Document 1

Argument Supporting Continuance

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Summary of Attorney Scheduling Conference

The parties met and did not agree on the time or amount of discovery.

The central issue is that Scott Hildebrandt/eKnowledge is requesting sufficient time to retain counsel.

The attached document explains the reasoning and support for Defendant's request to continue this proceeding for a minimum of 4-months to a date no sooner than May 30, 2025, to allow eKnowledge (Defendant) the time to:

- Raise public awareness
- Retain public interest law firm representation
- Complete its conversion to a 501(c)(3) not-for-profit organization
- Establish and fund a GoFundMe account

I am a pro se litigant and I apologize in advance if the way I have presented this information is inconsistent with the norms of the court. I also apologize for the length of the document. Without the necessary expertise, it's difficult to know precisely what is relevant and normal at this stage and for this request.

As you will see from the information presented, we believe that not only is everything we have worked for, sacrificed for, financed, and built over the past 25 years dependent on the court granting our continuance, but the significant rights of students, schools, teachers, other prep organizations, states, and the general public will also be significantly impacted by the court's decision. This case also raises significant public policy issues which deserve a robust defense.

Overview of Request for Continuance

The Parties

We will constantly draw a distinction between the 65-year-old ACT not-for-profit and Plaintiff's new entity owned by Nexus Capital Management.

For that reason, "ACT nfp" will refer to the 65-year-old quasi-public organization that developed all of the content, copyrights, goodwill, and favored public standing, and who placed, for free, PDF versions of many of their retired exams into the public domain for many decades, and whose leadership previously referred to those retired exams as "copyleft."

"ACT Nexus" will be used synonymously with Plaintiff in identifying the newly-created, private-equity-owned, for-profit corporation called "ACT Education Corporation," which claims to have purchased (in April 2024) all of ACT nfp's content, IP, goodwill, and favored public standing.

Defendant Scott Hildebrandt/eKnowledge is a 64-year-old working man, currently with limited financial resources. eKnowledge does not have investors. All of the funding has come directly from me personally, and much of the more recent funding came from selling my home in

California. Since around 2004, eKnowledge has functioned much like a nonprofit, re-investing all profits into improving its test prep programs and expanding student access. eKnowledge has been working towards official 501(c)(3) nonprofit status and will complete that conversion by the end of Q1 2025. Over the past 25 years, I have personally funded the efforts to build this organization. This is my life's work.

The main public and private issues raised in this case:

- *whether a private equity firm can purchase retired exams created with public funds and released for decades into the public domain and then wield copyright protection like a sword to stop others from using the retired questions.*
- *How does statutory fair use apply*
- *How do equitable considerations apply*
- *How does public policy apply*

This case raises many complex issues that will very likely impact the rights of up to 40 million students and their families, teachers, schools, and states over the next ten years alone. Ultimately, it will probably impact the direction the SAT will also take, and that will ultimately impact the very nature of the public not-for-profit vs. private for-profit influence on higher education.

However, I do not have the financial resources to properly defend this important case on my own behalf. But I am absolutely confident that once this case and the issues raised by it are known to the media, academia, and the general public, we will find significant sources of financial backing and support from individuals, public interest groups, education foundations, legislators, and potentially even states attorneys general.

Request for Continuance

Because this cases raises complex and fundamental issues necessitating specialized legal assistance, and because the issues raised will impact the general public and public policy, and because there is an enormous asymmetry in resources, expertise, and information between the parties, and because this continuance will NOT cause Plaintiff to suffer any identifiable harm, and because the court has broad authority to ensure the interests of justice are maintained, and because competent legal representation is fundamental to those interests and without it both the Defendant's rights and those of the general public will be jeopardized, we are asking the court to **continue the proceeding by a minimum of 4-months to May 30, 2025,** to allow Defendant the opportunity to begin raising public awareness and eventually retain competent counsel to represent him and by extension the interests of millions of students, their families, schools, teachers, other prep organizations, and by extension the proper functioning of public higher education.

Balancing the equities and the interest of justice weighs heavily in support of allowing for this request. Supporting arguments are in the following sections.

Once competent counsel is obtained, the process can continue apace.

During The Continuance We Will:

1. **Raise public awareness:** We have identified a cadre of well-respected reporters and academics who have previously scrutinized the 2024 ACT Nexus takeover of ACT nfp. Their articles and writings warn that the private takeover ACT nfp will lead to unintended and bad consequences. We believe when this cadre (and others) become aware of this case and its implications, their reporting will start to raise public awareness which will enable us to retain competent representation for ourselves and defend the interests of the general public.
2. **Retain public interest firm:** This goes hand in glove with raising public awareness.
3. **Complete our NFP:** This has been part of our business plan for a long time and will be accomplished by the end of Q1 2025.
4. **Establish a fundraiser for legal fees (GoFundMe):** This is connected with the Ripe(ish) issue that will be addressed more fully below. We must know whether ACT Nexus will sue our yet-to-be-established, not-for-profit organization before we can establish the GoFundMe. If we establish the GoFundMe now for eKnowledge/Scott Hildebrandt, there will be an issue about using the funds for the benefit of the not-for-profit.
5. **Court review and staging:** If the court desires, we are agreeable to periodically updating the court about our progress in the three main areas (public awareness, public interest law firm, conversion to nfp) during the pause.

