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13 **IN THE UNITED STATES DISTRICT COURT**
14 **IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA**
15 **OAKLAND DIVISION**

16 NATIONAL ASSOCIATION OF
17 MANUFACTURERS, CHAMBER OF
18 COMMERCE OF THE UNITED STATES
OF AMERICA, NATIONAL RETAIL FED-
ERATION, TECHNET, and INTRAX, INC.,

19 Plaintiffs,

20 v.

21 UNITED STATES DEPARTMENT
22 OF HOMELAND SECURITY,
UNITED STATES DEPARTMENT
23 OF STATE; CHAD F. WOLF,
in his official capacity as Acting Secretary of
24 Homeland Security; and, MICHAEL R.
POMPEO, in his official capacity as Secretary
25 of State,

26 Defendants.

Case No. 4:20-cv-4887-JSW

**PLAINTIFFS' MOTION TO
CLARIFY PRELIMINARY
INJUNCTION AND FOR
DISCOVERY REGARDING
COMPLIANCE**

Date: TBD
Time: TBD
Judge: Hon. Jeffrey S. White
Ctrm.: 5

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1 **SUMMARY OF ARGUMENT**

2 Plaintiffs are gravely concerned that Defendant Department of State and its officers and
3 employees have not appropriately complied with this Court’s injunction of October 1, 2020.

4 *First*, to this day, the Department has apparently failed to provide consulates necessary in-
5 structions. On October 30, a consulate in Milan informed one entity within the scope of the order
6 that, because of a lack of guidance regarding the injunction, it could not approve a visa.

7 *Second*, consulates that are currently processing nonimmigrant visas are informing indi-
8 vidual H, J, and L applicants covered by the Order that they cannot now apply *unless* they qualify
9 for a national interest exception (“NIE”) process under Presidential Proclamation 10052. That is,
10 consulates are still continuing to enforce the Proclamation as to businesses within the scope of the
11 Court’s order. That is wrong. It has been a *month* since this Court’s order.

12 *Third*, when consulates do accept interviews, they are failing to approve visas on a timely
13 basis, citing a purported need for “administrative processing” that may take weeks or months to
14 complete. This delay is apparently attributable to the Department’s stated need to verify whether
15 an entity is a member of a Plaintiff association and thus within the scope of the Court’s Order.
16 While Plaintiffs agree with verification, it should be prompt, not an opportunity for the admin-
17 istration to drag its feet and flout the orders of this Court.

18 *Fourth*, the situation has materially *worsened* for Plaintiff Intrax following the injunction.
19 That conduct must stop.

20 Plaintiffs request that the Court make certain clarifications of its Order in order to ensure
21 that Defendant Department of State and its officers and employees promptly comply. In addition,
22 Plaintiffs request certain discovery to determine whether Defendant Department of State and its
23 officers and employees have acted in good faith compliance over the past month.

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NOTICE OF MOTION AND MOTION TO CLARIFY PRELIMINARY INJUNCTION AND FOR DISCOVERY REGARDING COMPLIANCE

PLEASE TAKE NOTICE that on a date to be determined by the Court¹ in Courtroom 5 of the Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612, before the Honorable Jeffrey S. White, Plaintiffs the National Association of Manufacturers, the Chamber of Commerce of the United States of America, the National Retail Federation, TechNet, and Intrax, Inc. will and hereby do move to clarify the Court’s preliminary injunction of October 1, 2020, for discovery into the compliance of Defendant Department of State and its officers and employees with the preliminary injunction, and for the grant of any further relief that the Court deems appropriate.

Plaintiffs have conferred with Defendants, who oppose the relief requested by this motion. Although Defendants have informed Plaintiffs that they will oppose the administrative motion asking for this issue to be heard on November 6, 2020, Defendants have not informed us as to whether they intend to file a response to this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

As described below, Plaintiffs have grave concerns regarding compliance with the Court’s order issued on October 1, 2020. They thus request this Court’s urgent intervention.

