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13 **UNITED STATES DISTRICT COURT**
 14 **SOUTHERN DISTRICT OF CALIFORNIA**

16 SONNY LOW, J.R. EVERETT, and
 17 JOHN BROWN, on Behalf of
 18 Themselves and All Others Similarly
 Situated,

19 Plaintiffs,

20 v.

21 TRUMP UNIVERSITY, LLC et al.,
 22 Defendants.

Case No. 10-CV-0940-GPC (WVG)
 Judge: Hon. Gonzalo P Curiel

CLASS ACTION

DEFENDANTS' *EX PARTE*
APPLICATION TO CONTINUE
TRIAL DATE

DATE: EX PARTE
 TIME: EX PARTE
 COURT: 2D
 JUDGE: HON. CURIEL

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1 **TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that defendants Donald J. Trump and Trump
3 University, LLC (“defendants”), by and through their counsel of record, will and
4 hereby do apply to the Court *ex parte* for an order (a) continuing the trial date in
5 *Low* from November 28, 2016 to a date after the Presidential inauguration that is
6 convenient for the parties and the Court; (b) authorizing the video-recorded
7 testimony of Donald Trump before trial in this case; and (c) allowing all parties to
8 use the recorded testimony in the *Low* and *Cohen* trials. If the Court denies the
9 relief requested herein, defendants respectfully request a temporary stay of
10 proceedings to permit defendants to seek emergency relief pursuant to 28 U.S.C.
11 § 1651 and Circuit Rule 27-3.

12 On November 10, 2016, defendants’ counsel contacted plaintiffs’ counsel
13 and notified them of defendants’ intention to file the present application.
14 Declaration of Daniel M. Petrocelli (“Petrocelli Decl.”) ¶ 3; *see also* S.D. Cal. L.R.
15 83.3(g)(2). Defendants’ counsel also informed the Court of defendants’ intention to
16 file the request for a continuance, and the Court stated that defendants may file the
17 papers. Petrocelli Decl. ¶ 3. This application is based on the attached
18 memorandum of points and authorities and the Declaration of Daniel M. Petrocelli
19 filed concurrently herewith.

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

On November 8, 2016, the people elected Donald J. Trump to be the 45th President of the United States of America. President-Elect Trump must now prepare to lead the nation when he assumes the Presidency on January 20, 2016. The 69 days until inauguration are critical and all-consuming. President-Elect Trump must receive daily security briefings, make executive appointments (ultimately, thousands), and establish relationships with appointees, members of Congress, governors, and foreign leaders. He must also develop important policy priorities. *See Ex. 1, L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINIS. 2–3 (2016); Ex. 2, P'SHIP FOR PUBLIC SERV., PRESIDENTIAL TRANSITION GUIDE 10 (spec. ed. 2016).*¹

The President-Elect is also a defendant in this lawsuit (*Low*) and the companion lawsuit (*Cohen*) and has a right to defend himself, including testifying on his own behalf. The Court set trial in this case to commence on November 28, 2016, in lieu of an earlier date, to accommodate defendants' request that trial be deferred until the conclusion of the Presidential campaign.² Now that the election is over, we submit that the President-Elect should not be required to stand trial during the next two months while he prepares to assume the Presidency. The time and attention to prepare and testify will take him away from imperative transition work at a critical time. We acknowledge plaintiffs have a right to trial of their claims, but their rights will not be abridged if trial were continued to a date after the inauguration to allow the President-Elect to devote all his time and attention to the transition process.

¹ Exhibits are attached to the Declaration of Daniel Petrocelli, filed herewith.

² Defendants proposed a trial date after the Presidential transition and inauguration, but the Court concluded it did not want to proceed to trial with a sitting President. Dkt. 481 at 11:8–11; Dkt. 502 at 1.