Legal Support for Requested Continuance

The Law in support of granting Defendant's request for a pause of a minimum of 4-months to allow time to obtain competent legal counsel in this matter.

The matter of delays for securing legal representation, especially in the context of public interest or pro bono representation, can be considered under several legal principles:

1. **Right to Counsel:**
    - The Sixth Amendment guarantees the right to counsel in criminal cases. In civil cases, courts often consider the equitable treatment of defendants, particularly if they might be indigent or if their case involves significant public interest or constitutional rights.
2. **Judicial Discretion:**
    - Judges have broad discretion under Federal Rule of Civil Procedure 54(b) and other procedural rules to manage the timing and pacing of legal proceedings. Courts can grant continuances or delays for various reasons, including to allow defendants to secure representation, especially if the absence of counsel could prejudice their case or if the case involves complex issues necessitating specialized legal assistance.
3. **Public Interest Law and Pro Bono:**

- Public interest law firms often engage in pro bono work, and courts are generally supportive of these efforts. There's no specific precedent for a *mandated* delay for this purpose, but courts should be sympathetic to reasonable requests for time, especially if the case has significant public interest implications or if the defendant's ability to mount a defense is genuinely at stake due to lack of representation.

4. **Relevant Cases and Practices:**

   - While not directly on point, cases like Faretta v. California (1975) address the right to self-representation but indirectly highlight judicial sensitivity to ensuring defendants have adequate representation. In civil contexts, courts should reference or be influenced by principles from criminal law regarding the adequacy of legal representation.
   - In practice, judges can look at:
     - Martinez v. Court of Appeal of California (2000), which discusses the importance of effective assistance of counsel in appeals, suggesting a judicial inclination towards ensuring adequate representation.
     - Situations where courts have granted stays or continuances for defendants to secure counsel, particularly in high-profile or complex litigation where public interest is significant.
   - Policy Guidance from agencies like the EEOC, which discuss prejudgment interest and its application, might be analogized in the broader context of ensuring fair legal proceedings, including the right to representation.

5. **Case Management:**

   - Under the Federal Rules of Civil Procedure, particularly Rule 16, courts are encouraged to manage their dockets to achieve the just, speedy, and inexpensive determination of every action. This includes considering requests for delays if they serve the interest of justice.

The court has the discretion to grant Defendant's request for a continuance. This would be done by balancing the need for a timely resolution and potential harm to Plaintiff in granting the delay, with potential harm to Defendant in not granting the delay, and generally with the rights and fairness to the parties involved.

Factual Support for Requested Continuance

Setting the context for our request to continue the Attorney Scheduling conference for minimum 4-months to a date no sooner than May 30, 2025, with continuing review by the court:

For generations, both the SAT and ACT have freely released their retired exams into the public domain and encouraged everyone to use them to help students prepare for their college entrance exams. The public interest not-for-profit SAT has operated this way since 1899 and the ACT has operated in the same way since its inception in 1959.

The ACT is used for:

- **College entrance exams**: who gets accepted to what colleges/universities
- **High school exit exams:** required by states and scores are used to allocate tax dollars.
- **Publicly funded scholarships**: scores are directly linked to the award of taxpayer funded scholarships.
- **College readiness:** if a student scores roughly a 21, in most states that student is considered "college ready." That means they don't have to spend the first year of college taking high school remedial course.

Since there are only two standardized college entrance exams, all schools, organization, or NFPs that prepare students for these exams, MUST teach directly to the SAT and ACT tests. In order to teach to these exams, preparers MUST have access to the retired questions—something both SAT and ACT have freely acknowledged by their long conduct of releasing the retired questions to the public domain and encouraging their use. All high schools, legitimate test prep organizations, and private tutors have used the retired questions for that very purpose. Using the retired questions in this manner fulfills ACT's oft-repeated mission statement to "help students and increase access."

From our first encounter with Plaintiff over a year ago, we assumed our two organizations were mission-aligned to help students and increase access. So, we were absolutely certain that any issues they had with us were just a misunderstanding and could be easily sorted out.

Very early on, long before a lawsuit was filed, we explained that, for roughly 15 years beginning in 2005, we went directly to students and families providing a high-quality prep program that helped over 300,000 families (mostly military and homeschool). Parents paid between $10 and $50 for a year's access to our program. Note: equivalent private tutored prep costs between $1,500 and $5,000 per student.

