SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF TULARE

VISALIA DIVISION

Case No.: VCU 313532

Tulare Medical Center Property Owners Association,

Plaintiffs,

v.

Leopoldo Valdivia, et. el.

Defendants,

Ruling on Plaintiff's Request for Preliminary Injunction

Date of Hearing: December 16, 2024
Time: 8:30 a.m.
Department: 2

Dr. Leopoldo Valdivia and Mrs. Jennifer Valdivia own a space in the Tulare Medical Center development from which Family Planning Associates Medical Group, Inc. (FPA) provides medical services, presumably under a lease with the Valdivias. The Tulare Medical Center Property Owners Association (Association) has sued the Valdivias and FPA, seeking an injunction enjoining them from violation of recorded "Covenants, Conditions, and Restrictions" (CC&Rs), which, amongst other things, prohibit use of property in the Tulare Medical Center for an abortion clinic. The Association seeks a preliminary injunction to the same effect pending trial.

Dr. Robert Bell, D.D.S., the head of the Association, in a submitted declaration, contends—based on various factual assertions to which defendants object on foundation and hearsay grounds—that FPA provides, or seeks to provide, various types

of abortion care, including surgical abortions, at the Tulare location.

Defendants vehemently oppose the injunctive relief sought by the Association, and, according to FPA's CEO, Dr. Irving Feldkamp, if the injunction is granted, FPA will "lose business resulting in economic harm to FPA and its employees"; "suffer reputational harm"; and will "be engaging in discriminatory practices."

FPA is notably mum, however, about the services it provides that might potentially run afoul of the CC&Rs. Dr. Feldkamp makes a point to assert that FPA does not, at its Tulare location, provide "surgical abortion services whatsoever." Beyond that, he only affirmatively represents that FPA provides "fullscope gynecological care, STD testing and screening, sexual health education, [and] various methods of birth control."

Given that defendants' opposition to any injunction restraining their violation of the CC&Rs by operating an abortion clinic, it is at least clear that defendants' position is that the CC&Rs cannot validly restrict FPA's ability to perform abortion services at the Tulare location. What's more, while FPA's CEO represents no surgical abortions are *currently* being performed in Tulare, defendants do not concede that the CC&Rs can validly restrain them from doing so, nor consent to injunctive relief to that limited effect, and so, at least impliedly, it would appear defendants' position is also that the CC&Rs cannot validly restrict FPA's ability to perform even surgical abortion services at the Tulare location.

Based on the nature of defendants' objection to the relief requested by the Association, the court concludes, without needing to reach defendants' various evidentiary objections, that FPA's occupancy of the Valdivia's Tulare Medical Center space entails a credible threat that abortion services violative of the CC&Rs are or will be performed there if the Association's request for injunctive relief is denied.

A. Preliminary injunction standards

"A trial court's decision on whether to grant a preliminary injunction rests on ' "(i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his

[or her] claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction." ' [Citations.]" (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 856 [180 Cal.Rptr.3d 342].) The burden is on the party seeking the preliminary injunction to show all of the elements necessary to support issuance of a preliminary injunction. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481 [47 Cal.Rptr.3d 147].).)

B. Likelihood the Association will prevail on the merits

Defendants contend the Association "seeks to enforce invalid restraints to real property" that are "unconstitutional and discriminatory," and, for these reasons, defendants assert the Association is not likely to prevail on the merits of its underlying complaint. Defendants contend the CC&R's prohibition of abortion clinics is violative of the Unruh Civil Rights Act (Civ. Code, § 51) and section 1.1 of article I of the California Constitution, entitled "Reproductive Freedom."

1. Unruh Civil Rights Act

Civil Code section 51, the Unruh Civil Rights Act, states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (§ 51, subd. (b).)

