitutional rights of PPOSBC and the

26 ¹ See Russell Ingold, *Fontana City Council passes urgency ordinance which halts approval*
27 *process for Planned Parenthood facility*, Fontana Herald (Sept. 9, 2023),
28 https://www.fontanaheraldnews.com/news/fontana-city-council-passes-urgency-ordinance-which-halts-approval-process-for-planned-parenthood-facility/article_6a92ea88-4f1e-11ee-9e4a-3b21e7ccab23.html.

1 patients it exists to serve. This Urgency Ordinance simply cannot be permitted to stand. Failing to
2 invalidate this ordinance as unconstitutional and procedurally improper would allow local governments
3 to use their police powers to prohibit access to reproductive healthcare, including abortion and
4 contraceptives, in direct violation of this State's constitutionally-guaranteed freedoms.

5 7. PPOSBC now seeks review and the immediate stay of the Urgency Ordinance on the
6 following grounds:

- 7 a. As required by California Government Code Section 65858, Respondents have not
8 made a showing of exigent circumstances or other emergency to justify an urgency
9 ordinance.
- 10 b. Respondents have not provided adequate notice or shown that exigent circumstances
11 or other emergency justify the failure to provide adequate notice to PPOSBC prior
12 to adopting the moratorium.
- 13 c. Even if Section 65858 applies, the Urgency Ordinance is contrary to law, arbitrary
14 and capricious spot zoning, and a prejudicial abuse of discretion.
- 15 d. The moratorium represents a violation under Article 1, section 1.1 of the California
16 Constitution by interfering with PPOSBC's patients' fundamental rights to access
17 reproductive health care, including to have an abortion.
- 18 e. The Urgency Ordinance is causing and will continue to cause irreparable injury to
19 PPOSBC's patients who will be unable to obtain certain reproductive services
20 within the City of Fontana for at least one year (potentially longer, should the City
21 Council vote to extend the urgency ordinance) while the moratorium is in effect,
22 which is longer than the period from conception to viability.
- 23 f. Respondents have adopted the moratorium purely to frustrate the interests of a single
24 party, in violation of Due Process.
- 25 g. The Urgency Ordinance is a temporary taking of PPOSBC's private property for
26 public use without prior compensation in violation of Article I, section 19 of the
27 California Constitution and the Takings Clause of the Fifth Amendment of the
28 United States Constitution, as incorporated by the Fourteenth Amendment.

1 h. The Urgency Ordinance is preempted by state law, which provides, among other
2 rights, that the state shall not interfere with an individual's right to reproductive
3 freedom, including the right to access an abortion or choose or refuse contraceptives,
4 and which comprehensively regulates reproductive health at the state level. By
5 intentionally prohibiting PPOSBC from opening its clinic, the City attempts to
6 prohibit a service that the constitution guarantees a right to access.

7 8. No public harm will result from staying the effect of the Urgency Ordinance while this
8 Court determines whether the Ordinance was validly adopted. Respondents have presented no
9 evidence of ongoing public safety concerns to justify the purported emergency. By contrast, the
10 Ordinance interferes with constitutional rights held by PPOSBC's patients.

11 9. An immediate stay is necessary and justified to protect the interests of all parties. The
12 moratorium on the issuance of permits has the effect of halting PPOSBC's ability to retrofit and open
13 its Fontana Clinic to patients in need, creating an obstacle for patients seeking to exercise their
14 constitutionally-protected right to choose and access reproductive healthcare services.

15 **II. PARTIES**

16 10. Petitioner and Plaintiff PPOSBC is a California nonprofit corporation, with its principal
17 place of business in Anaheim, California, and maintains offices and does business in the County of San
18 Bernardino, California. PPOSBC currently holds a lease at 9699 Sierra Avenue, Fontana, California
19 (the "Fontana Clinic"), which is within the Ordinance Zone. As such, PPOSBC has a beneficial interest
20 in the issuance of the writ of mandate sought herein.

21 11. PPOSBC provides essential reproductive health care, comprehensive primary care,
22 nutrition services, and education programs to patients across Orange and San Bernardino Counties,
23 regardless of their patients' ability to pay for such care. PPOSBC exists to serve its patients and to
24 promote and protect their rights to safe, comprehensive, and exceptional reproductive and primary
25 health care, including abortions. PPOSBC opened its first clinic in 1965 in Santa Ana, and currently
26 operates six clinics in Orange County and three clinics in San Bernardino County. In fiscal year 2022
27 alone, PPOSBC provided over 260,000 medical visits to over 139,000 individual patients.

1 12. PPOSBC is informed and believes and thereon alleges that Respondent City of Fontana
2 (the “City”) is a municipal corporation, duly chartered and formed under the Constitution of the State
3 of California and the City’s Charter. The Fontana Clinic lies within the boundaries of the City.

4 13. PPOSBC is informed and believes and thereon alleges that Respondent City Council of
5 Fontana (“City Council”) is the governing body of the City of Fontana and is the primary public agency
6 of Fontana charged by law with determining the need for and approving the Urgency Ordinance.
7 Fontana, acting by and through the City Council, is the public body that adopted the Urgency
8 Ordinance.

9 14. PPOSBC is informed and believes that Respondent Acquanea Warren is the Mayor of
10 Culver City and a member of the City Council.

11 15. PPOSBC is informed and believes that Respondent Peter A. Garcia is a member of the
12 City Council.

13 16. PPOSBC is informed and believes that Respondent John B. Roberts is a member of the
14 City Council.

15 17. PPOSBC is informed and believes that Phillip W. Cothran is a member of the City
16 Council.

17 **III. JURISDICTION AND VENUE**

18 18. This Court has jurisdiction pursuant to Code of Civil Procedure Sections 1085 and
19 1094.5.