Plaintiffs patiently waited as it took Defendants eight days following the Court’s order to even notify the consulates of the injunction. That is, for more than a week, consulates were not aware of the Court’s Order and certainly not complying with it. Little has changed, however, even after Defendants finally issued guidance on October 9, 2020. There is robust evidence that Defendants have failed to instruct the consulates to comply with this Court’s order. Several issues are alarming.

First, the State Department has apparently instructed consulates not to issue visas pursuant to the Court’s injunction. On October 30, a consulate in Milan informed one member of Plaintiff the National Retail Federation that it had been “advised” by the Defendant “Department of State”

¹ The Court has set a preliminary conference in this case for next Friday, November 6, at which Plaintiffs submit the Court could consider the issues herein. To that end, Plaintiffs have contemporaneously filed an administrative motion to expedite the instant motion given that the purpose of the preliminary injunction, which took immediate effect a month ago, was to prevent the very harms that Defendants are now inflicting.

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1 that it “cannot proceed with this case until [it] receive[s] further guidance from the Department on
2 processing L visa applicants that are plaintiff members.” Thus, as of yesterday, Defendant De-
3 partment of State had directed consulates to deny visa issuance because of a putative need for
4 more guidance.

5 *Second*, consulates that are currently processing nonimmigrant visas—including by pro-
6 cessing H, J, and L visa applicants that qualify for a national interest exception (“NIE”) under
7 Proclamation 10052—are nonetheless informing individuals covered by the Court’s Order that
8 they cannot now apply *unless* they qualify for a NIE. That is, the consulates are *open* for individ-
9 uals who qualify for a waiver under the Proclamation, but closed otherwise. These actions consti-
10 tute continued enforcement of the Proclamation in direct contravention of this Court’s injunction.
11 Plaintiffs do not ask the Court to supervise bona fide COVID-19 related service reductions by
12 consulates. But when consulates are open and issuing nonimmigrant visas for those who qualify
13 under an NIE waiver—or who apply in a different nonimmigrant category, such as F visas issued
14 to international students—individuals covered by the injunction must stand in the same line. That
15 is, they must be provided an opportunity for an in-person interview at a U.S. embassy or consu-
16 late and be issued the nonimmigrant visa for which they have demonstrated eligibility.

17 *Third*, out of a purported desire to verify that applicants are in fact covered by the Court’s
18 injunction, Defendants are delaying visa processing for weeks or months. Plaintiffs do not object
19 to verification; we agreed to it immediately following the Court’s Order. But the government
20 must *promptly use* the verification mechanism. Verification cannot be used as a pretext for non-
21 compliance.

22 *Fourth*, the treatment of plaintiff Intrax is especially concerning. Prior to the Court’s in-
23 junction, Intrax program participants received dozens of visas pursuant to the Proclamation’s NIE
24 waivers. Since the Court’s order, Intrax has received almost none. This concerning course of con-
25 duct must stop.

26 Plaintiffs request that the Court clarify its injunction to remove all doubt regarding def-
27 endants’ obligations. Further, Plaintiffs request discovery regarding Defendants’ compliance
28

1 with the injunction, so as to determine whether any further relief is warranted. Plaintiffs also re-
 2 quest whatever additional relief the Court may deem just and proper.

3 Over the past few weeks, Plaintiffs have repeatedly sought to work with Defendants in re-
 4 solving these issues. Prior to the filing of this motion, Plaintiffs asked Defendants to agree to a
 5 stipulation regarding prospective compliance and negotiated it for days. Plaintiffs thought agree-
 6 ment had been reached Friday afternoon, until Defendant Department of State materially changed
 7 the terms near midnight. Because these efforts failed to produce material results, Plaintiffs now
 8 request the Court’s assistance in ensuring compliance with its Order.

9 BACKGROUND

10 A. The Court’s preliminary injunction.

11 On October 1, 2020, the Court issued a preliminary injunction, barring Defendants from
 12 “implementing, enforcing, or otherwise carrying out Section 2 of Proclamation 10052” or “from
 13 engaging in any action that results in the non-processing or non-issuance of applications or peti-
 14 tions for visas in the H, J, and L categories which, but for Proclamation 10052, would be eligible
 15 for processing and issuance, with respect to the Plaintiffs and the members of the Plaintiff associ-
 16 ations.” Dkt. 87 at 25. The preliminary injunction took effect immediately. *Id.* at 25.

