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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IMMIGRANT LEGAL RESOURCE
CENTER; and FREEDOM FOR
IMMIGRANTS,

Petitioners,

v.

CITY OF MCFARLAND; and
MCFARLAND PLANNING
COMMISSION,

Respondents,

GEO GROUP, INC.,

Real Party in Interest,

No. 1:20-cv-00966-TLN-AC

ORDER

On July 12, 2020, Petitioners Freedom for Immigrants (“FFI”) and Immigrant Legal Resource Center’s (“ILRC”) (collectively, “Petitioners”) filed an *Ex Parte* Application for Temporary Restraining Order and Order to Show Cause. (ECF No. 3.) On July 14, 2020, the Court granted Petitioners’ application for temporary restraining order and granted Petitioners’ application for an order to show cause as to why a preliminary injunction should not issue. (ECF

1 No. 8.) Respondent City of McFarland (“the City”) and Real Party in Interest GEO Group, Inc.
2 (“GEO”) filed oppositions. (ECF Nos. 19, 20.) Petitioners filed a reply. (ECF No. 21.) For the
3 reasons set forth below, the Court GRANTS Petitioners’ request for a preliminary injunction.

4 **I. FACTUAL AND PROCEDURAL BACKGROUND**

5 In December 2019, GEO contracted with United States Immigration and Customs
6 Enforcement (“ICE”) to operate immigration detention facilities at Central Valley (“Central
7 Valley”) and Golden State (“Golden State”) Modified Community Correctional Facilities in
8 McFarland, California. (ECF No. 3-1 at 8.) Shortly thereafter, GEO applied to the City of
9 McFarland Planning Commission (“the Planning Commission”) for modifications to Conditional
10 Use Permits 01-96 and 02-96 (“Proposed Modifications”) that would allow GEO to house federal
11 immigration detainees at those facilities. (*Id.*)

12 The Planning Commission first notified the public of the Proposed Modifications on
13 January 10, 2020. (*Id.*) The Planning Commission also held two hearings concerning the
14 Proposed Modifications: the first on January 21, 2020, and the second on February 18, 2020.
15 (*Id.*) At the end of the February 18 meeting, the Planning Commission voted to reject the
16 Proposed Modifications. (*Id.* at 9.)

17 On February 26, 2020, GEO appealed the Planning Commission’s decision to the
18 McFarland City Council (“City Council”). (*Id.*) The City Council held a public meeting to
19 address the issue on April 23, 2020. (*Id.*) Due to the COVID-19 pandemic, the City Council held
20 the meeting via videoconference on the Zoom platform and via dial-in. (*Id.*) During the meeting,
21 the City Council approved the Proposed Modifications by adopting Resolutions 2020-13 and
22 2020-14. (*Id.*) Resolutions 2020-13 and 2020-14 provide that the Proposed Modifications shall
23 not be considered “issued, executed, or effective until July 15, 2020.” (*Id.*) After that date, the
24 Proposed Modifications would allow GEO to accept transfers of federal immigration detainees to
25 Central Valley and Golden State. (*Id.* at 10.)

26 On June 30, 2020, Petitioners filed a Verified Petition for Writ of Mandate in Kern
27 County Superior Court seeking to compel Respondents to revoke approval of the Proposed
28 Modifications. (*See* ECF No. 1-2.) Petitioners named the City and the Planning Commission

1 (collectively, “Respondents”) as Respondents and GEO as a Real Party in Interest. (*Id.*) On July
2 10, 2020, Petitioners filed an *ex parte* application for a temporary restraining order in state court
3 to enjoin the transfer of detainees, which would be permissible under the Resolutions as of July
4 15, 2020. (*See* ECF Nos. 1-3, 1-4.) That same day, GEO removed the action to this Court. (*See*
5 ECF No. 1.)

6 Petitioners then filed an *ex parte* application for a temporary restraining order in this
7 Court on July 12, 2020, seeking to enjoin the City from taking any action to issue, execute, or
8 make effective the Proposed Modifications and seeking to enjoin GEO from transferring any ICE
9 detainees into or out of, and accepting any transfer of any detainee into or out of, and housing any
10 detainee at Central Valley or Golden State in reliance on the Proposed Modifications. (ECF No.
11 3.) On July 14, 2020, the Court granted Petitioners’ request and ordered Respondents and GEO
12 to show cause as to why a preliminary injunction should not issue. (ECF No. 8.) GEO and the
13 City filed separate oppositions on July 21, 2020. (ECF Nos. 19, 20.) Petitioners filed a reply on
14 July 24, 2020. (ECF No. 21.)

15 II. STANDARD OF LAW

16 Injunctive relief is “an extraordinary remedy that may only be awarded upon a clear
17 showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555
18 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). “The
19 purpose of a preliminary injunction is merely to preserve the relative positions of the parties until
20 a trial on the merits can be held.” *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)
21 (emphasis added); *see also Costa Mesa City Employee’s Assn. v. City of Costa Mesa*, 209 Cal.
22 App. 4th 298, 305 (2012) (“The purpose of such an order is to preserve the status quo until a final
23 determination following a trial.”) (internal quotation marks omitted); *GoTo.com, Inc. v. Walt*
24 *Disney, Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (“The status quo ante litem refers not simply to
25 any situation before the filing of a lawsuit, but instead to the last uncontested status which
26 preceded the pending controversy.”) (internal quotation marks omitted). In cases where the
27 movant seeks to alter the status quo, a preliminary injunction is disfavored and a higher level of
28 scrutiny must apply. *Schrier v. University of Co.*, 427 F.3d 1253, 1259 (10th Cir. 2005). A

1 preliminary injunction is not automatically denied simply because the movant seeks to alter the
2 status quo, but instead the movant must meet heightened scrutiny. *Tom Doherty Associates, Inc.*
3 *v. Saban Entertainment, Inc.*, 60 F.3d 27, 33–34 (2d Cir. 1995).