Further, we have received over 45,000 5-star reviews and thousands of amazing thank yous from parents and students who are grateful because they could not have afforded this level of prep without us. We gave Plaintiff access to those 45,000 comments and reviews, so they could confirm this for themselves.

In the beginning, our affiliate partners (NFPs, military organizations, homeschool organizations, Boy Scouts, US Youth Soccer, etc) conveyed the message directly to their members. We never paid for any of these affiliate relationships and that allowed us to keep the program costs very low, and in some cases totally free.

However, as the internet matured and organizations began monetizing their relationships, our ability to reach students and families in this way was greatly impacted. When we started in 2005, we could help thousands of families each month. But over time, that number declined to roughly 30 families a month.

We knew our program helped students and families, but because of the decline in our ability to reach those families, we decided to create a test prep program suitable for in-school classroom use, to be delivered via an official not-for-profit at a price that every school can afford. Over the past few years, we have been developing a "direct to school" program with associated student tracking and management tools. I sold my home of 20-years in California and used most of the proceeds to fund the development of this program. In developing this program, we worked with teachers and school administrators to create an effective and affordable way to prepare both public and private school students within the classroom.

This year we completed the beta testing, proved the concept, and finished gathering 3 years of independent data showing that students using our program inside the classroom increased an average of 4 ACT points (out of possible 36), and some increased as much as 13 points.

The next step of our business plan is to organize as an official NFP by the end of Q1 of 2025.

With our industry experience, freshly validated "school room" program, and independent data showing our program helps all students improve an average of 4 points, we are confident in finding donors, NFPs, foundations, etc. to support our educational mission on a much larger scale.

But the ACT Nexus lawsuit has put that process on hold.

We have explained all of this to Plaintiff, and it has baffled us that they continue to pursue us with a single-minded vengeance to put us out of business and stop us from helping students and fulfilling their stated mission of helping students and expanding access.

Nevertheless, during the entire process we acted in good faith at every stage:

- Each issue they raised about the wording on our website or in our program (whether we agreed or not) we immediately edited. We remain ready to work with them in any way regarding wording that they think might confuse the marketplace. We never intended to confuse anyone about who we are and what we do.
- When they requested a copy of our program so they could access it and confirm everything we were saying, we immediately complied.
- When they told us that the chances of resolving this matter where much higher if we could show that the ACT question stems did not constitute a significant portion of our program, we voluntarily disclosed each of the ACT question stems in our program. The results showed that the question stems make up only 0.017% of our program.
- When they claimed they needed 3 years of our financials in order to determine how much to charge us for a license agreement, we voluntarily complied.
- On Sept 28, 2023, Plaintiff asked us to propose a licensing agreement: "ACT invites eKnowledge to propose a solution that protects ACT's copyrights from unlawful infringement (including but not limited to **a licensing arrangement** for all ACT

copyrighted content eKnowledge has used and wishes to continue to use)." We accepted any reasonable license agreement Plaintiff wanted, yet they ignored their own offer.

- We retained a neutral expert IP attorney and professor to evaluate ACT Nexus' claims, and that evaluation concluded they would not prevail on their claims. Yet we continued to propose settlement and agreed to any reasonable licensing arrangement.

We have repeatedly explained to Plaintiff that while we are a very small organization, those we serve greatly depend on us because they have been left out of the current ACT Prep system. Most of these are military and homeschool families. We have also explained that all proceeds are reinvested to improve the program and reach more students. The financial documents already provided to Plaintiff show that for the past 3-4 years, while we have been developing our "school room" program, our total revenues have been between $75k and $100k per year.

We have willingly complied with every request ACT Nexus has made—except one. We cannot agree to their demand that we stop using the retired exam questions that ACT nfp freely released into the public domain over several generations of students since 1959. That is the one thing that cannot change if students are to have an equal, affordable, and fair chance at preparing for the ACT college entrance exam and qualifying for many state-funded scholarships.

Neutral Case Evaluation and Proposed Settlement

In May 2024, when things didn't immediately settle, I sought out a neutral expert to evaluate the Plaintiff's claims. We were fortunate to locate Mr. Bryan Wheelock, a principal attorney at Harness IP Firm in Washington DC., an IP expert, and an adjunct professor at Washington University School of Law. He **voluntarily** reviewed the facts and the case and wrote an opinion letter. He evaluated all of ACT Nexus' claims against copyright law (17 USC 107), the Lanham Act (15 USC 1124-1125) and relevant case law and concluded that ACT Nexus would not prevail. He also included what he believed was a reasonable settlement proposal for both sides.