20 19. PPOSBC has performed all conditions precedent to filing this Petition, including, but
21 not limited to, raising all of the issues herein with the City and exhausting all administrative remedies
22 or otherwise being excused from such requirement by futility, lack of jurisdiction, and the
23 unavailability of any other timely review.

24 20. Venue is proper in this Court because the Fontana Clinic is located in San Bernardino
25 County, the City is a public entity located in San Bernardino County, and the violations of PPOSBC’s
26 patients’ constitutional rights is occurring in San Bernardino County.

1 **IV. FACTUAL AND LEGAL STATEMENT**

2 **A. City of Fontana Adopts City Plan**

3 21. More than five years ago, in 2018, the City adopted its most recent General Plan. The
4 General Plan states that Downtown Fontana should become “an important regional destination for
5 dining, shopping, entertainment, special events, culture and education” with a “focus on families.”

6 22. Chapter 14 of the General Plan covers the Downtown Area Plan and includes the
7 Ordinance Zone. Chapter 14 explicitly encourages the presence of service uses in the downtown area,
8 explaining that “Many Fontanans would like their Downtown to . . . [o]ffer a wide variety of everyday
9 conveniences” including “service businesses.” It also adopts the General Plan’s strategy “envisioning
10 future street improvements and infill development along Foothill and Sierra—including new, high-
11 quality retail and commercial services, offices and employment, and housing of various types mixed
12 together.”

13 **B. PPOSBC Determines There is Need for a Clinic in Downtown Fontana**

14 23. Consistent with the City Plan’s purpose, in early 2022, PPOSBC determined there was
15 need for a clinic in downtown Fontana. Within Fontana, the populations that utilize PPOSBC’s
16 services were projected to grow, including women, people below the poverty level, and people without
17 health insurance. Even before the anticipated growth, the number of residents falling within these
18 groups is high. The average percentage of the population in Fontana that is either uninsured, or on
19 Medicaid or other need-based public coverage, is higher than the state average.

20 24. There are also many indicators that another clinic is needed. The majority of Fontanans
21 that visit PPOSBC clinics travel to the San Bernardino health center. The number of patients visiting
22 PPOSBC’s existing San Bernardino County health centers rapidly increased by 18.5% from 2021 to
23 2023. The San Bernardino health center is expected to continue this growth trajectory as the result of
24 abortion restrictions in other states, namely Arizona. The influx of patients from other communities
25 would make it more difficult for Fontanans to secure this critical health care at the San Bernardino
26 health center. Additionally, not all of the Fontanans desiring PPOSBC’s services are able to travel to
27 the San Bernardino health center because of financial and transportation limitations. Opening a clinic
28 in Fontana will satisfy a measurable need for PPOSBC’s services in the community.

1 25. In May 2022, PPOSBC entered into a lease for a vacant property at 9699 Sierra Avenue,
2 at the south end of downtown Fontana. The property is located within an area that is zoned to permit
3 medical services, and is approximately two blocks from the Kaiser Permanente Fontana Medical Center
4 that includes a hospital, urgent care, and pharmacy.

5 26. PPOSBC engaged an architect to prepare plans for modifying the property so that it
6 could be used as a clinic to provide a wide range of services to Fontanans and residents in the
7 surrounding communities, including essential reproductive healthcare, comprehensive primary care,
8 nutrition services, and education programs.

9 27. The Fontana Clinic is intended to be PPOSBC's fourth clinic in San Bernardino County,
10 filling a critical gap in accessible, affordable reproductive health care in the City. PPOSBC expects
11 that the Fontana Clinic will serve approximately 16,000 patients across roughly 32,000 patient visits
12 annually once it can finally open its doors.

13 **C. PPOSBC Works for Over a Year to Complete All Necessary Steps for Permit**

14 28. In July 2022, once its architectural plans were ready, PPOBSC began working with the
15 City Planning Department to secure a permit so that it could begin construction and open the Fontana
16 Clinic as soon as possible to serve its patients.

17 29. PPOSBC has faced repeated unwarranted barriers since it began working with City staff.
18 Over the course of more than a year, PPOSBC's architects were asked to make constant adjustments
19 to their architectural plans, based on aesthetic demands from the City. Among other things, the City
20 Planning Department insisted that PPOSBC include a trellis with a mosaic pattern to complement the
21 wall pattern beneath it, and that it add vines to the trellis.

22 30. Despite the urgent need for services, in a show of good faith and an attempt to avoid
23 further delays caused by challenging the City's requests, PPOSBC made each and every adjustment to
24 its plans that City staff requested. Finally, in July 2023, after an entire year of back and forth, City
25 staff told PPOSBC's architect that all architectural issues had been addressed.

26 31. On July 18, 2023, City Planning Department staff told PPOSBC's architect that a final
27 hearing on PPOSBC's application, known as a Director's action hearing, would be tentatively
28 scheduled for August 24, 2023.

1 32. When PPOSBC first submitted its architectural plans to the City, it reasonably
2 anticipated it would be able to begin construction and open its doors by May 2023. Even with a
3 Director’s action scheduled for August 24, 2023, PPOSBC estimated that it could complete
4 construction and open within six months of obtaining its permit.

5 **D. After Protests Against Fontana Clinic, the City Enacts an Interim Urgency**
6 **Ordinance**

7 33. In May 2023, while PPOSBC was working with the City to finalize its permit
8 application, City Planning Department employees began receiving phone calls from residents
9 expressing their opposition to the Fontana Clinic.

10 34. On June 2, 2023, approximately 500 demonstrators appeared at a protest against—as
11 well as a counter-protest in support of—the Fontana Clinic. PPOSBC was in direct contact with
12 Lieutenant Chris Tusan of the Fontana Police Department before and after the demonstration. After
13 the protests, Lieutenant Tusan told PPOSBC that the event was “peaceful” and that demonstrators
14 announced that they would attend the next City Council meeting.