4 “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed
5 on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,
6 [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.”
7 *Winter*, 555 U.S. at 20. A plaintiff must “make a showing on all four prongs” of the *Winter* test
8 to obtain a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
9 (9th Cir. 2011). In evaluating a plaintiff’s motion for preliminary injunction, a district court may
10 weigh the plaintiff’s showings on the *Winter* elements using a sliding-scale approach. *Id.* A
11 stronger showing on the balance of the hardships may support issuing a preliminary injunction
12 even where the plaintiff shows that there are “serious questions on the merits . . . so long as the
13 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
14 public interest.” *Id.* Simply put, Plaintiff must demonstrate, “that [if] serious questions going to
15 the merits were raised [then] the balance of hardships [must] tip[] sharply in the plaintiff’s
16 favor,” in order to succeed in a request for preliminary injunction. *Id.* at 1134–35 (emphasis
17 added).

18 **III. ANALYSIS**

19 **A. Likelihood of Success on the Merits**

20 The thrust of Petitioners’ argument is that the City unlawfully approved the Proposed
21 Modifications. More specifically, Petitioners argue Respondents violated California Civil Code §
22 1670.9(d) (“§ 1670.9(d)”), which provides,

23 (d) A city, county, city and county, or public agency shall not, on
24 and after January 1, 2018, approve or sign a deed, instrument, or
25 other document related to a conveyance of land or issue a permit for
26 the building or reuse of existing buildings by any private corporation,
27 contractor, or vendor to house or detain noncitizens for purposes of
civil immigration proceedings unless the city, county, city and
county, or public agency has done both of the following:

28 (1) Provided notice to the public of the proposed conveyance

1 or permitting action at least 180 days before execution of the
2 conveyance or permit.

3 (2) Solicited and heard public comments on the proposed
4 conveyance or permit action in at least two separate meetings
open to the public.

5 Petitioners argue Respondents violated § 1670.9(d) in three ways: (1) the City Council
6 held only one public meeting before approving the Proposed Modifications on April 23, 2020; (2)
7 the City Council “executed” the Proposed Modifications on April 23, 2020, less than 180 days
8 from when the public was first given notice; and (3) both the Planning Commission and the City
9 Council impermissibly restricted public participation during the public meetings.

10 The Court previously found there were at the very least serious questions as to whether
11 Respondents violated § 1670.9(d). In response, the City argues Petitioners’ motion fails to
12 address standing and was improperly brought under California Code of Civil Procedure § 1085.
13 GEO and the City also argue Petitioners cannot succeed on the merits of their claim because the
14 City fully complied with § 1670.9(d). Lastly, GEO argues § 1670.9(d) is unconstitutional under
15 the intergovernmental immunity doctrine. The Court will address the parties’ arguments in turn.

16 *i. Standing*

17 The City argues Petitioners failed to address standing. (ECF No. 19 at 4.) The City does
18 not go so far as to argue that Petitioners lack standing to bring their claims. Rather, the City
19 merely points out that Petitioners did not discuss standing in their motion. (*Id.* at 5.)

20 “To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2)
21 that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be
22 redressed by a favorable judicial decision.” *Sierra Club v. Trump*, 963 F.3d 874, 883 (9th Cir.
23 2020). “An organization has standing to sue on its own behalf when it suffers both a diversion of
24 its resources and a frustration of its mission.” *Id.* at 884 (9th Cir. 2020) (internal quotation marks
25 omitted).

26 The sworn, verified petition initiating this action states ILRC “works . . . to ensure that
27 immigrants have a voice on issues that impact them the most, such as immigration detention.”
28 (ECF No. 1-2 at 4.) The petition also states FFI “monitors conditions in immigration detention

1 facilities nationwide.” (*Id.* at 5.) Finally, the petition states Petitioners “would necessarily divert
2 considerable organizational resources to working with individuals detained in McFarland.” (*Id.* at
3 4–5.) Because Petitioners assert that they will suffer both a diversion of resources and a
4 frustration of mission, the Court finds Petitioners have sufficiently demonstrated they have
5 standing to bring this action. *See Sierra Club*, 963 F.3d at 884.

6 *ii. California Code of Civil Procedure § 1085*

7 The City argues Petitioners are unlikely to succeed on the merits because they improperly
8 brought their petition under California Code of Civil Procedure § 1085 (“§ 1085”) rather than
9 California Code of Civil Procedure § 1094.5 (“§ 1094.5”). (ECF No. 19 at 3.) The City argues
10 the approval of conditional use permits is an administrative or adjudicatory act, and therefore §
11 1094.5 is the exclusive remedy for reviewing the City’s actions. (*Id.*) Petitioners respond that §
12 1094.5 is appropriate only when a petitioner is challenging the manner in which a public agency
13 has exercised discretion. (ECF No. 21 at 6.) According to Petitioners, they are alleging the City
14 violated ministerial duties imposed by § 1670.9(d), which imposes mandatory prerequisites rather
15 than discretionary decisions. (*Id.*) As such, Petitioners argue § 1085 — which concerns statutory
16 duties that require a particular action be taken or not taken — is the correct vehicle for this case.
17 (*Id.* at 6–7.)