His opinion letter and proposed settlement was shared with Plaintiff with high hopes it would completely resolve the matter. The conclusion states:

> *eKnowledge has delivered low-cost ACT test preparation services to thousands of students, its continuation is essential to making sure that ACT test is a test of a student's learning ability, and not his/her parents' ability to pay for an effective preparation course. eKnowledge has always cooperated with requests from ACT, Inc. and is addressing the bulleted points in your letter, we hope that in return you will acknowledge that the limited use of question stems is a fair use, and even if you do not agree, that you will provide a license of these question stems on fair, reasonable, and non-discriminatory terms, as your monopoly position requires.*

Please See May 13, 2024 opinion letter attached

ACT Nexus never responded to me and their next communication was personally serving their lawsuit at my front door.

Their approach and demeanor remained baffling. We sincerely believed that they simply did not understand the important nature of our work helping the families of military members, homeschoolers, and at-risk students in the classroom who were not well served by existing Prep programs; and we were doing this at no profit to our organization!

We were fulfilling ACT's mission statement better than they were. So, why were they trying to eliminate us? It just made no sense.

Final Settlement Proposal

So, on Nov 7, 2024, with their lawsuit pending, we put together another settlement proposal that included even more background about how we got started, who we were helping, and our mission. We even included letters from two schools (principal and ACT teacher) and 2 military NFPs stating how critical our program was for their students/members.

We asked that ACT allow us to use the question stems without charge or in the alternative give us a reasonable licensing arrangement. We once again explained that by end of Q1 2025 we would be fully converted to an official NFP and we wanted to know if that would make a difference in how they evaluated the case. If it did, we would attempt to hasten the process.

See attached letters from MOAA, AUSA, Whitehorse high school, and Bearden high school asking ACT that eKnowledge be allowed to continue using the retired questions.

On November 15, 2024 Plaintiff responded: NO, you must not use the retired exam questions and we will not license them to you.

At that point, we gave up attempting to resolve the matter and sadly we began to prepare our answer to the complaint and filed it on Dec 2, 2024. Since we were not represented by counsel, my son and I worked full-time for 2 weeks to research and prepare our Answer.

The Truth Comes Out

During this process, it became clear why we were struggling to understand ACT's actions and demeanor. Things began to fall into place when we discovered that the 65-year-old ACT nfp had been recently purchased by the private, for-profit corporation, Nexus Capital Management.

All along, we had assumed that we were dealing with the 65-year-old public-interest ACT nfp, and that they were operating in good faith consistent with their public mission statement to expand access for all students. This assumption was false. I felt foolish that I had tried so hard to work with them and had voluntarily handed over our proprietary work product, our financial information, had plead with them to understand our history, and had even involved leaders of schools and military not-for-profits asking them to write letters explaining the importance of our program to their members, students, and missions.

It became abundantly clear that ACT Nexus had never intended to resolve or settle. They had used our desire to work something out as cheap discovery. After realizing our VERY limited financials, they targeted us as the test case to set precedent for cutting off access to retired questions for everyone (schools, organizations, NFPs, etc). Additionally, they know about the success of our "school room" beta program and the independent data showing an average 4-

point improvement. We believe they fear that schools will begin using our program—especially when it will be delivered at a very low price by a true not-for-profit organization.

The ugly and sad truth is that ACT Nexus wants exclusive, monopolistic control over the test prep market and will stop at nothing to destroy anyone in their way. But that is the nature of the for-profit world. They have a fiduciary duty to their investors to act in this way. That is why they filed this lawsuit and why they are so focused on destroying my livelihood and life's work.

That is the heart of this case and why they are willing to go to war and spend money targeting a microscopic defendant who they KNOW does not have the resources to properly defend the case.

While Preparing our Answer, we discovered:

- The education community has treated ACT nfp as a highly-trusted public-interest entity that produces and administers valuable exams—NOT PREP.ACT was ***never*** considered to be a test prep company.
- According to Michael J. Paparella, Former West Region Director at ACT (1980-2004) *"If the practice test questions are from retired forms of the tests now in the public domain…they would be in the category of copyleft."* https://www.quora.com/Will-I-face-any-copyright-issues-if-I-use-the-questions-in-the-official-SAT-guide-in-my-SAT-preparation-videos
- 10 states pay for some or all of their students to take the ACT and **it is mandatory**.
- 19 states base publicly-funded scholarships on a student's ACT scores.
- High school students' scores on the ACT college admissions test have dropped to their lowest in more than three decades. However, independent data from public schools indicates that students using our PowerPrep program increased on average 4 points but up to 13 points.
- Since COVID, the trend is heavily toward ***reinstating*** required ACT or SAT standardized testing. Example: by 2025/26 ALL Ivy League schools will be either mandatory (5) or optional (3).
- Most of the selective universities will also be mandatory: MIT, Georgetown, Purdue, Caltech, University of Texas Austin, Stanford, Vanderbilt, etc.
- All of the US Military Academies are or will be mandatory.
- The importance and significance of doing well on the SAT and ACT is resurging.