Obviously, the Unruh Act prohibits denial of access to public accommodations based on the specified classifications set forth in the statute (e.g., sex, race, color, religion, etc.) (*Harris v. Capital Growth Investors* XIV (1991) 52 Cal.3d 1142, 1148 [278 Cal.Rptr. 614, 805 P.2d 873] (*Harris*). In addition, however "[s]eminal decision of [the California Supreme Court] construing the scope of the Act [have] concluded that its protections [are] not confined to the enumerated categories in the statute but that these categories [are] 'illustrative rather than restrictive.' [Citations.]" (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 839 [31 Cal.Rptr.3d 565, 115 P.3d 1212]

(*Koebke*).) Defendants cite two such examples, *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735 [180 Cal. Rptr. 496, 640 P.2d 115] [the Act prohibits an apartment owner from refusing to rent an apartment to a family with a minor child] and *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790 [191 Cal. Rptr. 320] [the Act prohibits a condominium development from restricting residence to persons over 18]. Regarding the Unruh Act's broader scope, the Supreme Court has "concluded that in enacting the Unruh Civil Rights Act, the Legislature intended to ban *all* forms of arbitrary discrimination in public accommodations." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 840 [31 Cal.Rptr.3d 565, 115 P.3d 1212].)

Still yet, our Supreme Court has explained that "the Legislature's continued emphasis on the specified categories of discrimination in the Act (without adding the words 'arbitrary,' 'unreasonable,' or similar language to its provisions) [in various amendments to the Act following its enactment] reflects the continued importance of [the listed] categories [of types of discrimination] in its proper interpretation." (*Harris*, *supra*, 52 Cal.3d at p. 1159.)

Here, defendants contend "[t]he CC&R's restriction against operating an abortion clinic, on its face, and in its application, has a disparate discriminatory effect against individuals on the basis of their class: sex (female) and medical condition (pregnancy)."

As to "medical condition," the Association correctly notes that this term, as defined for the purposes of Civil Code section 51, does not encompass the condition of being pregnant. "Medical condition" means, for the purposes of section 51, either a "health impairment related to or associated with a diagnosis of cancer or a record or history of cancer"; or a "disease or disorder" of which the known cause is (or there is an associated statistically increased risk of the disease or disorder associated with) an "identifiable gene or chromosome" or "[i]nherited characteristic." (Civ. Code, § 51, subd. (e)(3); Gov. Code, § 12926, subd. (i).)

Equally important to note, however, "sex," as defined in the Act, "includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or

childbirth." (Civ. Code, § 51, subd. (e)(5).) Accordingly, discrimination against those who are pregnant, while not constituting discrimination based on a "medical condition," could constitute discrimination based on "sex."

In any event, defendants do not particularly well articulate the basis of their contention that the CC&R's abortion clinic prohibition constitutes discrimination based on sex (in any sense of the term as defined under the Act). Instead, they cite a 2024 12th edition Black's Law Dictionary definition of "abortion," which itself makes no reference to sex ("an artificially induced termination of a pregnancy for the purpose of destroying an embryo or fetus"); conclusorily assert that "restriction on abortion has a disparate discriminatory effect of targeting individuals on the basis of their sex"; and then note that the Association "fails to advance any argument in support of its discriminatory provision that targets women on the basis of their sex ... ." Defendants cite no authority for, nor otherwise explain, their contention that the CC&R's abortion clinic prohibition constitutes discrimination based on sex.

It appears to the court, however, based on its own review of the law, that defendants' sparse explanation and dearth of cited authority may be a result of the apparent fact that no California higher court has previously considered whether a private business establishment's restrictions on the performance of abortions constitutes discrimination against women (or otherwise constitutes arbitrary discrimination in public accommodations). The court is not certain that California authorities do not determine the issue presented (neither side of the litigation asserts as much) but does note that neither side of the litigation has identified any such authority, and the court has been unable to locate any such authority on its own in the time it has been able to devote to the matter thus far.

For its part, the Association cites various US Supreme Court authority for the proposition, contrary to the position of defendants, that "it is well-established in the law, as well as commonsense, that abortion is not synonymous with sex or gender, and opposition to abortion is not sex-based discrimination."

The cases cited by the Association, though—*Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263 [113 S.Ct. 753, 122 L.Ed.2d 34] (*Bray*) and *Dobbs v. Jackson Women's Health Org.* (2022) 597 U.S. 215 [142 S.Ct. 2228, 213 L.Ed.2d 545] (*Dobbs*)—involved the question of whether demonstrations in opposition to (*Bray*), or a State's regulatory opposition to (*Dobbs*), abortion necessarily constitute discrimination on the basis of sex such that federal constitutional standards are implicated.