17 The Court entered the preliminary injunction in response to the “plethora of evidence of
 18 injury” that plaintiffs and the plaintiff-associations’ members will irreparably suffer as a result of
 19 Proclamation 10052’s ban on L, H, and J visa categories. Dkt. 87 at 23.

20 B. The State Department delays notifying consulates for more than a week.

21 Though the Court’s preliminary injunction took effect immediately, Defendants did not
 22 inform the consulates of the order until the evening of October 9, 2020—eight days after the pre-
 23 liminary injunction entered. *See* U.S. Dep’t of State, *Court Order regarding Presidential Procla-*
 24 *mation 10052* (Oct. 9, 2020), perma.cc/J7FL-75CU. That communication went out only after
 25 Plaintiffs’ counsel told the government that, unless such communication was forthcoming, they
 26 would be forced to engage the Court. And, although Plaintiffs requested a copy of the cable that
 27 was sent to the consulates, Defendants have refused to provide it. *See* Hughes Decl. ¶ 3.
 28

1 **C. Membership verification mechanism.**

2 Defendants initially took the position that the Plaintiff associations had to provide the
3 identities of all their members so that Defendants could verify whether an applicant is within the
4 scope of the injunction. Hughes Decl. ¶ 1. Alone, the Chamber of Commerce of the United States
5 of America has approximately 300,000 members. *Id.* Many of those members do not make use of
6 H, J, or L visas. Plaintiffs did not agree to this request, as the First Amendment’s protection of the
7 freedom of association establishes a right to the confidentiality of membership in an advocacy
8 organization. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (“It is hardly a novel perception
9 that compelled disclosure of affiliation with groups engaged in advocacy may constitute ... a re-
10 straint on freedom of association.”).

11 Rather than waive their First Amendment rights, the Plaintiff associations promptly pro-
12 posed a straightforward verification mechanism: They have provided signed letters to members
13 who wish to prove that they are covered by the injunction, and those letters identify a person at
14 each association with whom Defendants may verify membership status. Hughes Decl. ¶ 1. The
15 government proposed—and the Plaintiff associations used—language for those letters. *Id.* The
16 government cannot seriously maintain that Plaintiffs have erected any obstacle to membership
17 verification.

18 **D. Consulates refuse to process visas covered by the preliminary injunction.**

19 Notwithstanding this guidance, several serious compliance issues remain.

20 **1. Consulates report that as late as yesterday, October 30, 2020, they still lack guid-**
21 **ance that is apparently necessary for them to implement the Court’s order.**

22 On October 8, 2020, the National Retail Federation issued a letter to one of its member
23 companies, verifying its status as a member in good standing. That letter stated, in part, that the
24 “government officials receiving this letter may contact Stephanie Martz by email
25 (martzs@nrf.com) or telephone (202-431-3915) if they wish to confirm its contents or to request
26 a corresponding copy from our files.” Cooney Decl. Ex. 1. Stephanie Martz is the Chief Adminis-
27 trative Officer and General Counsel of the National Retail Federation. *Id.* The attorney for the
28 member entity, Ms. Cooney, supplied that letter to the Milan consulate on October 13, 2020, re-

1 questing reconsideration of an L-1B visa that had been denied on October 2 on the basis of Presi-
2 dential Proclamation 10052. Cooney Decl. Ex. 2.

3 Yesterday, October 30, 2020, a consular officer in Milan, Italy responded:

4 The Department of State has advised that when there should be a need to seek clar-
5 ification regarding the membership status of an employer in the NAM court order,
6 we should deny the case until the Department receives more information from the
7 plaintiffs on how to independently verify membership at post.

8 *At this time, we cannot proceed with this case until we receive further guidance*
9 *from the Department on processing L visa applicants that are plaintiff members.*
10 We will contact the applicant once we receive additional information.