18 “To be enforceable by writ of mandate [under § 1085], a statutory duty must be
19 obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it
20 must require, rather than merely authorize or permit, that a particular action be taken or not
21 taken.” *Pich v. Lightbourne*, 221 Cal. App. 4th 480, 493 (2013). In contrast, § 1094.5 is a
22 mechanism for challenging discretionary decisions. *See Saad v. City of Berkeley*, 24 Cal. App.
23 4th 1206, 1212 (1994), *as modified* (May 5, 1994) (“Section 1094.5 clearly contemplates that at
24 minimum, the reviewing court must determine both whether substantial evidence supports the
25 administrative agency’s findings and whether the findings support the agency’s decision.”).

26 Here, Petitioners are not challenging the City’s discretionary decision to approve the
27 Proposed Modifications. Instead, Petitioners are challenging the City’s failure to follow the
28 mandatory procedural requirements set forth in § 1670.9(d) prior to making that decision.

1 Because Petitioners are not challenging the City’s exercise of discretion, they were not required to
2 bring their petition under § 1094.5.

3 *iii. Compliance with § 1670.9(d)*

4 As mentioned, Petitioners argue Respondents violated § 1670.9(d) in three ways. The
5 Court will address Petitioners’ arguments — and GEO and the City’s responses — in turn.

6 First, Petitioners argue that proper interpretation of § 1670.9(d) requires each public body
7 considering any action pertaining to an immigration detention facility to provide 180 days’ notice
8 and to hold at least two public meetings before approving the action. In other words, Petitioners
9 argue that even though the Planning Commission held two public meetings, the City Council was
10 also required to independently hold two public meetings once the matter was before it.
11 Petitioners argue the City Council violated § 1670.9(d) by holding only one meeting before
12 approving the Proposed Modifications on April 23, 2020.

13 In response, GEO and the City argue the City Council and the Planning Commission are
14 not separate municipal bodies. Rather, they argue the Planning Commission acted on behalf of
15 the City and the City Council functioned as an appellate body to the Planning Commission,
16 holding a total of three hearings.

17 In its previous order, the Court agreed with Petitioners that the disjunctive use of the word
18 “or” when listing “city, county, city and county, or public agency” supports a reasonable
19 interpretation that each separate municipal body considering a permitting decision must
20 independently satisfy § 1670.9(d). (ECF No. 8 at 6.) The Court also agrees with Petitioners that
21 because § 1670.9(d) is a statute which “furthers the people’s right of access” to government, the
22 California Constitution demands that it be construed broadly. *See* Cal. Const. art I, § 3. Neither
23 GEO nor the City provide authority to suggest that the City and its Planning Commission are
24 considered a single entity in the context of laws dealing with “the people’s right of access.”
25 Further, Petitioners submit minutes from the April 23 meeting to show that the City Council did
26 not limit itself to the review of the record from the Planning Commission.¹ (*See* ECF No. 3-2 at

27 ¹ Petitioners request the Court take judicial notice of the minutes from the April 23 City
28 Council meeting. Pursuant to Federal Rule of Evidence 201, Petitioners’ request is GRANTED.

1 33–36.) To the extent the City Council made its decision independent of the record from the
2 Planning Commission proceedings, such independence reinforces a reasonable interpretation that
3 the City Council acted as a separate municipal body rather than an appellate body. Accordingly,
4 there are at the very least serious questions as to whether the Planning Commission and the City
5 Council were each required to hold two public meetings under § 1670.9(d).

6 Second, Petitioners argue the City Council “executed” the Proposed Modifications on
7 April 23, 2020, which was less than 180 days from when the public was first notified as required
8 under § 1670.9(d). Petitioners argue it is improper to consider the Proposed Modifications
9 “executed” when they were to become effective on July 15, 2020, primarily because doing so
10 undermines the statute’s purpose of maximizing public participation by allowing permitting
11 decisions to be formally approved months before that permit’s effective date.

12 GEO and the City argue the City complied with the 180-day notice requirement. GEO
13 argues the City issued notice on January 10, 2020, and then “interpreted its own zoning powers”
14 to allow for the delayed execution of the Proposed Modifications until July 15, 2020. (ECF No.
15 20 at 14.) The City adds that the term “execute” is not ambiguous and applies to when the
16 Proposed Modifications were effective on July 15, 2020. (ECF No. 19 at 11.)

17 In its previous order, the Court found it was reasonable to interpret “execution” of the
18 Proposed Modifications to have taken place upon approval by the City Council on April 23, 2020.
19 (ECF No. 8 at 6.) Notably, neither GEO nor the City responded to the Court’s concern that
20 allowing a municipal body to postdate the effective date of its decisions could undercut §
21 1670.9(d)’s notice requirement. For example, under GEO and the City’s interpretation, the City
22 could have given public notice of the Proposed Modifications on January 10, 2020, held the first
23 public meeting January 11, 2020, and held the second public meeting and approved the Proposed
24 Modifications on January 12, 2020, without violating § 1670.9(d) so long as the City postdated

25 _____
26 The facts relied on in the aforementioned document are not subject to reasonable dispute because
27 they can be accurately and readily determined from sources whose accuracy cannot reasonably be
28 questioned. As for the other documents included in Petitioners’ request, the Court did not rely on
such facts or documents and therefore need not and does not rule on Petitioners’ request for
judicial notice thereof.