15 35. At the very next regularly scheduled City Council meeting, held at 7:00 p.m. on June
16 13, 2023, the City Council invited Police Chaplain Daniel Vasquez to give an invocation to open the
17 public meeting. Although there was nothing on the City Council agenda regarding PPOSBC or the
18 Fontana Clinic, Chaplain Vasquez opened his invocation by stating that “so many lives are taken
19 through abortion and other forms of violence.” During the nearly two minute prayer, he asked that
20 expectant mothers be given “wisdom and strength to choose life for their babies,” that expectant fathers
21 would be “empowered to stand up for the lives of their children,” that “the unborn babies that are at
22 risk of being aborted” be “protect[ed] from harm and be given the opportunity to live,” and that those
23 “who are working to protect innocent human lives” be given “courage, wisdom, and strength to
24 continue their efforts” and “would be effective in promoting a culture of life.”² A majority of the public
25 comments at the meeting also addressed the Fontana Clinic. Approximately 15 members of the public
26 spoke at the meeting, 10 related to the Clinic. Chaplain Vasquez was among the six speakers who

27 _____
28 ² See City Council Meeting (June 13, 2023, 7:00 PM), *available at*
https://fontana.granicus.com/player/clip/856?view_id=1&redirect=true&h=fecbe72d77c5fec4e4564da90cfacc80.

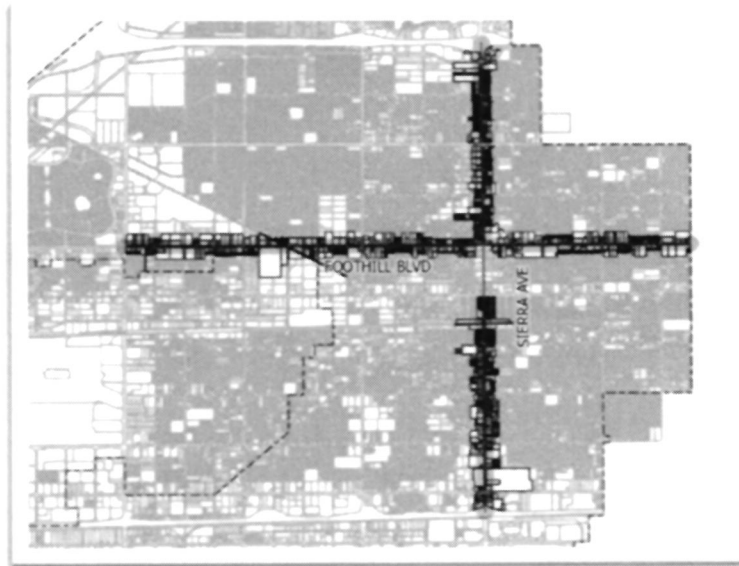
1 voiced opposition to the Fontana Clinic, basing their opposition largely on an opposition to the medical
2 practice of providing abortions and their views that Planned Parenthood is “evil,” is an “abortion mill,”
3 or a “curse to t[he] city.”

4 36. The public commentary regarding the Fontana Clinic continued at the next City Council
5 meeting, held on June 27, 2023, at 7:00 p.m. Again, despite there being no items on the City Council’s
6 agenda regarding the Clinic, 22 members of the public spoke regarding the Fontana Clinic or abortion
7 generally.

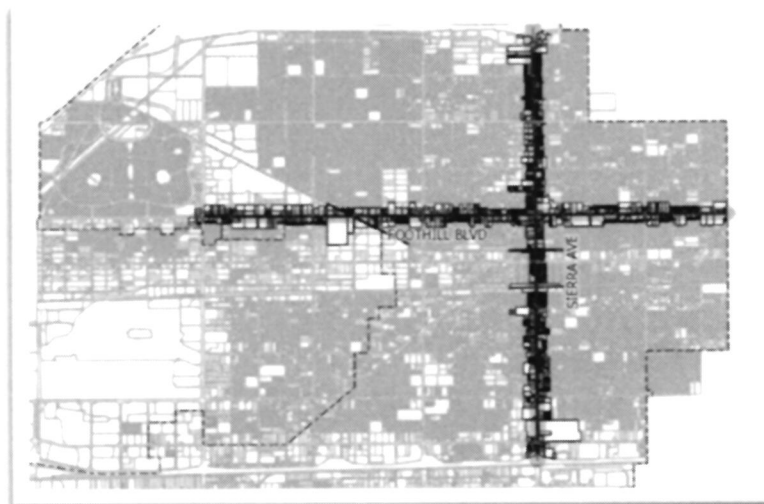
8 37. Public interest in the Fontana Clinic appeared to wane by the next regular meeting at
9 7:00 p.m. on July 11, 2023, where only two members of the public spoke regarding the Clinic.

10 38. At the next regularly scheduled City Council meeting, held at 7:00 p.m. on Tuesday,
11 July 25, 2023—approximately one week after PPOSBC’s permit application was filed and the City
12 Planning Department had tentatively scheduled a final hearing to review that application—the Council
13 introduced and voted on Ordinance No. 1922, an interim urgency ordinance (the “Interim Ordinance”).
14 The stated purpose for the Interim Ordinance, as set forth in the text of the ordinance and as summarized
15 at the meeting by Deputy City Manager Phillip Burum, was to allow the City to conduct “a study.”
16
17
18
19
20
21
22
23
24
25
26
27
28

1 39. The Interim Ordinance, based on alleged and unspecified threats to public safety,
2 established a 45-day moratorium on the issuance of permits for service-based, non-entertainment uses
3 within a segment of downtown Fontana, including the Fontana Clinic. As shown below, the Interim
4 Ordinance applied from Sierra Avenue between the I-10 Freeway and Arrow Boulevard, and between
5 Foothill Boulevard and the I-210 Freeway (Sierra Avenue corridor), and Foothill Boulevard between
6 Cherry Avenue and Maple Avenue (Foothill Boulevard corridor).