11 Cooney Decl. ¶ 3 & Ex. 2 (emphasis added). Thus, notwithstanding the plain verification mecha-
12 nism in this letter, the consular officer informed NRF’s member that it cannot process a visa for
13 its employee until it “receive[s] further guidance from the Department.” *Id.* The State Depart-
14 ment’s failure to provide this guidance—a month after the injunction issued—is facial noncom-
15 pliance with the Court’s order.²

16 **2. Consulates are open for NIE waivers under the Proclamation and other nonim-**
17 **migrant visas—but not for those covered by the injunction.** In some countries, Defendants
18 have refused to process visa applicants covered by the Court’s preliminary injunction while at the
19 same time processing applicants for national-interest exceptions to Proclamation 10052.

20 For example, on October 14, a consular official in Brasilia wrote to an Intrax-sponsored
21 au pair that “the State Department is reviewing the issue of the court decision, but at the moment
22 there has been no change.” 3d Schneider Decl. ¶ 13. The consular officer continued: “If you judge
23 your case as one that fits the exceptions to the Presidential Proclamation, forward the documents
24 and information supporting your application to the U.S. consulate where you intend to apply for a
25 visa.” *Id.* Thus, the consulate explained that, for Intrax-sponsored individuals, the consulate was
26 open for NIE requests, but not for J applications by those affiliated with Intrax. That is to say, the

27 ² The Milan consulate is processing nonimmigrant visas. Notably, the refusal of the consular
28 officer on October 30 was not based on any COVID-19 rationale. Today, October 31, the Milan
consulate’s website states that, “[a]s of July 20, 2020, the United States Embassy and Consulates
General in Italy are resuming certain immigrant and nonimmigrant visa services, including rou-
tine appointments for students (F and M), exchange visitors (J),” and several others. *See* Hughes
Decl. Ex. 3. And, in September 2020, the most recent statistics that the State Department has re-
leased, the Milan consulate issued 70 J-1 visas, as well as 131 F-1 international student visas,
among many others. *See* Hughes Decl. Ex. 2 at 32.

1 consulate in Brasilia is still enforcing the Proclamation that this Court enjoined as to Plaintiffs
 2 and the members of the Plaintiff associations. Intrax has received similar treatment at the consu-
 3 lates in Porto Allegre and Sao Paulo. *Id.* ¶¶ 14-16.³

4 In India, consulates are at least partially open for the processing of nonimmigrant visas,
 5 including those who apply for visas under a national-interest exception to Proclamation 10052.⁴
 6 Baselice Decl. ¶ 3. But those same embassies and consulates will *not* consistently schedule ap-
 7 pointments for L, H, and J applicants covered by the preliminary injunction, unless those applica-
 8 tions go through Proclamation 10052’s national-interest exception process. *Id.* ¶¶ 3-6. Indeed, one
 9 member of the U.S. Chamber wrote to the consulate in Chennai, informing it of its coverage un-
 10 der the Court’s injunction. *Id.* ¶ 4. On October 19, the consulate responded that, because “routine”
 11 visa services were suspended, the employees for this member company could seek visas only if
 12 they satisfied the NIE standards in Proclamation 10052. *Id.* ¶¶ 4-5. That is, on October 19, the
 13 consulate in Chennai took the position that consular operations are closed to U.S. Chamber mem-
 14 bers, *unless* they comply with Proclamation 10052, at which point they are eligible for visa pro-
 15 cessing. That just means that the consulate is disregarding the Court’s Order.

16 Many applicants in India do not even need an in-person interview appointment because
 17 they are renewing a visa, undermining any claim that in-person COVID-19 concerns are blocking
 18 the applicant, but these applications are inexplicably being delayed. Baselice Decl. ¶ 7.

19 And in France, more of the same. Between August 14 and October 15, Intrax secured 8
 20 national-interest exceptions for au pairs. 3d Schneider Decl. ¶ 11. In September 2020 alone, the
 21 State Department’s statistics reveal that the consulate in Paris processed 106 J-1 visas (as well as
 22 81 F-1 student visas). Hughes Decl. Ex. 2 at 40. Now, however, France will not schedule any visa
 23

24 _____
 25 ³ Consulates in Brazil do continue to process nonimmigrant visas. For example, the Sao Paulo
 consulate issued 82 J-1 visas in September 2020. *See* Hughes Decl. Ex. 2 at 46.