Important Public and Private Issues Raised:

The minimum 4-month pause is necessary to allow Defendant reasonable time to retain competent representation in order to property and fairly present the court with arguments necessary to decide these public and private issues raised by this case.

It's important to note that I am not trained in this area of the law, yet these are the issues we were able to identify. An expert IP firm with similar resources that are available to Plaintiff, will undoubtedly discover even more important public and private interests:

- ***Fair use:*** *should a private equity corporation be permitted to deny access to decades of freely-released retired ACT questions that are vital in preparing students for the ACT exam which is used variously as a college entrance exam, a public high school exit exam, and as a qualifier for* ***publicly funded*** *scholarships? Additionally, the exams were created in the first place using billions of taxpayer dollars. Should access to equal prep for this exam be protected under federal statutory fair use? Absent this protection, private commoditization will likely take over another aspect of the American academy.*

- ***Educational freedom and access:*** *will denying access to the retired exam questions eliminate competition and create a monopoly or duopoly that will eliminate pricing pressure and cause prices to soar? Does educational freedom and access demand that schools, organizations, and NFPs have access to the previously released/retired questions in order to equally and fairly prepare students to take an exam that impacts college and scholarship opportunities, and in many cases impacts the future direction of a student's life?*
- ***Public policy****: Most colleges, universities, and scholarships are funded by public tax dollars. Should a single private company control who has equal access to qualify for post-secondary education in America? Should a private equity company have exclusive control over both the exams and the prep?*
- ***Converting NFP to private:*** *should the law, policy, and equity allow a private firm to pillage the public interest position and IP developed over 65 years of publicly favored existence as a public-interest NFP, especially when that NFP is so completely interwoven with the public education system, and when the ACT is used as a mandatory high school exit exam, a public college and university entrance exam, and as a qualifier for publicly paid scholarships? Should public-interest NFPs even be allowed to own IP that was developed over decades, in large part, because of their public interest NFP status and billions of public tax dollars? In the current tech-driven economic environment, there is an emerging threat where NFPs are used as an alternative method of funding tech/IP based startups. But should these "tech bro" private corporations be allowed to exert such an anti-competitive influence over public education, or should these situations be treated more like open-source software within the tech world?*

- ***Sherman Anti-Trust and Clayton Acts:*** *Our analysis finds striking similarities to the behaviors at issue in United States v. Microsoft Corp. (2001). The retired questions at issue* ***cannot be reused*** *by the test maker. Therefore, they have no value to the test maker. It's analogous to selling seats on a commercial airliner: once the flight is over,*

seats on that flight have NO value—it's silly to even discuss or attempt to visualize it. Yet this is precisely the position that Nexus Capital is taking. We believe that Plaintiff is abusing ACT nfp's copyrights to stop others from using essential test prep materials in an anti-competitive bid to clear the test prep market and allow ACT Nexus to leverage into a monopoly position in a new segment. They would do this using test questions that were created using billions of tax dollars as part of a not-for-profit public-interest mission. Plaintiff wants to leverage the ACT nfp's publicly-funded, advantaged, and highly-trusted position for private, monopolistic purposes—thus privatizing the gain and socializing the costs.

Further, not only is ACT Nexus attempting to stop everyone else from using the retired questions, they also want to be the only entity allowed to use the word "REAL" to describe test questions, whether they are sourced from retired tests or elsewhere. This creates a patently unfair outcome based on their position as the test maker. If this is allowed to stand, ***no*** *school, organization, or NFP will ever be able to compete against "REAL," no matter how closely they clone the ACT questions because in the end, only the test maker can make that claim.*

- ***First Amendment/Quasi-public nature of the ACT exam:*** *states pay billions of dollars to ACT, 10 states have made the test mandatory for their high school juniors or seniors, and 19 states have linked ACT scores directly to taxpayer-funded scholarships. Therefore, as a right, schools and taxpayers must have the ability to prepare their students for these exams as they deem appropriate and without a private equity company censoring access and content.*

- ***Logical and Legal Impossibility of ACT Nexus' Mission Statement Claims:*** *Should a private equity company that converts a 65-year-old public interest NFP to a private for-profit company be held to the prior NFPs mission statement, especially when they have publicly pledged to continue that same mission statement?*

  Janet Godwin, ACT's current CEO, publicly pledged on multiple occasions that:

  "The only thing that's changing is our tax ID,"

  "The core mission of ACT would remain unchanged…"

  "We are still the same ACT that people know and trust."