17 40. The Interim Ordinance was originally intended to cover the entire strip of the Sierra
18 Avenue corridor, rather than exempting the small area, shown above, in the heart of downtown.



1 41. The exempted area along Sierra Avenue includes properties for which Council Member
2 Phillip W. Cothran has a lease and financial interests. Council Member Cothran recused himself from
3 votes at the July 25, 2023 City Council meeting regarding other ordinances that applied to Sierra
4 Avenue due to the proximity of his lease, but did not recuse himself from the vote on the Interim
5 Ordinance. The City Council’s apparent view was that by exempting Council Member Cothran’s
6 properties from the scope of the moratorium, he no longer had a conflict of interest.

7 42. Unlike other ordinances which require only a simple majority, California Government
8 Code section 65858 requires a four-fifths majority to pass an urgency ordinance.

9 43. On information and belief, at the eleventh hour, certain City Council Members chose to
10 exempt the segment of Sierra Avenue that included Council Member Cothran’s leased property from
11 the Interim Ordinance to ensure that Council Member Cothran would not have to recuse himself from
12 a vote, and to ensure that the City Council would have the required majority to pass the Interim
13 Ordinance. Council Member John B. Roberts moved to pass the Interim Ordinance, and Council
14 Member Cothran seconded the motion. The Interim Ordinance passed by a 5-0 vote.

15 44. Approximately 30 minutes before the vote on the Interim Ordinance, the City Council
16 approved a resolution adopting a Zoning and Development Code amendment to *allow* development in
17 other downtown areas. Specifically, the Council approved Amendment No. 22-010 based on a finding
18 that the “City desires to introduce six (6) new districts (Sierra Core, Gateway Core, Mixed-Use Core,
19 Multi-Family Core, Neighborhood Core, Civic Core) to the City’s downtown core, through Chapter 30
20 of the Fontana Municipal Code, that would . . . foster the City’s goal of creating a local and regional
21 hub for entertainment, retail, *service* and residential uses.”

22 **E. The City Makes Exceptions for Some Businesses Within the Ordinance Zone**

23 45. The next day, City employees circulated copies of the Interim Ordinance and the map
24 of the area to which it applied. The map circulated by and among City employees was the original
25 version of the map, which did not carve out a segment of downtown to account for Council Member
26 Cothran’s property. Employees noted the excepted area, and explained that an updated map would be
27 circulated once ready.

28

1 46. This surprise moratorium on the issuance of certain permits caused confusion among
2 City employees and permit applicants.

3 47. City employees discussed in email whether restaurants were considered “service based,
4 non-entertainment uses” within the scope of the Interim Ordinance, and ultimately concluded that they
5 were not. In other words, City employees could continue to issue permits to restaurants in the normal
6 course, even if they fell within the Ordinance Zone.

7 48. At least one medical use business was exempted from the Interim Ordinance as well.
8 After the affected property owner added Council Member John B. Roberts to an email thread with City
9 Planning Department employees, a City Planning Department employee promptly replied that the City
10 had determined that medical use business was really more “retail” than “medical.”

11 49. On August 4, 2023, employees at the property management company for a proposed
12 Lens Crafters storefront at 16855 Valley Boulevard were notified about the Interim Ordinance by their
13 tenant. A property management company employee emailed a City Planning Department employee
14 about the moratorium, and it was confirmed that the Lens Crafters fell within the Ordinance Zone. The
15 Lens Crafters approximately one-half block from the Kaiser Permanent Fontana Medical Center on
16 Sierra Avenue, just over two blocks from the Fontana Clinic.

17 50. On August 8, 2023, the president of the property management company added Council
18 Member Roberts to the email thread, citing the “need to come up with a quick resolution to this matter.”
19 Forty-five minutes later, at approximately 4:30 p.m., Council Member Roberts forwarded the email to
20 the City Manager, Matthew Ballantyne. Mr. Ballantyne forwarded the email to Deputy City Manager
21 Burum at 5:15 p.m. One hour later, at 6:15 p.m. on a Tuesday, Mr. Burum responded to the property
22 management company and explained that “the Lens Crafters, after some internal debate on whether it
23 was a retailer or a medical service provider, will also be cleared to move forward based on the premise
24 that the medical service is an ancillary use to the retailer (performing eye exams for the purposes of
25 making retail sales of eyewear).” Council Member Roberts and Mr. Ballantyne were copied on Mr.
26 Burum’s email, along with several other City employees.

27
28

1 **F. The City Votes to Extend the Moratorium While PPOSBC’s Application Is**
2 **Pending, at an Improperly Noticed Meeting and Without Identifying Any Exigent**
3 **Circumstances**

4 51. On Tuesday, September 5, 2023—the day after the Labor Day holiday weekend and
5 only three days before the Interim Ordinance was set to expire—the City Council held a special meeting
6 in the middle of the day, at 2:00 p.m., rather than its customary 7:00 p.m. meeting time, to vote on the
7 Urgency Ordinance to extend the moratorium in the Interim Ordinance by 10 months and 15 days (the
8 “Special Meeting”).

9 52. The City failed to provide advance notice to PPOSBC or the public of its intent to
10 impose a moratorium, even though it was well aware that PPOSBC was the sole applicant against
11 which Fontana would enforce the Ordinance.