26 ⁴ The consulate in Mumbai, for example, issued 95 H-1B visas in September 2020, as well as
 27 400 H-4 visas, 497 F-1 visas, and 641 B1/B2 visas. *See* Hughes Decl. Ex. 2 at 34-35. The consu-
 28 late in Chennai issued 209 F-1 visas, 123 H-2B visas, 591 H-4 visas, and 209 B1/B2 visas. *See id.*
 at 13. The website for India’s consulates, as of today, informs H, J, and L visa applicants that they
 “should request an appointment only if you have reason to believe you may qualify for one of the
 [NIE] exceptions.” *See* Hughes Decl. Ex. 4.

1 appointments for J-1s covered by the preliminary injunction, even though it continues to process
2 J-1 visas eligible for national-interest exceptions. 3d Schneider Decl. ¶¶ 6-8, 17.

3 **3. Administrative Processing Refusals.** Defendants have placed applicants covered by
4 the Court’s preliminary injunction under blanket “administrative processing” delays, which is ad-
5 ditional processing beyond routine processing times. *See* Hughes Decl. Ex. 5.

6 For example, in the Philippines, Alliance Abroad seeks to obtain visas for 14 J-1 teacher
7 applicants who must begin work in December 2020. Bell Decl. ¶¶ 5, 9. The Manila consulate
8 scheduled these individuals for interviews, confirming that the embassy was open and processing
9 nonimmigrant visas. Bell Decl. ¶ 9. Indeed, the consulate processed hundreds of nonimmigrant
10 visas in September 2020, and it currently declares on its website that it is open for visa interviews
11 for those who qualify for national interest exceptions under Presidential Proclamation 10052. Bell
12 Decl. ¶¶ 6-8 & Ex. 1 at 29, Ex. 2.

13 Alliance Abroad provided extensive proof that it is a member of the U.S. Chamber—it
14 provided a letter acknowledging its membership, as well as multiple declarations filed in this
15 Court attesting to its membership. Bell Decl. ¶¶ 10, 13, 15 & Exs. 3-4. But the consulate refused
16 visas on grounds of administrative processing. Per the consulate, “additional processing time is
17 needed for J-1 groups given new guidance from the Department of State and this can lead to de-
18 lays.” Bell Decl. ¶¶ 14-16 & Ex. 5. The length of this delay is unknown, and as a result Alliance
19 Abroad still cannot bring in the teachers it requires. *Id.* ¶¶ 17-18. Plaintiffs, meanwhile, do not
20 know what this “new guidance” says nor how they and their members may comply with it.

21 The same has happened in Brazil, to Intrax. 3d Schneider Decl. ¶¶ 12, 15-16. Intrax has
22 already had three au pairs placed into “administrative processing delay” in Brazil. 3d Schneider
23 ¶ 15-16.

24 **4. Intrax is now treated worse than prior to the injunction.** It is especially notable
25 that, although a named Plaintiff in this lawsuit, Intrax inexplicably finds itself in a *worse* position
26 than prior to the Court’s injunction. As Intrax previously told the Court, as of August 28, Intrax
27 secured 75 national interest exceptions to Proclamation 10052 for au pairs on J-1 visas. 2d
28 Schneider Decl., Dkt. 69-7 ¶ 13. In Brazil alone, by October 1, Intrax had secured 42 national in-

1 terest exceptions for au pairs traveling on J-1 visas from Brazil. 3d Schneider Decl. ¶ 11. Since
 2 October 1, Intrax has had *zero* J-1 visas approved: no regular appointments, no emergency ap-
 3 pointments, and no new national-interest exceptions even for persons who would have met Proc-
 4 lamation 10052’s national-interest exception. *Id.*

5 **E. Defendants continue to delay.**

6 Before bringing these concerning issues to the Court’s attention, Plaintiffs first ap-
 7 proached Defendants to request non-judicial resolution of these issues. Conversations about these
 8 issues have been ongoing throughout the month of October. Hughes Decl. ¶ 6. On Wednesday,
 9 October 28, 2020, Plaintiffs informed Defendants that, if a non-judicial resolution were not forth-
 10 coming, Plaintiffs would seek relief from this Court on October 30, 2020, with a request that the
 11 Court hear the motion at the conference already scheduled on November 6, 2020. *Id.* ¶ 7.