1 There is another important consideration, and that is the looming *Cohen* case,
2 where the President-Elect is the sole defendant. Although a trial date has not been
3 set, the case will go to trial while Mr. Trump is the sitting President. For that
4 reason, it is appropriate to consider all options to avoid requiring Mr. Trump to
5 prepare to testify and testify on two separate occasions.

6 Taking all of these factors into account, the President-Elect respectfully
7 proposes the following plan:

- 8 • Continue the trial date in *Low* from November 28, 2016 to a date after the
9 inauguration that is convenient for the parties and the Court.
- 10 • Prior to the trial date, the trial testimony of the President-Elect can be
11 taken by videotaped deposition, consistent with the approach taken by
12 courts in those rare circumstances where this issue has arisen. *See infra*
13 n. 10.
- 14 • Alternatively, if the Court prefers, President-Elect Trump will make
15 himself available for trial examination in January 2017, by which time
16 much of the transition process will have been concluded.
- 17 • The Court can preside over the examination. The recorded testimony may
18 be used by either side in the *Low* and *Cohen* trials, regardless of the
19 President's availability to appear live at trial.³

20 This balanced approach will allow President-Elect Trump to focus on
21 transitioning to office. The single examination ensures that President-Elect Trump
22 is not forced to testify *twice*, once as President-Elect (for *Low*) and once as
23 President (for *Cohen*).⁴ The videotaped testimony will ensure no additional delay
24 of trial based on future scheduling unpredictability. The breathing room also will
25 permit the parties to explore alternative methods of resolving both cases. And the
26 definite period after which to schedule trial safeguards plaintiffs' rights and
27 minimizes the prejudice to them.

28 ³ We request that the specific date and location be confidential and the recording
and transcript therefrom be ordered confidential unless and until a trial occurs.

⁴ A single examination can be used for both trials or, if preferred, the examination
can be divided into two parts—one for *Low* and one for *Cohen*.

1 This is exactly the kind of pragmatic solution to an extraordinary
2 circumstance that was envisioned by *Clinton v. Jones*, 520 U.S. 681, 709 (1997),
3 where the Supreme Court held that federal courts must afford the “utmost
4 deference” to the truly “singular” nature of the Office of the President of the United
5 States. We respectfully request that the Court grant the requested relief forthwith.

6 **II. THE CONSTITUTION, DEFERENCE TO THE PRESIDENT-ELECT,**
7 **AND BASIC PRAGMATISM COMPEL THE MODEST RELIEF**
8 **SOUGHT IN THIS MOTION.**

9 President-Elect Trump is not seeking to stay this case indefinitely or until the
10 end of his term. Instead, we seek a modest continuance of the trial to a date after
11 the inauguration that is convenient for the parties and the Court. Plaintiffs will be
12 able to examine the President-Elect before trial begins. If the Court requires, the
13 examination can occur in January before the inauguration on January 20, 2017. The
14 testimony from that examination may be used in the *Low* and *Cohen* trials. In this
15 way, the Court minimizes the intrusion on the President-Elect, preserves his trial
16 testimony, and guarantees plaintiffs their day in court without regard to a sitting
17 President’s unpredictable schedule.

18 **A. Separation of Powers Requires That the Trial Court Schedule Its**
19 **Proceedings So As To Not Impede a President’s Public Duties.**

20 It is a “basic principle of our constitutional scheme that one branch of
21 Government may not intrude upon the central prerogatives of another.” *Loving v.*
22 *United States*, 517 U.S. 748, 757 (1996). That means “[e]ven when a branch does
23 not arrogate power to itself, . . . the separation-of-powers doctrine requires that a
24 branch not impair another in the performance of its constitutional duties.” *Id.*
25 (citing *Misretta v. United States*, 488 U.S. 361, 397–408 (1989)).

26 The Office of the President is unlike any other position in the country, “with
27 powers and responsibilities so vast and important that the public interest demands
28 that he devote his undivided time and attention to his public duties.” *Jones*, 520

1 U.S. at 697. The President “is the only official for whom the entire Nation votes,
2 and is the only elected officer to represent the entire Nation both domestically and
3 abroad.” *Id.* at 711 (Breyer, J., concurring).