1 the effective date of the Proposed Modifications to 180 days later. Such an interpretation renders
2 § 1670.9(d) a nullity as the public would be left essentially no time to be solicited or heard on the
3 issue before the City made its final decision. Further, although GEO and the City argue the term
4 “execute” unambiguously referred to the Proposed Modifications’ effective date, it bears
5 mentioning that the City’s own municipal code implies city documents are executed when signed
6 by the mayor. *See* McFarland Mun. Code § 2.10.010. Here, the mayor signed the resolutions
7 approving the Proposed Modifications on April 23, 2020. (*See* ECF No. 19-6 at 169, 176.) For
8 all these reasons, the Court finds there are serious questions as to whether the City violated §
9 1670.9(d)’s 180-day notice requirement.

10 Third, Petitioners argue both the Planning Commission and the City Council
11 impermissibly restricted participation during public meetings.² More specifically, Petitioners
12 argue the City capped videoconference attendance for the City Council meeting at 100
13 participants even though the Zoom platform permits up to 1,000 attendees and between 200–300
14 members of the public had attended the previous Planning Commission meetings on the issue.
15 Petitioners also file declarations from attendees who claim they were wrongly prohibited from
16 commenting or were unable to connect either through dial-in or videoconference.

17 GEO and the City argue there were no unreasonable restrictions on public participation at
18 the City Council meeting. GEO emphasizes that although videoconferencing was capped at 100
19 participants, the public could also participate by teleconference without any participation cap.
20 GEO also argues that minutes from the hearing indicate only seven people spoke during the
21 public comment period and only nineteen spoke on the agenda item for the Proposed
22 Modifications. As such, GEO argues there is no evidence the videoconferencing cap impeded
23 public participation. The City also argues public participation was not hampered, as evidenced by
24 the 848 written comments they received. The City argues that although members of the public
25 claim to have experienced technical difficulties that prevented them from connecting to the

26 ² Because the Court finds there are serious questions as to whether the City unreasonably
27 restricted public participation in the City Council meeting on April 23, 2020, the Court need not
28 and does not discuss the parties’ arguments regarding the two prior Planning Commission
meetings.

1 meeting, these technical difficulties were not caused by or within the City’s control.

2 In its previous order, the Court found it arguable that the City Council’s use of dial-in and
3 videoconferencing — specifically the alleged cap on attendance/comment and connection issues
4 — was inadequate. (ECF No. 8 at 6.) The arguments set forth by GEO and the City do not
5 persuade the Court otherwise. Petitioners have submitted declarations from members of the
6 public attesting to the fact that they were prevented from participating in the April 23 hearing.
7 (See ECF No. 3-2 at 148 (“At the April 23, 2020 City Council meeting, I addressed the City
8 Council during its open public comment session [and] requested that the meeting be postponed
9 given the difficulties that many members of the public were experiencing connecting to the
10 meeting.”)³; see *id.* at 154 (“During the meeting, I used Zoom’s ‘hand-raise’ function to indicate
11 that I wished to address City Council. Despite this, I was never permitted to address City
12 Council.”)) Petitioners raise novel legal issues. Not only has no other court interpreted §
13 1670.9(d), but these are unprecedented times where new technological measures for public
14 participation have suddenly become necessary and require careful scrutiny. As such, the Court
15 finds serious questions remain about whether the City Council meeting satisfied § 1670.9(d)’s
16 requirement that the public be “solicited and heard.”

17 In sum, the Court again finds that each of the arguable defects in the City’s approval
18 process are sufficient to raise “serious questions going to the merits” of Petitioners’ claims. See
19 *Alliance*, 632 F.3d at 1134–35.

20 *iv. Intergovernmental Immunity Doctrine*

21 Lastly, GEO argues Petitioners cannot succeed on the merits of their claims because §
22 1670.9(d) is unenforceable in any event because it violates the doctrine of intergovernmental

23 ³ The City objects to several aspects of the declaration of Alex Gonzalez, arguing that the
24 declaration relies on inadmissible hearsay. (See generally ECF No. 19-5.) However, “the rules of
25 evidence do not apply strictly to preliminary injunction proceedings.” *Herb Reed Enter., LLC v.*
26 *Fla. Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013); see also *Republic of the*
27 *Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (“It was within the discretion of the
28 district court to accept . . . hearsay for purposes of deciding whether to issue the preliminary
injunction.”). Therefore, the City’s evidentiary objections are OVERRULED.

1 immunity. “The doctrine of intergovernmental immunity is derived from the Supremacy Clause,
2 U.S. Const., art. VI, which mandates that the activities of the Federal Government are free from
3 regulation by any state.” *United States v. California*, 921 F.3d 865, 878 (9th Cir. 2019), *cert.*
4 *denied*, No. 19-532, 2020 WL 3146844 (U.S. June 15, 2020) (citation and internal quotations
5 marks omitted). “Accordingly, state laws are invalid if they ‘regulate[] the United States
6 directly or discriminate[] against the Federal Government or those with whom it deals.’” *Id.*
7 (alterations in original) (quoting *North Dakota v. United States*, 495 U.S. 423, 435 (1990)
8 (plurality opinion)).

9 GEO specifically argues § 1670.9(d) violates the intergovernmental immunity doctrine
10 because the statute (1) discriminates against and (2) directly regulates the federal government.
11 The Court will address discrimination and direct regulation in turn.