12 Plaintiffs and Defendants worked in good faith to negotiate an agreement, with the shared
 13 goal of resolving the compliance problems without the Court’s intervention. Hughes Decl. ¶ 9. By
 14 mid-afternoon Friday, Plaintiffs’ counsel believed the parties had reached agreement on terms
 15 acceptable to both sides. *Id.* ¶ 10. That is, until 11:20 p.m. ET, when Defendant Department of
 16 State rewrote essential terms of the parties’ draft agreement. *Id.* ¶ 11.

17 Plaintiffs sought to engage again on the morning of October 31, 2020, in an effort to reach
 18 agreement. Hughes Decl. ¶ 12. Defendants informed Plaintiffs that, due to the “holiday week-
 19 end,” Defendants will not further discuss non-judicial resolution until Monday, November 2. *Id.*
 20 Because of the urgency of this issue—and to ensure sufficient time prior to the Court’s status con-
 21 ference on November 6, 2020—Plaintiffs now seek relief from the Court.

22 **ARGUMENT**

23 **I. THE COURT SHOULD CLARIFY THE PRELIMINARY INJUNCTION.**

24 As described below, we ask the Court to clarify the preliminary injunction to ensure that
 25 Defendants promptly comply with it. This Court “may clarify its order for any reason.” *Padgett v.*
 26 *Loventhal*, 2015 WL 13753300, at *1 (N.D. Cal. May 13, 2015) (quoting *Wahl v. Am. Sec. Ins.*
 27 *Co.*, 2010 WL 2867130, at *9 (N.D. Cal. July 20, 2010)).

1 **First, those covered by the Court’s injunction must receive treatment from each con-**
2 **sulate at least as favorable as any other category of nonimmigrant visa applicant.** Plaintiffs
3 recognize that not all consulates around the world have resumed full capacity visa processing, as
4 a result of COVID-19 related closures. In addition, Plaintiffs recognize that there are currently
5 regional presidential proclamations that limit travel from certain countries as a result of COVID-
6 19. Plaintiffs acknowledge that they and the members of the Plaintiff associations are subject to
7 capacity reductions and restrictions unrelated to Presidential Proclamation 10052.

8 However, it is imperative that bona fide COVID-19 limitations do not become pretext for
9 continued enforcement of the goals or objectives of Proclamation 10052, which has been enjoined
10 with respect to the Plaintiffs and the members of the Plaintiff associations. To the extent that con-
11 sulates are open for the processing of nonimmigrant visas, individuals petitioned, sponsored, or
12 hosted by Plaintiffs or members of the Plaintiff associations must be eligible for visas (and visa
13 interviews) on terms equally as favorable as any other category of nonimmigrant visa applicant.
14 That is, if consulates are open to processing nonimmigrant visas in any capacity, those covered by
15 the injunction must stand in the same line and be treated on terms no less favorable than others.

16 Indeed, this understanding of the scope of the preliminary injunction necessarily follows
17 from the Court’s decision. In response to Defendants’ argument that COVID-19 related clo-
18 sures—and not Proclamation 10052—caused Plaintiffs’ harm, the Court held this assertion “pa-
19 tently false” in part because “many of the consulate offices have reopened but continue not to
20 process the banned visas.” Dkt. 87 at 23. The Court thus enjoined Defendants “from engaging in
21 any action that results in the non-processing or non-issuance of applications or petitions for visas
22 in the H, J, and L categories which, but for Proclamation 10052, would be eligible for processing
23 and issuance.” *Id.* at 25.

24 The details of this clarification are important. Defendants have attempted to suggest to us
25 that individuals covered by the injunction may be processed in only those consulates that are en-
26 gaged in “routine” visa services. But many consulates that are closed for “routine” visa services
27 *are* open and issuing nonimmigrant visas (including H, J, and L visas) *if* the individual satisfies
28 the national-interest exception contained in Proclamation 100052. That is exactly the situation in

1 the Manila consulate, for example; there, if an individual is within an exception, the individual is
 2 instructed “to request an emergency appointment.” Bell Decl. ¶¶ 6-8 & Ex. 2. So too in India.
 3 Baselice Decl. ¶¶ 4-6. The Court’s injunction precludes Defendants from continuing to apply the
 4 Proclamation’s effective terms to Plaintiffs and their members.