  Logical impossibility: The mission statement she is pledging to continue and that will remain UNCHANGED states:

  "ACT is a mission-driven ***nonprofit*** *organization. Our insights unlock potential and create solutions for K-12 education, college, and career readiness."*

  It is impossible for ACT Nexus to continue the ACT nfp's mission statement because their mission statement was **centered** on being a **NON-PROFIT**. A for-profit, private equity firm cannot continue the core mission statement of **being a nonprofit!**

Legal Impossibility and Federal Trade Commission Act (fraud): If Nexus were to follow the ACT mission statement (like they have pledged) they would commit fraud against their investors. They cannot serve two masters. They must either serve a public interest or a private profit interest; they CANNOT serve both. Since they are now a private for-profit company, they MUST serve the profit interest, and therefore, their claim that nothing has changed and they are continuing to operate under the same NFP mission is an unfair and deceptive act that violates the Federal Trade Commission Act and is misleading the market, their investors, and the general public. ACT Nexus is most assuredly ***not*** the same as ACT nfp.

Here is the heart of this lawsuit. ACT nfp was bleeding cash and laid off over 100 employees. Nexus saw a distressed organization and pounced (per their stated policies and procedures). As a for-profit corporation, they MUST increase revenues. Nexus desperately wants to stop all other providers from using retired exam questions in order to eliminate competition and then enter schools and the general public as the ONLY viable ACT prep.

- **Additional Abuse of nonprofit status*:*** So far, we have focused on the nature and use of the retired question stems. However, there are other relevant aspects to this issue.

  Over the past 65 years, ACT nfp has collected a vast array of private student data that students, schools, and states voluntarily provided to ACT nfp. Should students' private personal data provided to a public interest nonprofit be monetized by a private, for-profit corporation for the benefit of their shareholders and investors?

  Types of Data Collected and amassed: *Demographic Information* like age, gender, race/ethnicity, and socioeconomic status and geographic information (state, school district, high school). *Academic History:* High school courses taken and grades achieved, and GPA. *Educational and Career Aspirations:* Intended college major and career interests and plans post-high school. *Enrollment Data:* College enrollment patterns (which colleges students apply to and attend) and persistence and completion rates. *Student and Parent/Guardian Information:* Contact details for students and sometimes their parents/guardians, used for recruitment and outreach by colleges. *Behavioral and Interest Data:* ACT Interest Inventory results for career exploration and responses to non-test questions regarding educational plans, activities, and accomplishments.

  Amounts of Data Collected and Amassed: *Number of Students:* ACT Inc. has tested tens of millions of students annually since its inception in 1959. By 2019, approximately 52% of U.S. high school graduates took the ACT, totaling over 1.78 million students for that year alone. *Historical Data:* The ACT has records dating back to its first administration in 1959, with millions of test scores and related data points, and they have access to nearly 8 million student profiles from their datasets. *Longitudinal Data:* Databases like the Enrollment Management Database, ten-Year Trends Database, and College Completion Database track students from high school through college. *Specialized Datasets:* They

track both ACT test-takers and participants in their college planning programs, providing a comprehensive view of student interests, behaviors, and educational outcomes.

All of this data was provided to ACT nfp because they were a trusted public interest NFP. Unless ACT Nexus is stopped, ALL of this private data will be monetized by ACT Nexus for the benefit of their private investors.

Balancing the Equities and No Harm to Plaintiff

Defendant is fighting an asymmetric battle to protect its own economic and business life and to allow open, fair, and equal prep for all schools, organizations, and other NFPs to equitably prepare students for the ACT. A successful defense of this case will encourage equal and open access to colleges and prevent a single private equity firm from pillaging publicly trusted entities with the intent to commoditize and control access to postsecondary education, high school exit exams, and access to publicly funded scholarships.

A small delay in this process to allow the field to be evened, will avoid all of that unfairness and potential harm to both the Defendant and millions of future students.

In deciding whether to grant Defendant's request, the court should balance the benefits and harms that would occur to each side:

On the ACT Nexus side of the scales: there is no harm to Plaintiff that we could identify because:

- ***The questions are already in the public domain and have no value to the test maker:*** *the questions stems that we are using come from **r**etired exam questions that ACT nfp has placed into the public domain for generations and those retired questions have NO value to the test maker because they cannot be reused*
- ***The Questions were created and funded by the public****: Those retired questions ONLY exist because the education infrastructure gave ACT nfp a favored and trusted position for 65 years, based on their public interest nfp status and because billions of public dollars paid for the creation of those questions.*
- ***"Nothing has changed":*** *The ACT Nexus CEO promised their investors and the general public to continue operating **exactly as they had for 65-years** and that nothing was changing—only their tax ID. The ACT Nexus CEO has publicly and emphatically declared their mission statement would remain the same as the prior ACT nfp. The **singular** way they fulfilled their mission of expanding student access was by releasing the retired exams to the public.*

  ACT Nexus' organization and mission would not be impacted by this continuance because everything would continue exactly as it has for 65-years, therefore, this continuance cannot materially harm Plaintiff.
- ***Programs sold by Defendant****: Even if we assume that Plaintiff's claims for copyright infringement are valid, and that programs sold by Defendant during this continuance*

might harm a yet-to-be-determined or identified interest, over the past 2-3 years Defendant has been focused on creating their direct "to school-room" program and has sold on average of fewer than 30 programs each month to the general public. So, the number of programs that Defendant might sell during this continuance is insignificant and will cause virtually no financial harm to Plaintiff.