12 53. Despite the fact that its leased property falls within the Urgency Ordinance zone,
13 PPOSBC did not receive notice of the Special Meeting, as required under Fontana Zoning and
14 Development Code section 30-23. PPOSBC only learned about the Special Meeting—held during
15 normal business hours rather than the typical 7:00 p.m. time—because it happened to be monitoring
16 upcoming agendas that the City Council posted online.

17 54. PPOSBC submitted a written objection to the Urgency Ordinance. One other member
18 of the community submitted a written objection, which was noted but not read by the clerk.

19 55. A representative of PPOSBC appeared at the City Council hearing to object to extending
20 the Interim Ordinance. No other members of the community spoke at the City Council’s Special
21 Meeting regarding the Urgency Ordinance. PPOSBC has exhausted all of its administrative remedies
22 to the extent necessary for filing this Petition and Request for Stay.

23 56. The Interim Ordinance required that the City Manager issue “a written report describing
24 the measures taken to alleviate the condition which led to” its adoption at least 10 days before the
25 Interim Ordinance or any extension expires. The City Manager did not issue a written report before
26 the Special Meeting, and on information and belief, none exists as of the filing of this Petition.

27 57. The Urgency Ordinance covered the same defined locations as the Interim Ordinance,
28 with a small portion between Arrow Boulevard and Foothill Boulevard exempted from the Urgency

1 Ordinance moratorium. The stated purpose of the Urgency Ordinance is the same as the Interim
2 Ordinance, and Deputy City Manager Burum re-summarized this purpose at the Special Meeting as he
3 did before the Council voted on the Interim Ordinance.

4 58. This time, the City Council’s prior decision to exempt Council Member Cothran’s
5 property area from the moratorium proved to be crucial. Council Member Jesus Sandoval voted against
6 the Urgency Ordinance, but because Council Member Cothran did not have to recuse himself from the
7 vote due to a financial interest, the Urgency Ordinance passed by a 4-1 vote—satisfying the four-fifths
8 majority requirement in Government Code section 65858.

9 59. In extending the Interim Ordinance, Fontana failed to comply with the substantive
10 requirements of Section 65858.

11 **G. The City’s Findings Do Not Demonstrate the Presence of an “Immediate Threat”**
12 **as Required by Section 65858(c)**

13 60. An urgency ordinance may only be adopted where a municipality demonstrates
14 “through legislative findings” the presence of “*a current and immediate threat* to the public health,
15 safety, or welfare and that the approval of additional subdivisions, use permits, . . . or any other
16 applicable entitlement for use which is required in order to comply with a zoning ordinance *would*
17 *result* in that threat to public health, safety, or welfare.” (Gov. Code § 65858, subd. (c), emphases
18 added.)

19 61. An interim ordinance must recite facts that “may reasonably be held to constitute” an
20 urgency. (*216 Sutter Bay v. Cnty. of Sutter* (1997) 58 Cal.App.4th 860, 868.)

21 62. The stated reason for the Urgency Ordinance is the need for “studies necessary to
22 implement General Plan policies,” and that:

23 without the enactment of this Ordinance, multiple applicants *could* quickly receive
24 entitlements that would allow for uses contrary to the City’s General Plan, subjecting
25 the City to the *potential* effects and impacts of uncoordinated and conflicting uses,
26 impacts on parking availability in the downtown area of the City, the aesthetic impacts
27 to the City, and other similar or related effects on property values and the quality of life
28

1 in the City’s neighborhoods and effectively creating a current and immediate threat to
2 the public health, safety, and welfare.

3 63. The City’s General Plan was approved in 2018. Conditions over five years old are not
4 a “discovered” need justifying an urgent moratorium to immediately suspend issuance of permits in
5 Fontana. (*Beck Development v. Southern Pacific Trns.* (1996) 44 Cal.App.4th 1160, 1200–1201.)

6 64. These events are insufficient to justify the Urgency Ordinance. Unspecified concerns
7 regarding conflicting or uncoordinated uses, the availability of parking, and aesthetic impacts that
8 *could* occur do not constitute a “current and immediate threat” to the public health and safety of the
9 residents of Fontana. (Cf. *216 Sutter Bay, supra*, 58 Cal.App.4th at p. 868 [where ordinance passed to
10 place moratorium on development of previously undeveloped section of the county].) Because the
11 City’s General Plan specifically envisions and encourages the present of service uses in the downtown
12 area, it is inconceivable that these uses pose a current and immediate threat to public health, safety, and
13 welfare to justify an urgency ordinance.

14 65. Moreover, any purported purpose of addressing a threat to public safety is entirely
15 undercut by the City Council’s willingness to summarily exempt an area that is at the heart of the
16 downtown area, between Arrow Boulevard and Foothill Boulevard, from the effect of the Urgency
17 Ordinance. If the Urgency Ordinance truly was intended to address an emergency, then exempting the
18 area between Arrow Boulevard and Foothill Boulevard prevented the Ordinance from achieving its
19 stated purpose.

20 66. The only credible explanation for the exemption is that the City Council knows there is
21 no emergency, that the entire Ordinance is a subterfuge, and that it wished to avoid a negative impact
22 from this subterfuge on Councilman Cothran’s family. Such an exemption is a clear example of
23 arbitrary and capricious spot zoning that is not in the public interest. (*Foothill Communities Coalition*
24 *v. County of Orange* (2014) 222 Cal.App.4th 1302, 1307.)

25
26
27
28

1 **H. Section 65858 Does Not Grant Cities the Authority to Suspend Processing of**
2 **Permit Applications**

3 67. Section 65858(a) permits “a city, including a charter city,” to adopt an interim ordinance
4 which prohibits “uses which may be in conflict with a contemplated general plan, specific plan or
5 zoning proposal” the city is studying.

6 68. The provisions of Section 65858 regulate land use and do not allow cities to adopt an
7 interim ordinance that takes the extra step of prohibiting the processing of land use applications.
8 (*Building Industry Legal Defense Foundation v. Super. Ct.* (1999) 72 Cal.App.4th 1410, 1416–1417.)