5 The injunction has a clear meaning: If a consulate is processing *any* nonimmigrant visa,
 6 those covered by the injunction must stand in the same line. Thus, if a consulate is open to pro-
 7 cess H, J, or L visas for those qualifying for an NIE waiver—or any other nonimmigrant visas
 8 (like F visas for students or B1/B2 visas for business or tourist travelers)—it must be open on
 9 equal terms for those within the injunction’s scope.

10 **Second, Defendants may not use lengthy delays or “administrative processing” to**
 11 **preclude effective relief.** As we further demonstrated, there is a documented pattern of Defend-
 12 ants indicating that there is a lengthy delay or “administrative processing” required for visa appli-
 13 cants within the scope of the Order. We understand that Defendants take the view that verification
 14 of a visa applicant’s association with a Plaintiff or a member of the Plaintiff is requisite. We do
 15 not object to such verification procedures; following the Court’s order, we affirmatively agreed
 16 with the government to create mechanisms for verification. *See* Hughes Decl. ¶ 1.

17 But it is incumbent on the government to *promptly use* these verification procedures. On
 18 October 28, undersigned counsel for Plaintiffs communicated to defense counsel that, so far as he
 19 was aware, no one from State had *ever* reached out for verification of membership to the plaintiff
 20 associations, notwithstanding the submission of *dozens* of letters from the Plaintiff associations
 21 attesting to the membership status of businesses seeking covered visas over the last month.
 22 Hughes Decl. ¶ 8. On the morning of October 29, 2020, Plaintiff the National Association of
 23 Manufacturers received the very first verification request from the State Department. *Id.*

24 In short, verification is straightforward. If the government has any question as to whether
 25 an entity is a member of one of the Plaintiff associations, it must promptly email (via the address-
 26 es we have supplied) the relevant officials at the associations. Those officials will confirm (or de-
 27 ny) membership status. If a Plaintiff association confirms that an entity is a member at the time of
 28 a visa interview or processing, that will demonstrate that the individual is within the scope of the

1 Court's injunction. The government must complete these steps in a prompt manner. It should take
 2 no more than one business day, not counting the time it takes the Plaintiff associations to respond.
 3 (In our conversations, the government requested two business days for verification.)

4 Further, the government should compile a list of members it has confirmed as within the
 5 scope of the Court's injunction. That will include the members of Plaintiff TechNet (whose mem-
 6 bership is public, *see* perma.cc/AF8V-599G), as well as all other entities verified by Defendants.
 7 That list must also include the programs Plaintiff Intrax, Inc. operates, including Au Pair Care
 8 (also known as Au Pair Care by Intrax) (Program Number P-4-06027), Camp Care USA (also
 9 known as CampCare and CampCare by Intrax) (Program Number P-4- 35841), Intrax Work
 10 Travel (Program Number P-4-06056), Intrax Career Training (Program Number P-4-10008), and
 11 Intrax Internship Training (Program Number P-4-11197). Given that the Department of State had
 12 volunteered to undertake this step, we do not understand it to impose any undue burden.

13 ***Third, the government must promptly process all of Intrax's applications.*** Plaintiffs
 14 are especially concerned regarding the treatment of named Plaintiff Intrax. As we have described,
 15 its situation has materially *worsened* following this Court's order. That conduct must cease im-
 16 mediately, and Plaintiffs request instructions from the Court directing careful attention to visa re-
 17 quests by individuals associated with Intrax.

18 ***Fourth, consulates must be notified of these clarifications promptly.*** Last time, it took
 19 State eight days to deign to notify the consulates of this Court's Order. We request that the Court
 20 require notification in 48 hours or less. Further, the Court should require that the government pro-
 21 vide the instructions or cables to the Court and the Plaintiffs (under seal, if necessary), so that we
 22 may verify compliance with the Court's order.