While in both cases the US Supreme Court held that discrimination targeted at abortion does not necessarily constitute unconstitutional discrimination based on sex (*Bray*, at pp. 272-273; *Dobbs*, at p. 236), the question presented here is not whether the CC&Rs implicate federal constitutional discrimination standards, but whether they are violative of California's Unruh Civil Rights Act.

And here, the court is reluctant to conclude, at this stage in the litigation, that this state's courts should look to cases like *Bray* and *Dobbs* to resolve whether restrictions on abortion, such as those presented in the CC&Rs, constitute discrimination based on sex, or otherwise constitute discrimination prohibited by the Act.

Firstly, as noted above, "sex," as defined in California's Unruh Civil Rights Act, "includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth," (Civ. Code, § 51, subd. (e)(5)), and it is not particularly illogical to conclude that restrictions targeting abortion necessarily discriminate in the provision of medical care related to "pregnancy," such that, under California law, such restrictions could be viewed as constituting discrimination based on "sex."

Second, the court notes that in November 2022, immediately following the *Dobbs* decision, California voters passed Proposition 1, amending the California Constitution to expressly protect from state interference an individual's "reproductive freedom," including the "fundamental right to choose to have an abortion." (See Cal. Const., art. 1, § 1.1.) And, while California's constitutional amendment does not establish that discrimination against abortion is tantamount to discrimination against women (and, as noted by the Association, is directed at state, not private, action), that amendment and

its historical context at least suggest that federal constitutional principles expressed in a case like *Dobbs* may not be altogether reliable guideposts for construing the scope of the Unruh Civil Rights Act in this state.

What's more, California courts, as noted above, do not construe the Act as solely prohibiting discrimination on the specified bases listed in the statute. As explained in *Koebke*, in *Harris*, the California Supreme Court "created a three-part analytic framework for determining whether a future claim of discrimination, involving a category not enumerated in the statute or added by prior judicial construction, should be cognizable under the Act." (*Koebke*, *supra*, 36 Cal.4th at p. 840.)

"First, in reviewing the statutory language, [the Supreme Court in *Harris*] discerned an essential difference between economic status and both the Act's enumerated categories and those added by judicial construction. [The Supreme Court] found that their common element was that they 'involve personal as opposed to economic characteristics—a person's geographical origin, physical attributes, and personal beliefs.' " (*Id.*, at p. 841, citing *Harris*, *supra*, 52 Cal.3d at p. 1160.)

"Second, [the Supreme Court] asked in *Harris* whether a legitimate business interest justified the [alleged discriminatory conduct]." (*Ibid.*)

"Third," as relating solely to claims based on "economic status" discrimination (which is not the type of discrimination asserted by defendants here), "[the Supreme Court] considered the potential consequences of allowing [the asserted] claims for economic status discrimination to proceed under the Act." (*Ibid.*)

As to the first prong of the *Harris* analysis, it would not seem unreasonable to conclude that discrimination against persons seeking abortion involves discrimination based on personal characteristics, not necessarily unlike those categories enumerated in the Act. "What those categories have in common is not immutability, since some are, while others are not, but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition." (*Id.*, at pp. 842-843.) According to this standard, it would at least appear that the status of being a person

seeking abortion services is more akin to the existing categories than it is to mere economic status. Indeed, the right to abortion in this state has been described not simply as a right to an elective procedure, but as a "fundamental right of procreative choice" (*Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 258 [172 Cal.Rptr. 866, 625 P.2d 779]) and "the right to decide whether or not to bear a child" as "a fundamental constitutional right pursuant to the privacy guaranty of California Constitution, article I, section 1" (*Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, 170 [17 Cal.Rptr.2d 510]). Although the connection of these constitutional pronouncements is not direct, the court here cannot ignore that the characterization of abortion as a fundamental procreative right worthy of enshrinement in the California constitution suggests, at least indirectly, that abortion represents a "choice[] fundamental to a person's identity, beliefs and self-definition." (*Koebke*, *supra*, 36 Cal.4th at pp. 842-843).