9 69. The Urgency Ordinance states that the City “shall not issue *or approve*” any service
10 based, non-entertainment use permits.

11 70. Fontana cannot use an Urgency Ordinance as a backdoor method to suspend permit
12 processing requirements because such action is outside the authority of Section 65858.

13 **I. The Urgency Ordinance Is Preempted by State Law that Guarantees an**
14 **Individual’s Right to Access an Abortion and Contraceptives**

15 71. The Urgency Ordinance expressly and impliedly contradicts and enters an area fully
16 occupied by comprehensive state laws regulating and guaranteeing access to reproductive healthcare,
17 including specifically abortion and contraceptives. The Urgency Ordinance is thereby preempted and
18 void.

19 72. The California Constitution explicitly guarantees a right to privacy, equal protection,
20 and the right to reproductive freedom. The California Constitution expressly guarantees “an
21 individual’s reproductive freedom in their most intimate decision, which includes their fundamental
22 right to choose to have an abortion and their fundamental right to choose or refuse contraceptives.”
23 (Cal. Const. Art. 1, Section 1.1.)

24 73. The City adopted the Urgency Ordinance in an effort to prohibit PPOSBC from opening
25 and operating a clinic providing reproductive healthcare, including access to abortion and
26 contraceptives, in plain violation of state law. The law’s prohibition on new permits is an indirect
27 method by which it seeks to prohibit PPOSBC from operating a clinic in Fontana. By prohibiting an
28 activity that is expressly required under the state constitution and other state laws, this Urgency

1 Ordinance is contrary and inimical to the state constitutional rights of reproductive freedom, as
2 expressed in the California Constitution.

3 **J. The Urgency Ordinance Was Adopted Purely to Frustrate the Interests of a Single**
4 **Party—PPOSBC—in Violation of Due Process and the Constitutional Rights of**
5 **PPOSBC’s Patients**

6 74. The California Supreme Court has held that an ordinance adopted solely to frustrate the
7 project at hand may be found invalid as a violation of due process. (*G & D Holland Construction Co.*
8 *v. City of Marysville* (1970) 12 Cal.App.3d 989.)

9 75. On information and belief, PPOSBC is the only applicant against which the Urgency
10 Ordinance is being enforced. PPOSBC is not aware of any application, including at the Director’s
11 Action stage, that is impacted. In fact, the City has allowed similarly situated businesses to continue
12 their building projects by exempting them from the moratorium. In response to PPOSBC’s Public
13 Records Act requests, the City has failed to timely respond to the request that it identify other pending
14 applications impacted by the Interim and Urgency Ordinances. None of the City’s productions—all of
15 which were made after the 10-day period within which the City was required to respond (Cal. Gov’t
16 Code, § 7922.535.)—have included any applications other than PPOSBC’s. The City’s productions
17 have included correspondence showing that it has exempted other medical use projects that otherwise
18 would have been subject to the Urgency Ordinance. Because the City has failed to provide any
19 evidence to the contrary despite specific requests to do so, PPOSBC believes that it is the only applicant
20 actually impacted by the Urgency Ordinance.

21 76. The Administrative Record will demonstrate that the Interim and Urgency Ordinances
22 were adopted solely to prevent the City from issuing a permit to PPOSBC, thereby preventing PPOSBC
23 from opening the Fontana Clinic and frustrating its patients’ constitutional right to make reproductive
24 health care decisions, including the right to choose to obtain an abortion. In fact, that is precisely how
25 the Urgency Ordinance has been viewed in the community at large.³

26
27
28

³ See, e.g., Russell Ingold, *supra* fn. 1.

1 77. Not only does this violate due process, but it results in the significant and irreparable
2 deprivation of constitutional interests of PPOSBC’s patients, on whose behalf PPOSBC has standing
3 to pursue claims.

4 78. The California Constitution enshrines not only the right to privacy, but the right to
5 “reproductive freedom,” including the “fundamental right to choose to have an abortion and the[]
6 fundamental right to choose or refuse contraceptives.” (Const. Art. I, § 1.1.) This constitutional right
7 to reproductive health care was passed by the votes in November 2022 by a resounding 66.88% of the
8 vote.

9 79. The ability of Fontana residents to access this constitutionally-protected care is very
10 limited. PPOSBC has conducted studies and projected that Fontana’s overall population and female
11 population living below the poverty line will likely increase over the next decade, resulting in a likely
12 commensurate growth in PPOSBC patients. Moreover, compared to the state average, Fontana has a
13 higher percent of population that is uninsured (9.4% in Fontana versus 7.2% statewide) or on Medicaid
14 (30.5% in Fontana versus 25.9% statewide). In addition, there is particular need for reproductive health
15 care and education services in San Bernardino county, which has sexually transmitted infection rates
16 higher than the state average, and which have continued to increase over recent years. For instance,
17 San Bernardino county’s rate of Gonorrhea infections is 8.5% higher than the state average, and its rate
18 of Chlamydia infections is 18.8% higher than the state average.

19 80. The Fontana Clinic is intended to fill that need and serve over 16,000 patients annually.
20 Based on its original, reasonable expectations for opening the Fontana Clinic, PPOSBC should have
21 already begun serving patients by now. Every day that the Urgency Ordinance stands as an obstacle to
22 PPOSBC (and only PPOSBC) serving the community is another day that a patient is unable to obtain
23 this care. And with the Urgency Ordinance lasting at least 10 months and 15 days—and possibly
24 another year after that if the City Council extends it—this barrier to constitutionally-protected care will
25 last longer than a pregnancy.