- ***Plaintiff's desire that Defendant have representation:*** *During discussions with ACT Nexus, Plaintiff has emphatically stated directly to me that they sincerely wished that I were represented by an attorney—stating that I didn't know what I was doing, and that working with an experienced attorney would make their lives so much easier. This continuance will grant their sincerely held wish.*

This continuance will not cause any definable harm to ACT Nexus' interests . During this minimum 4-month pause, their business will continue EXACTLY as it has for the past 65-years. Nothing will change—just as their CEO claimed. Given these facts, it is ***impossible*** for Plaintiff to suffer any significant harm from this short pause.

On the eKnowledge (Defendant) side of the scales

Without a minimum 4-month pause to allow eKnowledge to execute a process designed to gather support that will culminate with competent legal representation, eKnowledge will **likely be forced out of the ACT prep market entirely**, and lose a lifetime of effort, work, and investment, and all of the following important public and private interests will be compromised. Granting the request for a 4-month pause will avoid the harms to all of these important issues and interests:

- ***Interest of Justice:*** *this truly is a case of David vs Goliath. Plaintiff is a multi-billion-dollar conglomerate with a literal army of attorneys at their disposal. Defendant is a single person with working man finances attempting to protect a life's work of helping military and homeschool families and students in general. Fairness dictates that a minimum 4-month delay, designed to even the playing field and allow the Defendant the opportunity to present a case on equal grounds, is appropriate in the interest of justice.*
- ***Equality & Fairness:*** *Who will be harmed if the delay is not granted and Defendant is unable to mount a robust defense? Students from privileged socioeconomic backgrounds will continue to pay the $1500 to $5000 that private tutors typically charge for competent prep. The honors and AP level students will continue to perform well on the test without any or much assistance. The most vulnerable are the very ones that will be harmed. The less-privileged that don't have the money to pay for personalized private tutors will be left with only two options—1. pay ACT Nexus whatever they charge, or 2. Accept significantly sub-standard prep without retired ACT questions (if it is even available). If Defendant and all other schools, teachers, and other prep organizations are shut out, the most vulnerable and overlooked sector of the market will lose out because no other program is designed for them. For example, we have students that routinely go from a 12 to a 26. Those students were already overlooked until they used our program. Their rights should be protected.*

- ***Expanded Access to higher education and Scholarships:*** *Competition is the only way to drive innovation and access. By allowing other groups, organizations, schools, and NFPs to equally and fairly prepare students for these exams, the marketplace will provide the greatest possibility for access in terms of price and teaching style/manner. This is consistent with ACT nfp's and ACT Nexus' claimed mission statement of expanding student access.*
- ***Good public policy:*** *As a society we want everyone to have a fair and equal shot at life (equity and equality of opportunity). A large part of that depends on access to higher education. A good education is a cornerstone of economic and social wellbeing. Expanding competition for ACT prep will have a beneficial impact on expanding unique, innovative, and affordable access for students who the system left behind.*
- ***Morality:*** *The ACT test is the gateway to a college education. The public and the education system trusted ACT nfp and paid billions of dollars for the creation of these questions; therefore, the public has the right to benefit from the results. What ACT Nexus is attempting is more akin to well planned and executed grift where a very rich and privileged group is preying on a public interest NFP and the public education system. It's the wealthy, privileged, old eating the less advantaged, most vulnerable young. In a properly-functioning society, the old and successful sacrifice for the young—this is civic duty. ACT nfp claimed that role for 65 years. Now, ACT Nexus is attempting to make the public pay the costs while they privatize the profits. This is an immoral position.*
- ***Defense of public education:*** *Students, schools, and families are voiceless because there is no moneyed interest to defend and align with their interests. The entire Wall Street industry is aligned against them as they attempt to commoditize and subscriptionize EVERYTHING (including public education). If Defendant cannot mount a defense and Plaintiff is successful, all NFP's, foundations, etc. will be in the private corporate world's cross-hairs to be converted to private for-profit entities—look at college sports for a recent example of where this will go.*
- ***General Abuse of nonprofit status:*** *Nonprofits traditionally pursued public interest missions in the physical world (feeding the homeless, providing medical services, etc.) The not-for-profit classification was never intended to be an incubator for privately-owned intellectual property or personal data. If Plaintiff's claims are successful, it will provide precedent for nonprofits of all types to be used as mendacious bait-and-switch vehicles for the transfer of personal data, AI models, and other deceptively-developed IP assets into private hands, against the interests of the public.*

Summary: Balancing the Equities and Justice

On the Plaintiff's ACT Nexus side of the scales is: NOTHING**.** It's empty. In fact, it is LESS than empty because not only is there NO benefit to weigh for Nexus; there is literally NO harm because the retired questions CANNOT be reused and the small number of students using our program actually fulfills ACT Nexus' mission statement of helping students and expanding access. Nexus places NOTHING into the scale!