4 While the Constitution does not categorically bar the exercise of jurisdiction
5 over the President—or, put differently, a President may not delay litigation until the
6 end of a term—courts *must* exercise “judicial deference and restraint” and work
7 with the President on case scheduling and testimonial obligations. *Nixon v.*
8 *Fitzgerald*, 457 U.S. 731, 753 (1982) (noting that “the President’s constitutional
9 responsibilities and status [are] factors counseling judicial deference and restraint”).

10 As Justice Breyer reasoned in his *Jones* concurrence:

11 A Constitution that separates powers in order to prevent one branch of
12 Government from significantly threatening the workings of another
13 could not grant a single judge more than a very limited power to
14 second-guess a President’s reasonable determination (announced in
15 open court) of his scheduling needs, nor could it permit the issuance of
16 a trial scheduling order that would significantly interfere with the
17 President’s discharge of his duties—in a private civil damages action
the trial of which might be postponed without the plaintiff suffering
enormous harm.

18 *Jones*, 520 U.S. at 723 (Breyer, J., concurring). Thus, a court “must balance the
19 constitutional weight of the interest to be served [in the litigation] against the
20 dangers of intrusion on the authority and functions of the Executive Branch.”
21 *Fitzgerald*, 457 U.S. at 754.

22 *Clinton v. Jones*—a case in which President Clinton sought to stay a civil
23 action brought against him until the conclusion of his presidency—provides direct
24 guidance regarding this separation-of-powers analysis for district courts. There,
25 while the Supreme Court concluded that President Clinton was not entitled to a
26 multiple-year stay until his term expired, it nevertheless recognized the “singular
27 importance of the President’s duties.” *Jones*, 520 U.S. at 686. And as to matters of
28 scheduling, the Supreme Court made clear that it expected district courts to

1 “accommodate the President’s needs” and “giv[e] the utmost deference to
2 Presidential responsibilities.” *Id.* at 709 (noting that “there is no reason to assume
3 that the district courts will be either unable to accommodate the President’s needs
4 or unfaithful to the tradition—especially in matters involving national security—of
5 giving the utmost deference to Presidential responsibilities”) (internal quotation
6 marks and citations omitted). Because the stakes are different, “district courts,
7 supervised by the Courts of Appeals and perhaps [the Supreme Court], might prove
8 able to manage private civil damages actions against sitting Presidents without
9 significantly interfering with the discharge of Presidential duties—at least if they
10 manage those actions with the constitutional problem in mind.” *Id.* at 723 (Breyer,
11 J., concurring); *see id.* at 708 (noting that a district court must “manage those
12 actions in such fashion (including deferral of trial) that interference with the
13 President’s duties would not occur”).

14 These same principles apply no less to the President-Elect. Congress has
15 made clear that the President-Elect’s unhindered transition into the office of
16 President is a matter of great public importance:

17 The national interest requires that such transitions in the office of
18 President be accomplished so as to assure continuity in the faithful
19 execution of the laws and in the conduct of the affairs of the Federal
20 Government, both domestic and foreign. ***Any disruption occasioned
21 by the transfer of the executive power could produce results
22 detrimental to the safety and well-being of the United States and its
23 people.***

22 Presidential Transition Act of 1963, Pub. L. No. 88-277, § 2, 78 Stat. 153, 153–154
23 (codified at 3 U.S.C. § 102 note) (1964) (emphasis added).⁵

24 _____
25 ⁵ As President Obama recognized in his remarks after the election, “[t]he peaceful
26 transition of power is one of the hallmarks of our democracy.” Team Fix,
27 Transcript: President Obama’s remarks on Donald Trump’s election, WASH. POST,
28 Nov. 9, 2016; *see also* Press Release, Nancy Pelosi, Pelosi Statement on 2016
Election (Nov. 9, 2016), <http://www.democraticleader.gov/newsroom/pelosi-statement-on-2016-election/> (“The peaceful transfer of power is the cornerstone of our democracy.”).