12 *a. Discrimination*

13 GEO argues § 1670.9(d) is facially discriminatory because it regulates the housing and
14 detention of noncitizens for the purposes of civil immigration proceedings, which is the exclusive
15 province of the federal government. (ECF No. 20 at 18.) GEO further argues § 1670.9(d)
16 discriminates against the federal government by imposing additional procedural requirements and
17 burdens that do not apply to contractors who detain individuals on behalf of the State. (*Id.*)

18 GEO relies on the Ninth Circuit’s decision in *California*. In *California*, the United States
19 challenged and moved to enjoin several California laws related to federal immigration
20 enforcement. 921 F.3d at 872–73. One of the challenged laws was AB 103, which imposed
21 inspection requirements on facilities that house civil immigration detainees. *Id.* More
22 specifically, AB 103 “require[d] the California Attorney General to review ‘the conditions of
23 confinement,’ ‘the standard of care and due process provided,’ and ‘the circumstances around
24 [the] apprehension’ of civil immigration detainees, and then prepare ‘a comprehensive report
25 outlining the findings of the review.’” *Id.* at 876.

26 The United States argued AB 103 violated the intergovernmental immunity doctrine
27 because it “require[d] facilities housing federal immigration detainees to cooperate with broad
28 investigations that examine [1] the due process provided to detainees and [2] the circumstances

1 surrounding the detainee’s apprehension and transfer to the facility.” *Id.* at 882. In opposition,
2 California argued AB 103 did not discriminate against the federal government because “all of AB
3 103’s requirements duplicate[d] preexisting inspection demands imposed on state and local
4 detention facilities.” *Id.* at 884.

5 Although the Ninth Circuit noted AB 103 imposed a “specialized burden” on federal
6 activity, the court did not find AB 103 to be unconstitutional in its entirety for the purposes of
7 ruling on the preliminary injunction. *Id.* at 882, 884. Rather, the court concluded AB 103’s
8 provision requiring inspectors to examine the due process provided to detainees likely did not
9 violate the doctrine of intergovernmental immunity to the extent it merely replicated the
10 inspection scheme that already applied to California facilities. *Id.* at 884. In contrast, the court
11 concluded AB 103’s provision requiring inspectors to examine the circumstances surrounding the
12 apprehension and transfer of immigration detainees likely did violate the doctrine of
13 intergovernmental immunity because that provision was “a novel requirement, apparently distinct
14 from any other inspection requirements imposed by California law” and thus “burden[ed] federal
15 operations, and *only* federal operations.” *Id.* at 883, 885 (emphasis in original).

16 GEO argues that unlike the due process provision in AB 103, § 1670.9(d) is not
17 duplicative of any other law that affects California detention facilities. In other words, GEO
18 argues “nowhere does the California Code impose burdens on contractors carrying out state
19 operations like those imposed on federal contractors.” (ECF No. 20 at 19.) GEO points to its
20 own experience, arguing that when it was a state contractor tasked with detaining state inmates, it
21 was never required to comply with any procedures comparable to those imposed by § 1670.9(d).

22 In reply, Petitioners argue § 1670.9(d) does not discriminate against the federal
23 government because the statute is imposed on a basis unrelated to GEO’s status as a federal
24 contractor. Petitioners argue that California’s interest in § 1670.9(d) — encouraging public
25 participation in decisions concerning private immigration detention facilities — is incidental to
26 the relationship that private immigration detention facilities enjoy with the federal government.
27 Petitioners further argue that private immigration detention poses a suite of unique local concerns,
28 such as good governance, community safety, public trust, and economic development, that are

1 untethered to facility operators’ status as federal contractors. Given these unique concerns,
2 Petitioners argue there are significant differences between the entities affected by § 1670.9(d) —
3 private immigration detention facility contractors and municipalities that issue permits — and
4 entities that are not.

5 Petitioners also argue § 1670.9(d) does not discriminate against the federal government
6 because other provisions of California law restrict the State’s relationship with private detention
7 contractors to a greater extent than § 1670.9(d) affects the federal government. More specifically,
8 Petitioners argue that as of 2020, AB 32 prohibits the State from entering into or renewing an
9 existing contract with any private detention contractor except to comply with a court-ordered
10 population cap. Cal. Penal Code § 5003.1(a), (b), (e). AB 32 also affects the federal government
11 by broadly mandating “a person shall not operate a private detention facility” unless such
12 operation is pursuant to a contract in effect before 2020 or a court-ordered population cap. *Id.* §§
13 9501, 9505.4. Petitioners emphasize that California, however, is subject to an even greater
14 restriction than the federal government: as of 2028, the State may not incarcerate any person in a
15 private detention facility without exception, regardless of any contract’s effective date. *Id.* §
16 5003.1(c). Petitioners argue this restriction has no effect on the federal government, which may
17 continue to work with private detention contractors beyond 2028 pursuant to contracts in effect
18 before 2020. In other words, Petitioners argue that unlike state contractors, federal contractors
19 may continue to house detainees in private detention facilities well after 2028, and new facilities
20 pursuant to existing contracts require only the notice and hearing requirements of § 1670.9(d)
21 rather than the more onerous requirement of a court order.

22 The Court has reviewed the relevant case law and finds the plurality opinion in *North*
23 *Dakota* to be instructive. In *North Dakota*, the United States challenged North Dakota laws
24 regulating liquor sold to military bases within the state. 495 U.S. at 426. The two regulations at
25 issue “require[ed] out-of-state shippers to file monthly reports and to affix a label to each bottle of
26 liquor sold to a federal enclave for domestic consumption.” *Id.* After out-of-state suppliers
27 informed the federal government that they would not ship liquor to the North Dakota bases due to
28 the burden of complying with the North Dakota regulations, the United States instituted an action

1 seeking declaratory and injunctive relief against the application of North Dakota’s regulations.
2 *Id.* at 429–30. The United States argued, among other things, that the state provisions violated
3 the intergovernmental immunity doctrine. *Id.* at 434.