Second, as defendants suggest, the Association does not expressly articulate any legitimate business interest justified by the CC&Rs prohibition against abortion clinics. Instead, the Association generally contends merely that "[t]he Medical Center was established to best serve the interest of patients for medically related fields and the owners within the project" and their position is that FPA's provision of abortion services would "not fulfill the purpose of the Medical Center."

Primarily, the Association's argument focuses on the enforceability of the CC&Rs generally, without regard to their potentially discriminatory implications. At the hearing, counsel argued extensively that this was simply an issue of private property rights, and that the association had the right to prohibit activities like drug rehabilitation, chiropractic care and abortion services that counsel argued carried a "certain stigma." Attempting to bolster their position, Defendants cite *Roth v. Rhodes* (1994) 25 Cal.App.4th 530 [30 Cal.Rptr.2d 706] (*Roth*), and, in so doing, appear to suggest that the CC&Rs are justified as restrictions targeting merely occupational/professional attributes as opposed to personal characteristics. Defendants, however, do not much expand on the point.

The factual circumstances of *Roth*, in any event, are distinguishable. In that case, a podiatrist challenged the refusal of a building operator to lease space to him incident to a policy limiting tenants to medical doctors. (*Id.*, at p. 535.) The court held that the Unruh Civil Rights Act did not prohibit discrimination in leasing office space based on profession or occupation, so long as it was not a stratagem designed to disguise discrimination based on protected personal characteristics. (*Id.*, at p. 537.)

Firstly notable, *Roth* distinguished the podiatrist's discrimination claim as one not involving "personal characteristics" of the type enumerated in the Act and further discussed in *Harris*. (*Id.*, at pp. 538, 539.) Instead, the court viewed "[t]he election to practice a particular profession represents a professional and, frequently, an economic choice, rather than a personal characteristic of the type enumerated in the act." (*Id.*, at p. 539.)

Second, *Roth* found "a legitimate business interest" was presented by the building operator. The court explained: "Operators of commercial buildings have legitimate reasons to designate the purposes for which they wish to let them by limiting their tenants to certain trades or professions or with respect to the type of merchandise sold. If a shopping mall is intended to appeal to a particular segment of the market, it serves no social or economic purpose for the law to demand tenants not in keeping with this objective, be granted leases. If operators of an office building perceive a niche in the market for a particular type of tenant, no useful purpose is to be served by our interfering with their economic decision to so limit the tenancy. It may well be that the very prestige which Roth attributes to Rhodes' medical building, and on which Roth desires to trade, is in part the result of Rhodes' leasing policies. Unless legally prohibited discrimination results, a court should not insinuate itself into the market place to prohibit Rhodes from maintaining such policies as have resulted in the commercial success attributed to him by Roth." (*Ibid.*)

Here, as explained above, discrimination against persons seeking abortion arguably involves discrimination based on personal characteristics as opposed to the

mere economic status of profession or occupation, and the Association does not submit any argument, or evidence, to the effect that a legitimate business interest underlies the CC&Rs prohibition of abortion clinics.

Accordingly, the court is not persuaded, based on the arguments and authority submitted by the Association, that it carries its burden to establish a likelihood of prevailing on the merits.

This is not to say that the court finds defendants have definitively established that the Association cannot prevail on the merits. Once again, defendants have not clearly articulated the basis of their contention that the CC&R's abortion clinic prohibition constitutes discrimination based on sex (in any sense of the term as defined under the Act) and the court is not at this point convinced that the Unruh Civil Rights Act necessarily prohibits, as unlawfully discriminatory, a property operator from imposing restrictions on the operation of abortion clinics on private property.

Indeed, a reasonable argument could be made, as the Association suggests, that the CC&Rs are not targeted at all women or even all who are pregnant. Rather, it could reasonably be said that the CC&Rs restrictions target solely women who might consider an abortion, and do not directly impact any women or anyone who is pregnant who would not consider having an abortion. At the hearing, counsel repeatedly argued that there was no evidence of harm to pregnant women in enforcing the covenants.