1 In addition, Congress has determined it is in the public interest to allow the
2 President-Elect and his transition team to receive confidential national security
3 briefings as early as practicable after the election. *See* Presidential Transition Act
4 of 1963 § 3(8)(A)(v); *see also* 50 U.S.C. § 3342 (allowing for expedited security
5 clearances for transition team members). In addition, secret service protection is
6 mandatory for the President-Elect. *See* 18 U.S.C. § 3056(a)(1). President-Elect
7 Trump’s duties and privileges as the future President thus commenced the moment
8 he was elected.

9 **B. The Transition Process is All-Consuming.**

10 President-Elect Trump and his transition team have only 69 days to prepare
11 to lead the country. The task is momentous, exceedingly complex, and requires
12 careful coordination involving the respective staffs and teams of both President
13 Obama and President-Elect Trump. In fewer than three months, the President-Elect
14 must be prepared to manage 15 executive departments, more than 100 federal
15 agencies, 2 million civilian employees, and a budget of almost \$4 trillion. *See* Ex.
16 1, L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL34722, PRESIDENTIAL
17 TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING ADMINISTRATIONS 2–3
18 (2016); Ex. 2, P’SHIP FOR PUBLIC SERV., PRESIDENTIAL TRANSITION GUIDE 10 (spec.
19 ed. 2016). He needs to devote this intensive period to transitioning the vast
20 functions of the federal government to an administration that has yet to be formed.

21 The concerns weighing in favor of “judicial deference and restraint” for a
22 sitting President are just as acute for a President-Elect. Whereas a sitting President
23 already has a functioning administration in place, the President-Elect is in the
24 process of building one from the ground up. Ex. 3, H.R. COMM. ON OVERSIGHT
25 AND GOV’T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITION (Plum
26 Book) (Comm. Print 2012) (2016 edition not yet available); Ex. 2, P’SHIP FOR
27 PUBLIC SERV., PRESIDENTIAL TRANSITION GUIDE 12, 61, 63 (spec. ed. 2016). This
28 entails a process of assessing key issues facing numerous agencies, their

1 workforces, and how their work will fit into policy priorities. Ex. 2, P'SHIP FOR
2 PUBLIC SERV., PRESIDENTIAL TRANSITION GUIDE 12 (spec. ed. 2016); Ex. 4, Press
3 Release, The White House Office of the Press Secretary, Fact Sheet: Facilitating a
4 Smooth Transition to the Next Administration (Nov. 10, 2016),
5 [https://www.whitehouse.gov/the-press-office/2016/11/10/fact-sheet-facilitating-](https://www.whitehouse.gov/the-press-office/2016/11/10/fact-sheet-facilitating-smooth-transition-next-administration)
6 [smooth-transition-next-administration](https://www.whitehouse.gov/the-press-office/2016/11/10/fact-sheet-facilitating-smooth-transition-next-administration) (describing briefings on agencies provided to
7 the President-Elect's Agency Review Teams and policy teams). And it requires the
8 President-Elect to establish relationships with appointees, members of Congress,
9 governors, and foreign leaders. Ex. 2, P'SHIP FOR PUBLIC SERV., PRESIDENTIAL
10 TRANSITION GUIDE 13 (spec. ed. 2016). These vital responsibilities cannot be
11 delegated.

12 Further, because the Presidency is shifting from one political party to
13 another, President-Elect Trump and his team must devote substantial work to
14 developing policy priorities and a plan to implement those priorities in both Houses
15 of Congress. *See* Ex. 1, L. ELAINE HALCHIN, CONG. RESEARCH SERV., RL34722,
16 PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND INCOMING
17 ADMINISTRATIONS 5 (2016); Ex. 5, POLITICO PRO, THE PRESIDENTIAL TRANSITION
18 ROADMAP 3 (2016). Like Presidents before him, President-Elect Trump will enter
19 the White House confronting significant policy decisions, likely including
20 legislation in the first 100 days of his Presidency and the upcoming congressional
21 term. *See* Ex. 5, POLITICO PRO, THE PRESIDENTIAL TRANSITION ROADMAP 4 (2016).
22 This requires intensive planning now with direct involvement by President-Elect
23 Trump.