4 The plurality explained that “a regulation imposed on one who deals with the Government
5 has as much potential to obstruct governmental functions as a regulation imposed on the
6 Government itself.” *Id.* at 438. Therefore, “the Court has required that the regulation be one that
7 is imposed on some basis unrelated to the object’s status as a Government contractor or supplier,
8 that is, that it be imposed equally on other similarly situated constituents of the State.” *Id.* The
9 plurality added that “in analyzing the constitutionality of a state law, it is not appropriate to look
10 to the most narrow provision addressing the Government or those with whom it deals.” *Id.*
11 Rather, “[a] state provision that appears to treat the Government differently on the most specific
12 level of analysis may, in its broader regulatory context, not be discriminatory.” *Id.* The plurality
13 emphasized, “We have held that [t]he State does not discriminate against the Federal Government
14 and those with whom it deals unless it treats someone else better than it treats them.” *Id.* (citation
15 and internal quotation marks omitted). Applying these principles, the plurality concluded,

16 The North Dakota liquor control regulations . . . do not disfavor the Federal
17 Government but actually favor it [because the] labeling and reporting regulations
18 are components of an extensive system of statewide regulation that . . . applies to all
19 liquor retailers in the State. In this system, the Federal Government is favored over
20 all those who sell liquor in the State. All other liquor retailers are required to
21 purchase from state-licensed wholesalers, who are legally bound to comply with the
22 State’s liquor distribution system. The Government has the option, like the civilian
23 retailers in the State, to purchase liquor from licensed wholesalers. However, alone
24 among retailers in the State, the Government also has the option to purchase liquor
25 from out-of-state wholesalers if those wholesalers comply with the labeling and
26 reporting regulations. The system does not discriminate with regard to the economic
27 burdens that result. A regulatory regime which so favors the Federal Government
28 cannot be considered to discriminate against it.

24 *Id.* at 438–39. Similarly, the Ninth Circuit in *California* stated that even if a state law “singles out
25 federal activities,” it does not violate the intergovernmental immunity doctrine so long as it “does
26 not treat the federal government worse than anyone else.” 921 F.3d at 881.

27 In light of the recent changes to California’s regulatory scheme relating to private
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1 detention facilities, it is unclear whether § 1670.9(d) treats the federal government “worse than
2 anyone else.” *See id.* GEO only provides its own past experience as an example. GEO submits a
3 declaration by Richard Long, the Senior Vice President of Project Development for GEO, in
4 which Long states that “absent [§ 1670.9(d)], GEO’s applications would have been processed
5 under the McFarland municipal codes.” (ECF No. 20-5 at 106.) Long also states “[i]n GEO’s
6 more than 20 years of experience with [conditional use permit] applications and modifications in .
7 . . . McFarland, the process typically requires no more than 90 days from beginning to end,
8 inclusive of appeals to the city council.” (*Id.*) As such, Long states that § 1670.9(d) “imposes an
9 additional delay of approximately 90 days or three months before GEO can obtain modified
10 [conditional use permits] from . . . McFarland, which it needs to operate [its facilities] on behalf
11 of the Federal Government.” (*Id.*)

12 The record before the Court is too incomplete at this time to determine whether §
13 1670.9(d) discriminates against the federal government. More to the point, GEO’s past
14 experience as a state contractor appears to have predated the current regulatory scheme. GEO’s
15 current federal contract, which it entered into in December 2019, would allow it to operate a
16 private detention center until December 2034. (*See* ECF No. 20-5 at 80.) Looking at the
17 “broader regulatory context,” it is unclear whether there is a similarly situated state contractor that
18 would be treated better than GEO. Indeed, considering AB 32’s new limitations that prevent state
19 contractors from operating private detention facilities after 2028, it appears unlikely that is the
20 case. *North Dakota*, 495 U.S. at 438; *see* Cal. Penal Code § 5003.1(c). By having the option to
21 operate private detention facilities past 2028, GEO, as a federal contractor, appears to be favored
22 over state contractors despite being subject to § 1670.9(d)’s notice and hearing requirements. *See*
23 *id.* at 448 (Scalia, J., concurring) (“In giving the Federal Government a choice between
24 purchasing label-free bottles from in-state wholesalers or purchasing labeled bottles from out-of-
25 state distillers, North Dakota provides an option that no other retailer in the State enjoys.”).
26 Moreover, it is also unclear whether private immigration facilities are sufficiently different than
27 other detention facilities such that § 1670.9(d) is properly imposed “on some basis unrelated to
28 the object’s status as a Government contractor.” *Id.* at 438. Based on the limited information

1 before the Court and in the context of this preliminary injunction, the Court finds GEO has not
2 shown that § 1670.9(d) discriminates against the federal government.

3 *b. Direct Regulation*

4 GEO next argues § 1670.9(d) directly regulates the Federal Government by conditioning
5 the ability of a federal contractor to carry out federal immigration detention operations on
6 compliance with extra procedural requirements, and it subjects the Federal Government to review
7 by municipal zoning commissions.⁴

8 In reply, Petitioners argue § 1670.9(d) is far too remote from the federal government to
9 directly regulate it because the statute directly regulates only municipalities and public agencies
10 who issue permits to federal contractors. Petitioners also argue § 1670.9(d) does not disrupt
11 federal operations because it is a one-time permitting statute that applies only before the
12 contractor operates a federal facility and GEO has offered no evidence that the law affects any
13 federal interest aside from its own revenues.