As a result, the court's determination that the Association has not shown a likelihood of prevailing, is made principally because the court believes it is an open question, given the apparent absence of clearly relevant prior authority, whether restrictions on the operation of abortion clinics on private property, as in the subject CC&Rs, run afoul of the Unruh Civil Rights Act. And, given that uncertainty, and the court's reluctance to conclude that such restrictions do not constitute unlawful discrimination based solely on the authority cited by the Association—the US Supreme Court's decision in in *Bray* and *Dobbs*, which involved federal constitutional considerations and not the scope of the Act as applied in California—the court is not

persuaded that a preliminary injunction is supported by a likelihood that the Association will prevail on the merits.

2. California Constitution, Art. I, § 1.1 - "Reproductive Freedom"

Given the court's determination above, the court need not reach whether the CC&Rs violate section 1.1 of article I of the California Constitution regarding "reproductive freedom."

Nevertheless, the court notes, as does the Association, that section 1.1 appears, on its face, to limit solely state action and not the actions of private parties. Section 1.1 states: "*The state* shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection." (Emphasis.)

C. Balance of Harms

Determination of the balance of harms presented by the parties significantly depends on the determination of whether the CC&Rs are deemed to run afoul of the Unruh Civil Rights Act.

If it is determined that they do not, the balance clearly tips in the Association's favor. Other than challenging the CC&Rs as discriminatory and unconstitutional, defendants raise no dispute as to the validity and applicability of the CC&Rs to the owners of property within the Tulare Medical Center. Given that the validity and applicability of the CC&Rs, generally, is not challenged, it accordingly follows that the Association's business interest in its established common plan for the ownership of property within the Tulare Medical Center and the binding effect of the plans it establishes would necessarily countervail over the concerns of any party who takes title with notice of the common plan and then attempts to operate in a manner that contravenes it.

Less convincing, though, is the Association's significantly emphasized contention that it has suffered "irreparable harm" resulting from "a significant amount of public attention, both in favor of and in opposition to the prohibited activity" and the presence of protestors outside the medical center property.

No doubt such activity is disruptive and unwelcome both by the Association and those who patronize businesses within the Tulare Medical Center, but this activity is not caused by FPA's activities at the medical center; rather, it is caused by various members of the public, with no demonstrated connection to FPA, who apparently harbor strong views on the issue of abortion and a desire to express them publicly. Moreover, the application for a preliminary injunction merely contains several photos of what appears to be a single protest from this group at TMC in October 2024. The declaration of Dr. Bell in support of the injunction is both vague as to the time the protest(s) occurred and the damages suffered by his office.

The court relatedly concludes that the Association is unlikely to prevail on the merits of the contention that FPA's activities violate another CC&R provision prohibiting "offensive activity ... upon the premises," and any activity "which may be or may become an annoyance or nuisance to the complex." Indeed, setting aside for a moment the issue of whether FPA's abortion activities could be enjoined, it is hard to fathom any injunctive relief this court might fashion that might specifically enjoin "nuisance" activity occurring in the asserted manner of "public attention" or public protests.

In any event, while the court is not convinced that the harm of protests and public attention supports granting the injunction, if the court were persuaded that the CC&Rs were not violative of the Unruh Civil Rights Act, then it would necessarily also conclude, in the circumstances presented, that the balance of harms tipped in the Association's favor.

Turning to the opposite scenario, however, if it is determined that the CC&Rs do violate the Unruh Civil Rights Act, or other rights protected by California law, then the balance of harms would necessarily tip in favor of the defendants, since the Association

could have no interest in a legally unenforceable CC&R provision that countervails the defendants right to carry out legally protected business activities that the invalid provision purports to restrict.

Given, then, as covered above, that the court finds that, at this stage, the Association has not carried its burden to show a likelihood of prevailing on the issue of whether the CC&Rs violate the Unruh Civil Rights Act, or other California laws, the court also concludes that the Association fails to show that the balance of harms supports the issuance of a preliminary injunction.

Accordingly, the request for a preliminary injunction is denied.

Dated: 12/17/24

Bret D. Hillman,
Judge of the Superior Court