24 The transition period also has significant security implications, particularly
25 because foreign enemies may perceive the United States to be more vulnerable
26 during a Presidential transition. Ex. 1, L. ELAINE HALCHIN, CONG. RESEARCH
27 SERV., RL34722, PRESIDENTIAL TRANSITIONS: ISSUES INVOLVING OUTGOING AND
28 INCOMING ADMINISTRATIONS 3, 24 (2016). As such, the new national security team

1 must be selected, complete security clearances, and be fully briefed along with
 2 President-Elect Trump to begin work before the inauguration to ensure the
 3 continued safety of the country.⁶ *See* Intelligence Reform and Terrorism
 4 Prevention Act of 2004, Pub. L. No. 108-458, § 7601, 118 Stat. 3638, 3856–58
 5 (2004). As part of that effort, President-Elect Trump will soon begin to receive the
 6 same detailed, top-secret briefings intelligence officials give President Obama.⁷
 7 Requiring the President-Elect to defend himself in a civil trial while “preparing for
 8 the vast challenges a political novice will face in assuming the presidency”⁸
 9 threatens the effectiveness of this transition.

10 In sum, there is no question that President-Elect Trump’s duties, even before
 11 he takes office, are momentous and warrant deference.⁹ An order allowing a
 12 continuance would be consistent with every other case involving the participation
 13 of Presidents in litigation. *See Jones*, 520 U.S. at 719 (“Case law . . . strongly
 14 supports the principle that judges hearing a private civil damages action against a
 15 sitting President may not issue orders that could significantly distract a President
 16 from his official duties.”) (Breyer, J., concurring).¹⁰

17 _____
 18 ⁶ *See* Russell Berman, “*The Most Important Takeover of Any Organization in*
 19 *History*,” THE ATLANTIC (Apr. 22, 2016),
 20 <http://www.theatlantic.com/politics/archive/2016/04/improving-the-presidential-transition-2016/477528/> (discussing extensive transition efforts for national security officials before the 2009 inauguration).

21 ⁷ Mark Hosenball, *Donald Trump Set To Receive Top Secret Security Briefings*,
 22 THE HUFFINGTON POST (Nov. 9, 2016),
http://www.huffingtonpost.com/entry/trump-security-briefings_us_5823dcbfe4b0d9ce6fc0cb09.

23 ⁸ *See* Josh Gerstein, *President-Elect Trump due to appear in court at trial starting*
 24 *later this month*, POLITICO (Nov. 9, 2016),
<http://www.politico.com/story/2016/11/donald-trump-court-university-231082>.

25 ⁹ In recognition of the importance of the transition period, the Consolidated
 26 Appropriations Act, 2016, includes \$13.278 million for activities authorized by the
 27 Pre-Election Presidential Transition Act of 2010. Pub. L. No. 114-113, 129 Stat.
 2242 (codified at 3 U.S.C. § 102 note) (2015). Funding covers, for example,
 28 orientation meetings for key personnel. *Id.*

¹⁰ *See also Fitzgerald*, 457 U.S. at 753 (noting that civil lawsuits “could distract a
 DEFS.’ EX PARTE APPLICATION TO
 CONTINUE TRIAL
 3:10-CV-0940-GPC(WVG)