On Defendant's eKnowledge side of the scale is: the interests of justice, equity, fair use law, good public policy, general fairness and reasonableness, morality, expanded access to prep, expanded access to public scholarships, lower prices, more options, preventing Big Tech abuse of not-for-profit status, and defending public education against private for-profit efforts to commoditize, monetize, and subscriptionize students and their families.

Defendant is alone, fighting a multi-billion-dollar conglomerate to protect his life work of providing affordable prep to students who would otherwise have been left behind by the system. He is further fighting to allow open, fair, and equal prep for all schools, organizations, and other NFPs so that they can maintain access to the retired questions in order to equitably prepare students for the ACT.

A small delay in this process to allow the field to be evened, will avoid all of this unfairness, asymmetry, and potential harm to both the Defendant and millions of future students.

Bad Faith

A further consideration that weighs in favor of granting a minimum 4-month pause is the bad faith Plaintiff has consistently exhibited:

Settlement: *Plaintiff held out the possibility of settlement for many months, in bad faith, never intending to settle. It was an attempt to run out the clock and force a fast and unfair conclusion using their HUGE legal and monetary advantage. We were entirely focused on complying with each request made by Plaintiff, all the while assuming a resolution was going to happen. We have only focused on the legal process since Dec 2 when we filed our answer because it became clear that Plaintiff had been operating in bad faith all the while.*

Website verbiage: *we edited our website and program each time Plaintiff raised an issue about the verbiage, and we remain disposed to continue that process.*

Our program: *when Plaintiff asked for access to our program, we immediately furnished with detailed explanations.*

Percentage of ACT questions: *when Plaintiff implied that settlement was likely if the ACT question stems did not constitute a large part of our program, we immediately showed them the question stems make up only 0.017% of our program.*

Profit and Loss: *when they asked for our financial information because they claimed it was needed to decide how much to charge us for licensing, we voluntarily complied.*

NFP Status: *We asked repeatedly whether our NFP status would impact their decisions. They still have not answered this question.*

Retired Questions: *the retired questions have no value unless they are trying to create a monopoly* ***in the prep market.***

Rejected Their Own Settlement Offer: *On Sept 28, 2023, Plaintiff asked us to propose a licensing agreement, "ACT invites eKnowledge to propose a solution that protects ACT's copyrights from unlawful infringement (including but not limited to* ***a licensing arrangement*** *for all ACT copyrighted content eKnowledge has used and wishes to continue to use)." We proposed any reasonable license agreement they wanted, yet the ignored their own offer.*

Mission Statement: *Their CEO claimed nothing would change, including the ACT nfp mission statement. This is a legal and logical impossibility and a blatant attempt to manipulate investors and the general public and most importantly the education establishment and states that pay billions to ACT.*

Monopolistic Goal*: The Proof—why is Plaintiff spending all this time and money suing us—a micro player? Winning this case and establishing this precedent to cut off access to the retired questions is central to ACT Nexus' planned model to exercise monopolistic leveraged control over the retired questions to stop everyone else from accessing them. These retired questions only have value to ACT Nexus to the extent they can enforce the copyright and stop others from using them.*

The public literally paid billions to ACT NFP to create these questions, now a private entity wants to pillage all of that publicly paid for content.

Not Ripe(ish)

Another factor that weighs in support of granting a minimum 4-month pause is the issue of Ripeness (ish). This is a separate analysis, but it impacts our request for a delay. We have repeatedly explained to Plaintiff that our plan is to convert to a not-for-profit 501(c)(3) by the end of Q1 2025. We have also repeatedly asked whether that conversion would impact their approach and treatment of our situation. In other words, would they stop pursuing us and allow us to use the retired questions. They have yet to answer that question.

Nevertheless, once the conversion happens, going forward, the actual "defendant" will be the not-for-profit. Therefore, we should wait for the not-for-profit to be established and allow the Plaintiff to decide whether they will join the not-for-profit to this suit.

This is another reason to delay the attorney scheduling for a minimum of 4-months.

Conclusion:

This continuance is in the interest of justice in order to balance the structural asymmetry of information, expertise, and resources that currently exists in this case between Plaintiff and Defendant, and because the case raises significantly complex issues that required expertise currently beyond Defendant's ability, and because the cases raise significant issues that could impact a significant portion of the general public and the American education system generally.

Also, because Plaintiff will suffer no material or actual harm, it is justified to continue this proceeding to a date no sooner than May 30, 2025, to allow Defendant the opportunity to raise public awareness and eventually retain expert legal counsel to represent him and defend all of the important interest identified in this document.

Once competent counsel is obtained, the process can continue apace.