14 A state law does not impermissibly regulate the federal government merely by making it
15 “more costly for the Government to do its business.” *North Dakota*, 495 U.S. at 434. Rather,
16 “[t]hose dealing with the Federal Government enjoy immunity from state control . . . when a state
17 law actually and substantially interferes with specific federal programs.” *Id.* at 452 (Brennan, J.,
18 concurring) (citing *United States v. New Mexico*, 455 U.S. 720, 735, n. 11 (1982)). In *North*
19 *Dakota*, for example, the plurality found “there is no claim in this case, nor could there be, that
20 North Dakota regulates the Federal Government directly” because “[b]oth the reporting
21 requirement and the labeling regulation operate against suppliers, not the Government.” *Id.* at
22 436–37. The plurality went on to note “[i]n this respect, the regulations cannot be distinguished
23 from the price control regulations and taxes imposed on Government contractors that we have
24 repeatedly upheld against constitutional challenge.” *Id.*

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27 ⁴ To the extent GEO complains of the permitting requirement generally, the Court notes
28 that GEO is not expressly challenging the constitutionality of the City law that requires permits
and gives the City discretion to approve or deny permits.

1 GEO argues this scenario is like *Hancock*, *Leslie Miller*, and *Johnson*, in which the
2 Supreme Court found certain state permitting requirements substantially interfered with federal
3 operations. *See Hancock v. Train*, 426 U.S. 167 (1976) (“It is clear from the record that
4 prohibiting operation of the air contaminant sources for which the State seeks to require permits is
5 tantamount to prohibiting operation of the federal installations on which they are located”); *Leslie*
6 *Miller, Inc. v. Arkansas*, 352 U.S. 187, 190 (1956) (holding an Arkansas statute requiring
7 procurement of a license by federal contractors and review by a state licensing board interfered
8 with federal government’s power to select its contractors); *Johnson v. Maryland*, 254 U.S. 51, 57
9 (concluding that federal postal workers were not required to hold a state driver’s license during
10 the course of their employment because “[s]uch a requirement . . . lays hold of [Government
11 agents] in their specific attempt to obey orders and requires qualifications in addition to those that
12 the Government has pronounced sufficient”). GEO also argues this case is similar to *United*
13 *States v. California*, No. 2:18-CV-00721-WBS-DB, 2018 WL 5780003, at *4 (E.D. Cal. Nov. 1,
14 2018) (“[C]onditioning purchasers’ ability to record a title to recently acquired federal public
15 lands on whether the government provided the Lands Commission with refusal rights in those
16 lands trespasses on the federal government’s ability to convey land to whomever it wants.”).

17 GEO’s cited case law is distinguishable from the instant case. In *Hancock*, *Leslie Miller*,
18 and *Johnson*, the state laws directly regulated the federal government or its contractors, while §
19 1670.9(d) most directly regulates cities, counties, and public agencies. *See* Cal. Civ. Code §
20 1670.9(d). Further, unlike the regulations at issue in the cases cited by GEO, the procedural
21 requirements of § 1670.9(d) are not “tantamount to prohibiting” operation of private immigration
22 detention facilities. Section 1670.9(d) does not prevent the government from contracting with
23 GEO, nor does the law prevent the facilities from operating. To the contrary, the City ultimately
24 approved the Proposed Modifications. Although GEO argues § 1670.9(d)’s requirements
25 increase costs and create a 90-day delay before GEO can begin operating a facility, it cannot be
26 said that these procedural requirements “substantially interfere” with federal operations to the
27 same degree as the laws at issue in GEO’s cited cases. Indeed, there is a lack of evidence as to
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1 any burden on the federal government other than potentially increasing the cost of business,
2 which alone is not sufficient. *See North Dakota*, 495 U.S. at 434. For all these reasons, the Court
3 finds GEO has not shown that § 1670.9(d) directly regulates the federal government.

4 In sum, the Court cannot say at this stage that § 1670.9(d) violates the intergovernmental
5 immunity doctrine either by discriminating against or directly regulating the federal government.
6 Therefore, GEO’s constitutional arguments do not preclude the Court from finding that
7 Petitioners have at the very least raised serious questions as to the merits of their claims for the
8 purposes of ruling on the preliminary injunction.

9 B. Irreparable Harm

10 As to irreparable harm, the Court previously found Petitioners sufficiently demonstrated
11 that preventing detainee transfers is an effective method for reducing unnecessary risks to public
12 health related to COVID-19, and that absent an injunction, there is an imminent threat of
13 irreparable harm resulting from detainee transfers. (ECF No. 8 at 7.)

14 In response, both GEO and the City argue the alleged harm is too speculative to warrant
15 an injunction. GEO additionally argues Petitioners egregiously delayed seeking the TRO and
16 their “invocation of the COVID-19 pandemic is bare opportunism.” (ECF No. 20 at 24.) GEO
17 emphasizes that its Adelanto ICE Processing Center has successfully limited spread, reporting
18 only one staff case and 11 detainee cases at a facility with the capacity to hold 1,940 detainees.
19 Further, GEO submits declarations about the precautions GEO has undertaken to mitigate the
20 spread of COVID-19, especially during the transfer process. Lastly, GEO argues the alleged
21 harms have nothing to do with the procedural violations at issue and ceasing operation of its
22 facilities is too broad.