1 **C. Plaintiffs Will Suffer Minimal Prejudice From Brief Continuance.**

2 As the Court has previously pointed out, this case is six years old and
 3 plaintiff Sonny Low is of advanced age.¹¹ However, we submit that a short
 4 continuance of the trial will cause no prejudice to plaintiffs. Plaintiffs seek only
 5 monetary relief and claim a right to pre-judgment interest. *See* Pls.’ Am. Pretrial
 6 Conf. Order. Delay in the recovery of monetary damages is insufficient prejudice
 7 to support the denial of a reasonable continuance. *See CMAX, Inc. v. Hall*, 300
 8 F.3d 265, 268–69 (9th Cir. 1962); *see also Kingdom of Sweden v. Melius*, 2015 WL
 9 7574463, at *3 (C.D. Cal. Nov. 25, 2015) (“The Ninth Circuit has held that a delay
 10 in the recovery of money damages does not constitute a sufficiently strong showing
 11 of damage to the non-moving party when determining whether a grant of a stay of
 12 proceedings was an abuse of discretion.”) (citing *CMAX*, 300 F.2d at 268–269);
 13 *Liberty Surplus Ins. Corp. v. IMR Contractors Corp.*, 2009 WL 1010842, at *4
 14 (N.D. Cal. Apr. 14, 2009) (same).

15 A reasonable continuance will also allow the parties to explore resolution of
 16 both the *Low* and *Cohen* cases, including through alternative methods of resolution
 17 such as private arbitration.

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 21 President from his public duties, to the detriment of not only the President and his
 22 office but also the nation that the Presidency was designed to serve”); *United States*
 23 *v. Fromme*, 405 F. Supp. 578, 583 (E.D. Cal. 1975) (acknowledging “the high
 24 office of the President and being mindful of the inconvenience and burden the
 25 subpoena will impose upon him” and permitting President Ford to testify via video
 26 deposition at a “place and time of his choosing”); *United States v. Poindexter*, 732
 27 F. Supp. 142, 1446 (D.D.C. 1990) (permitting former President Reagan to testify as
 28 witness in a criminal trial via video and noting that the case law evidences that
 courts “have . . . sought to exercise this power in a way that would be least
 damaging to the Presidency or onerous to the particular individual occupying the
 Office”); *United States v. McDougal*, 934 F. Supp. 296, 298 (E.D. Ark. 1999)
 (allowing President Clinton to testify in criminal proceeding from White House, as
 travel would be “unduly burdensome”); *In re Bush*, 287 S.W.3d 899, 903 (Tex. Ct.
 App. 2009) (disallowing deposition of former President Bush as unnecessary).

¹¹ There has been no indication or contention that Mr. Low is not in good health.

1 **III. CONCLUSION**

2 This is an unprecedented circumstance. A brief continuance of the trial date
3 will allow for the preservation of the President-Elect’s trial testimony and enable
4 both pending cases to proceed to trial within months without further interference or
5 delay while allowing President-Elect to fulfill his transition obligations.¹²

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9 DATED: November 12, 2016

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21 ¹² If the Court denies the relief requested herein, defendants respectfully request a
22 temporary stay of proceedings to permit defendants to seek emergency relief
23 pursuant to 28 U.S.C. § 1651 and Circuit Rule 27-3. The Court has discretion to
24 grant a stay pending the outcome of appellate proceedings. *See Nken v. Holder*, 556
25 U.S. 418, 421, 433–34 (2009); *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012)
26 (citation omitted). In deciding whether a stay is warranted, the Court must balance:
27 (1) the likelihood that defendants will succeed on appeal in obtaining the relief
28 sought herein; (2) the potential harm to the President-Elect in the absence of a stay;
(3) whether a stay will substantially injure plaintiffs; and (4) the public interest in a
stay. *See Lair*, 697 F.3d at 1203; *Leiva-Perez v. Holder*, 640 F.3d 962, 964–70 (9th
Cir. 2011). These factors—especially the **public interest** in ensuring a proper
transition of power—all overwhelmingly favor a temporary stay to permit appellate
consideration. *Golden Gate Rest. Ass’n v. City & Cnty. of S.F.*, 512 F.3d 1112,
1115–16 (9th Cir. 2008) (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.
1983)).