26 81. The moratorium imposed by the Urgency Ordinance will irreparably harm PPOSBC
27 and its patients. PPOSBC’s application remains pending, and the City has not proceeded with a final
28 hearing on its application despite having scheduled one before the Interim Ordinance was passed.

1 PPOSBC's patients have a constitutional right to choose to obtain an abortion, and the City's approval
2 of a permit to PPOSBC is entirely ministerial.

3 **FIRST CAUSE OF ACTION**
4 **(Petition for Writ of Traditional Mandamus –**
5 **Code of Civil Procedure Sections 1085)**

6 82. PPOSBC realleges and incorporates herein by reference Paragraphs 1 through 81 above.

7 83. PPOSBC seeks a writ of traditional mandate pursuant to Code of Civil Procedure
8 Section 1085. The adoption of the Urgency Ordinance, without notice or due process and in violation
9 of equal protection and the right to privacy, is contrary to law, arbitrary and capricious spot zoning, a
10 prejudicial abuse of discretion, and is preempted by state law.

11 84. Review is appropriate under Code of Civil Procedure Section 1085 because Fontana has
12 failed to act in the manner required by law, and thus the repeal of the Ordinance is specifically enjoined
13 by the law.

14 85. PPOSBC has no plain, speedy, and adequate remedy in the ordinary course of law.

15 86. PPOSBC has exhausted its administrative remedies, or is excused from exhausting any
16 available remedies because any such pursuit would be futile, such pursuit would not afford PPOSBC
17 the relief it seeks.

18 87. As a result, PPOSBC is entitled to, and requests that this Court issue, a peremptory writ
19 of mandate compelling Respondents to repeal the enactment of the Ordinance.

20 88. PPOSBC further requests that the Court order Respondents to refrain from taking any
21 action in connection with or in furtherance of any moratorium relating to the issuance of permits within
22 the Ordinance Zone for service based, non-entertainment uses, as defined in the Ordinance.

23 89. Pursuant to Code of Civil Procedure Section 923 and the Court's inherent equitable
24 powers, PPOSBC requests that the Court immediately stay Fontana's adoption of the Urgency
25 Ordinance or any attempt by Fontana to enforce the Ordinance. If the Ordinance is allowed to remain
26 in effect, PPOSBC's patients will be irreparably injured in that an ordinance will have been adopted
27 that affects their constitutional rights without due notice or an opportunity to be heard.
28

1 **SECOND CAUSE OF ACTION**
2 **(Petition for Writ of Administrative Mandamus –**
3 **Code of Civil Procedure Sections 1094.5)**

4 90. PPOSBC realleges and incorporates herein by reference Paragraphs 1 through 89 above.

5 91. PPOSBC seeks a writ of administrative mandate pursuant to Code of Civil Procedure
6 Section 1094.5. The adoption of the Urgency Ordinance, without notice or due process and in violation
7 of equal protection and the right to privacy, is contrary to law, arbitrary and capricious spot zoning, a
8 prejudicial abuse of discretion, and is preempted by state law.

9 92. Review is appropriate under Code of Civil Procedure Section 1094.5 because Fontana
10 has failed to act in the manner required by law, and thus the repeal of the Ordinance is specifically
11 enjoined by the law.

12 93. The City's adoption of the Ordinance was the result of a proceeding without an
13 evidentiary hearing as required by law based on due process principles. The City's failure to provide
14 a proper evidentiary hearing is in clear violation of law.

15 94. PPOSBC has no plain, speedy, and adequate remedy in the ordinary course of law.

16 95. PPOSBC has exhausted its administrative remedies, or is excused from exhausting any
17 available remedies because any such pursuit would be futile, such pursuit would not afford PPOSBC
18 the relief it seeks.

19 96. As a result, PPOSBC is entitled to, and requests that this Court issue, a peremptory writ
20 of mandate compelling Respondents to repeal the enactment of the Ordinance.

21 97. PPOSBC further requests that the Court order Respondents to refrain from taking any
22 action in connection with or in furtherance of any moratorium relating to the issuance of permits within
23 the Ordinance Zone for service based, non-entertainment uses, as defined in the Ordinance.

24 98. Pursuant to Code of Civil Procedure section 923 and the Court's inherent equitable
25 powers, PPOSBC requests that the Court immediately stay the City's adoption of the Ordinance or any
26 attempt by City to enforce the Ordinance. If the Ordinance is allowed to remain in effect, PPOSBC's
27 patients will be irreparably injured in that an ordinance will have been adopted that affects their
28 constitutional rights without due notice or an opportunity to be heard.

1 99. Petitioner hereby elects to prepare the Administrative Record under Section 1094.5 of
2 the Code of Civil Procedure.

3 **V. COMPLAINT**

4 **THIRD CAUSE OF ACTION**
5 **(Violation of Cal. Const. Article I, Section 1.1)**

6 100. PPOSBC realleges and incorporates herein by reference Paragraphs 1 through 99 above.

7 101. The City adopted the Urgency Ordinance in an arbitrary and discriminatory manner.

8 102. The Urgency Ordinance arbitrarily prevents PPOSBC from developing its leased
9 property and opening the Fontana Clinic, which interferes with PPOSBC’s patients’ constitutional right
10 to choose to obtain an abortion. Moreover, the Ordinance was adopted in bad faith to prevent PPOSBC
11 from opening the Fontana Clinic.

12 103. In taking such action, the City violates Article I, Section 1.1 of the California
13 Constitution, which guarantees the fundamental right to seek and obtain reproductive healthcare.

14 104. A judicial determination of the invalidity of the Ordinance and an injunction prohibiting
15 its enforcement is necessary and appropriate to avoid the deprivation of state constitutional rights to
16 PPOSBC’s patients that will result from the City’s adoption of the Urgency Ordinance.