23 The Court disagrees that the alleged harm is too speculative. COVID-19 poses a concrete
24 threat to the public health, especially in the context of detention facilities and detainee transfers.
25 As discussed in the Court’s previous order, Petitioners cite government statistics regarding
26 outbreaks at detention facilities generally and in Kern County specifically, as well as public
27 health advisories recommending against transferring inmates unless necessary. (ECF No. 8 at 7.)
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1 Petitioners also submit a declaration by an epidemiologist named Dr. Eric Lofgren.⁵ (ECF No. 3-
2 2 at 156.) Dr. Lofgren describes his extensive background as an epidemiologist and his research
3 regarding the spread and control of infectious diseases through mathematics and computer
4 simulation. (*Id.* at 157–58.) Dr. Lofgren states he relied on a mathematical model using data
5 from Allegheny County, Pennsylvania to simulate an urban area of 1.2 million people with a jail
6 of 2,500 people. (*Id.* at 158.) Dr. Lofgren states “the results of this model in terms of trends and
7 patterns are broadly generalizable to . . . other types of detention facilities in other communities.”
8 (*Id.*) He concludes “[b]ased on this model, the underlying research, and my experience as an
9 epidemiologist, it is my professional judgment that the transfer of detainees into detention
10 facilities within McFarland would increase the severity and duration of the COVID-19 pandemic
11 among the population of detained persons, corrections officers employed at detention facilities,
12 and the community of McFarland at large.” (*Id.* at 159.) Despite GEO’s arguments that it is
13 capable of mitigating the spread of COVID-19, the Court again finds Petitioners’ evidence is
14 sufficient to show there is a likelihood of irreparable harm if the Proposed Modifications take
15 effect and detainees are transferred to GEO’s facilities.

16 C. Balance of Equities and Public Interest

17 Having found there are serious questions going to the merits of Petitioners’ claims and a
18 likelihood of irreparable harm absent an injunction, Petitioners must demonstrate the balance of
19 hardships tips sharply in their favor. *See Alliance*, 632 F.3d at 1134–35. The Court previously
20 found Petitioners met their burden due to the severe risks related to COVID-19. (ECF No. 8 at 7–
21 8.)

22 In response, GEO argues it would lose \$79.6 million per year with an injunction in effect
23 and would also be required to eliminate at least 420 jobs with an annual payroll loss totaling \$36
24 million. (ECF No. 20 at 25.) Similarly, the City argues it is relying on the GEO revenue to
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26 ⁵ The City objects to several aspects of Dr. Lofgren’s declaration, including that Dr.
27 Lofgren’s opinions lack foundation and/or rely on hearsay. (*See generally* ECF No. 19-3.) As
28 already discussed, “the rules of evidence do not apply strictly to preliminary injunction
proceedings.” *Herb Reed*, 736 F.3d at 1250 n.5. As such, the Court OVERRULES the City’s
objections.

1 account for somewhere between 10 to 20 percent of its annual budget. (ECF No. 19 at 13.) The
2 City also argues the indirect consequences of COVID-19 — such as unemployment, public safety
3 revenue, declining tax revenues, and increased demands on social services — are just as great as
4 the direct threat of infection. (*Id.*)

5 The COVID-19 pandemic undoubtedly has caused devastating economic consequences
6 that have been felt across the nation. Federal, state, and local governments have urgently
7 struggled to find a balance between mitigating the economic effects of the pandemic and
8 preventing the risks to human life. However, as the Ninth Circuit has stated, “[f]aced with such a
9 conflict between financial concerns and preventable human suffering, we have little difficulty
10 concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” *Lopez v. Heckler*,
11 713 F.2d 1432, 1437 (9th Cir. 1983); *see also Golden Gate Rest. Ass’n v. City & Cnty. of San*
12 *Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). Here, the Court finds the need to avoid the
13 preventable risk of severe illness and death that is likely to result from detainee transfers far
14 outweighs GEO and the City’s financial concerns.

15 For these reasons, the Court again finds the balance of hardships tips sharply in
16 Petitioners’ favor. *See Alliance*, 632 F.3d at 1135. And for the same reasons, the public interest
17 factor weighs strongly in favor of granting an injunction.

18 **IV. CONCLUSION**

19 For the reasons set forth above, the Court GRANTS Petitioners’ request for a preliminary
20 injunction. (ECF No. 3.)

21 IT IS ORDERED that, while this action remains pending, Respondents City of McFarland
22 and City of McFarland Planning Commission ARE HEREBY ENJOINED from taking any action
23 to issue, execute, or make effective the modifications to Conditional Use Permits 01-96 and 02-96
24 approved by the City Council on April 23, 2020, in which the following text was approved for
25 both conditional use permits: “The facility may house Federal inmates and detainees, both male
26 and/or female.”

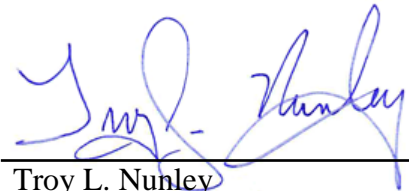
27 IT IS FURTHER ORDERED that, while this action remains pending, Real Party in
28 Interest Geo Group, Inc. (“GEO”), GEO’s employees, agents, assigns, and any other persons

1 acting on GEO's behalf, ARE HEREBY ENJOINED from transferring any detainee into or out
2 of, and accepting any transfer of any detainee into or out of, and housing any detainee at, the
3 Central Valley Modified Community Correctional Facility (254 Taylor Avenue, McFarland, CA
4 93250) or the Golden State Modified Community Correctional Facility (611 Frontage Road,
5 McFarland, CA 93250) in reliance on the modifications to Conditional Use Permits 01-96 and 02-
6 96 approved by the City Council on April 23, 2020, in which the following text was approved for
7 both conditional use permits: "The facility may house Federal inmates and detainees, both male
8 and/or female."

9 IT IS FURTHER ORDERED that no bond is required to be posted by Petitioners as a
10 condition for the issuance of this relief.

11 IT IS SO ORDERED.

12 DATED: August 10, 2020

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16 Troy L. Nunley
17 United States District Judge
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