23 **II. THE COURT SHOULD ORDER LIMITED DISCOVERY INTO THE GOVERN-**
 24 **MENT'S COMPLIANCE.**

25 The evidence gathered to date from Plaintiffs also raise serious concerns about whether
 26 Defendants have complied with the preliminary injunction since its issuance a month ago. Plain-
 27 tiffs therefore respectfully request expedited discovery into Defendants' compliance for the em-
 28

1 bassies and consulates in the five countries Plaintiffs have here identified: Brazil, France, India,
2 Italy, and the Philippines.⁵

3 “If significant questions regarding noncompliance [with a court’s judgment] have been
4 raised, appropriate discovery should be granted.” *Cal. Dep’t of Social Servs. v. Leavitt*, 523 F.3d
5 1025, 1034 (9th Cir. 2008). “Indeed, a district court should give careful attention to a request for
6 discovery to establish noncompliance with one of its judgments.” *Id.* at 1033. The inquiry evalu-
7 ates “whether the discovery request could . . . provide[] potentially favorable information.” *Id.*
8 (citation omitted).

9 This standard is readily met here. *First*, as of October 30, the Milan consulate has affirma-
10 tively stated that the State Department has instructed it to deny issuing visas to those covered by
11 the injunction pending more guidance. *Second*, it is apparent that several consulates are pro-
12 cessing nonimmigrant visas (including H, J, and L applicants qualifying for an NIE under the
13 Proclamation), yet not processing individuals within the scope of the injunction. *Third*, requests
14 for visas from those plainly encompassed within the Court’s order have fallen into an administra-
15 tive black hole, with no reasonable explanation forthcoming. *Fourth*, the treatment of Intrax is
16 especially alarming.

17 This evidence raises significant questions regarding Defendants’ compliance with the
18 Court’s order. The Court should thus order the State Department to expeditiously produce, at
19 minimum, (1) all cables, communications, and instructions in whatever form from Defendants to
20 U.S. embassies and consulates in Brazil, France, India, Italy, and the Philippines concerning Proc-
21 lamation 10052 or this case⁶; (2) all communications from U.S. embassies and consulates in Bra-

22 _____
23 ⁵ Plaintiffs limit their request to these five countries at this time in order to preclude the gov-
24 ernment from asserting that this request is overly burdensome. If Plaintiffs receive additional evi-
25 dence suggesting non-compliance with the Court’s order, Plaintiffs may request discovery regard-
26 ing communications with embassies and consulates in other locations. Similarly, Plaintiffs reserve
27 the right to seek leave for other forms of discovery, including depositions.

28 ⁶ This Court already has before it the Administrative Record the government produced in relat-
ed litigation, *Gomez v. Trump*, No. 20-cv-1419 (D.D.C.). *See* 2d Hughes Decl. Ex. 2 (Dkt. 69-3).
In that record, the government provided its cables and instructions to the consulates regarding im-
plementation of Proclamation 10052. Given that the government already has produced its com-
munications to the consulates regarding the Proclamation’s implementation, the government has
no meaningful basis to resist similar communications regarding its implementation of this Court’s
Order.

1 zil, France, India, Italy, and the Philippines to Defendants concerning Proclamation 10052 or this
2 case; and (3) all internal communications at the State Department concerning implementation of
3 the Court’s injunction.

4 **III. THE COURT SHOULD CONSIDER SANCTIONS, INCLUDING ATTORNEY’S**
5 **FEES.**

6 As we have described, Plaintiffs are deeply concerned with whether Defendants have
7 complied in good faith with the Court’s Order. At present, sanctions may be warranted, including
8 an award of attorney’s fees caused by the necessity of this motion.

9 At the very least, the Court should order discovery in order to provide a more complete
10 picture of Defendants’ conduct over the prior month. Following discovery, Plaintiffs will report to
11 the Court as to what steps Defendants did—or did not—take over the past 30 days.

12 **CONCLUSION**

13 The Court should clarify the preliminary injunction, order specified discovery, and enter
14 any additional relief it deems just and proper.

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ATTORNEYS AT LAW
MENLO PARK

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