17 **FOURTH CAUSE OF ACTION**
18 **(Equal Protection)**

19 105. PPOSBC realleges and incorporates herein by reference Paragraphs 1 through 104
20 above.

21 106. The City adopted the Urgency Ordinance in an arbitrary and discriminatory manner.

22 107. The Ordinance arbitrarily prevents PPOSBC from developing the leased property and
23 opening the Fontana Clinic, which interferes with PPOSBC’s patients’ constitutional right to choose
24 to obtain an abortion. Moreover, the ordinance was adopted in bad faith to prevent PPOSBC from
25 opening the Fontana Clinic. The Urgency Ordinance does not restrict any existing businesses from
26 continuing to operate, including existing healthcare facilities, and therefore is applied unequally to
27 prohibit the Fontana Clinic from operating, in violation of constitutionally-guaranteed freedom to
28 access reproductive healthcare.

1 108. For these reasons, the adoption of the Ordinance violates the Equal Protection Clause
2 under Article I, section 7 of the California Constitution as well as the Fourteenth Amendment to the
3 United States Constitution.

4 109. PPOSBC is entitled to a declaration that the Urgency Ordinance is unconstitutional, as
5 well as an injunction preventing the City from implementing the Urgency Ordinance.

6 110. A declaration of the invalidity of the Ordinance and an injunction on its enforcement is
7 necessary and appropriate to avoid the deprivation of state and federal constitutional rights that results
8 from applying the Ordinance to PPOSBC and its patients.

9 **FIFTH CAUSE OF ACTION**
10 **(Due Process)**

11 111. PPOSBC realleges and incorporates herein by reference Paragraphs 1 through 110
12 above.

13 112. The City adopted the Urgency Ordinance in an arbitrary and discriminatory manner.

14 113. The Ordinance arbitrarily prevents PPOSBC from developing the leased property and
15 opening the Fontana Clinic, which interferes with PPOSBC’s patients’ constitutional right to choose
16 to obtain an abortion. Moreover, the Ordinance was adopted in bad faith to prevent PPOSBC from
17 opening the Fontana Clinic.

18 114. For these reasons, the adoption of the Ordinance violates the due process rights of
19 PPOSBC and its patients under Article I, section 7 of the California Constitution as well as the Due
20 Process Clause of the Fourteenth Amendment to the United States Constitution.

21 115. PPOSBC is entitled to a declaration that the Urgency Ordinance is unconstitutional, as
22 well as an injunction preventing the City from implementing the Urgency Ordinance.

23 116. A declaration of the invalidity of the Ordinance is necessary and appropriate to avoid
24 the deprivation of state and federal constitutional rights that results from applying the Ordinance to
25 PPOSBC and its patients.

26
27
28

1 **SIXTH CAUSE OF ACTION**
2 **(Takings)**

3 117. PPOSBC realleges and incorporates herein by reference Paragraphs 1 through 116
4 above.

5 118. At the time of the City's acts alleged herein, PPOSBC had leasehold interests in 9699
6 Sierra Avenue. The lease expressly limits PPOSBC's use of the leased premises to uses that are barred
7 by the Urgency Ordinance.

8 119. The enactment of the Urgency Ordinance eliminates substantially all economically
9 viable use of the Fontana Clinic for the alleged benefit of the public without prior compensation to
10 PPOSBC. In taking such an action, the City violates Article 1, section 19 of the California Constitution,
11 which prohibits the taking or damaging of private property for public use without prior, just
12 compensation. Further, the City violates the takings clause of the Fifth Amendment of the U.S.
13 Constitution, as incorporated by the Fourteenth Amendment, which prohibits the taking of private
14 property for public use without prior, just compensation.

15 120. As a direct result of the City's actions as alleged herein, the enactment of the Urgency
16 Ordinance will interfere with the reasonable investment-backed expectations of the Fontana Clinic at
17 9699 Sierra Avenue by depriving PPOSBC of all rights and benefits of its lease.

18 121. To date, PPOSBC has not received any compensation from the City on account of the
19 above alleged taking of, or damage to, its property rights at 9699 Sierra Avenue.

20 122. As a direct and proximate result of the City's violation of Article 1, section 19 of the
21 California Constitution and the takings clause of the Fifth Amendment of the U.S. Constitution,
22 PPOSBC has been and will be damaged from the interference with their reasonable investment-backed
23 expectations of the Fontana Clinic, and will suffer further damages in an amount to be determined at
24 trial.

25 **VI. PRAYER**

26 WHEREFORE, PPOSBC prays for issuance of a writ of mandate and judgment as follows:

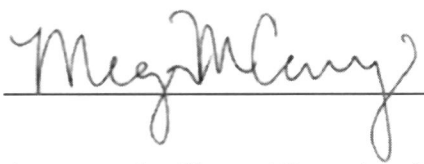
27 A. That the Court order an immediate stay of the adoption and enforcement of the
28 Ordinance pending judgment on this petition for writ of mandate;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- B. That the Court issue a peremptory writ of mandate compelling repeal of the Ordinance;
- C. That the Court preliminarily and permanently enjoin Respondents from taking any action in connection with or in furtherance of any moratorium relating to the issuance of permits for service based, non-entertainment uses, as defined in the Ordinance;
- D. For damages and just compensation for the illegal and unconstitutional takings;
- E. That the Court award reasonable attorneys' fees (including an appropriate lodestar multiplier) incurred in this matter pursuant to Code of Civil Procedure 1021.5 and other pertinent law;
- F. That the Court award costs of suit incurred herein; and
- G. That the Court grant such other and further relief as the Court deems just and proper.

DATED: December 4, 2023

GIBSON, DUNN & CRUTCHER LLP

By:  _____

Attorneys for Planned Parenthood/Orange and San Bernardino Counties, Inc.