IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

ROXANNE McEWEN, et al.,

Plaintiffs,

v.

BILL LEE, in his official capacity as Governor of the State of Tennessee, et al.,

Defendants,

and

NATU BAH, et al.,
Intervenor-Defendants.

Case No. 20-0242-II

Hon. Anne C. Martin

INTERVENOR-DEFENDANTS' CONSOLIDATED JOINT REPLY IN SUPPORT OF THEIR MOTIONS FOR JUDGMENT ON THE PLEADINGS

BEACON CENTER OF TENNESSEE

Braden H. Boucek (BPR No. 021399)
P.O. Box 198646
Nashville, TN 37219
Tel: (615) 383-6431
Email: braden@beacontn.org

Attorney for Bria Davis / Star Brumfield

Jason I. Coleman (BPR No. 031434)
7808 Oakfield Grove
Brentwood, TN 37027
Tel: (615) 721-2555
Email: jicoleman84@gmail.com

Local Counsel for Natu Bah / Builguissa Diallo

INSTITUTE FOR JUSTICE

Arif Panju* (TX Bar No. 24070380)
816 Congress Avenue, Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Email: apanju@ij.org

David Hodges* (D.C. Bar No. 1025319)
Keith Neely* (D.C. Bar No. 888273735)
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Email: dhodges@ij.org
Email: kneely@ij.org

Tim Keller* (AZ Bar No. 019844)
398 S. Mill Avenue, Suite 301
Tempe, AZ 85281
Tel: (480) 557-8300
Email: tkeller@ij.org

*Admitted *pro hac vice*
Attorneys for Natu Bah / Builguissa Diallo

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The ESA Pilot Program, Tenn. Code Ann. §§ 49-6-2601, *et seq.*, (or "Pilot Program"), is in harmony with Tennessee law. As Intervenor-Defendants Natu Bah, Builguissa Diallo, Bria Davis, and Star Brumfield ("Parents") explained in their opening briefs,[1] they are entitled to judgment on the pleadings because Metro Plaintiffs and McEwen Plaintiffs (collectively, "Plaintiffs")[2] have failed to state a claim for which relief can be granted. Parents do not belabor those arguments below. Instead, they confine themselves to four points in reply to arguments raised in Plaintiffs' response briefs.[3]

Parents first show how Plaintiffs misstate key aspects of the Pilot Program in support of their legal claims. Second, Parents demonstrate that Plaintiffs' claims under Article XI, Section 9 ("Home Rule Amendment") fail as a matter of law because those claims require inserting new words into the text of the Amendment, something the Tennessee Supreme Court has never done. Third, Parents explain that Plaintiffs' claims under the Tennessee Constitution's equal protection guarantees also fail because the proper focus of a court's analysis here centers on Tennessee children, not on school districts. Fourth, Parents show that the Court should grant judgment to Parents on Plaintiffs' claims under Article XI, Section 12 ("Education Clause") because those claims require accepting that the Clause forbids the General Assembly from funding any educational alternatives outside of the

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[1] Parents have filed the same consolidated reply brief in both case No. 20-0143-II and case No. 20-0242-II. Parents will refer to their Memorandum of Law in Support of Intervenor-Defendants' Joint Motion for Judgment on the Pleadings Under Rule 12.03 filed in Case No. 20-0143-II as "Parents' MJP (Metro)," and will refer to the similarly titled brief filed in Case No. 20-0242-II as "Parents' MJP (McEwen)."

[2] Parents will refer to Plaintiffs in Case No. 20-0143-II as the "Metro Plaintiffs," and they will refer to the Plaintiffs in Case No. 20-0242-II as the "McEwen Plaintiffs."

[3] *See* Plaintiffs' Response in Opposition to the Motion for Judgment on the Pleadings by Intervenor-Defendants Nate [sic] Bah, et al. (Case No. 20-0143-II) ("Metro Resp."); Plaintiffs' Consolidated Opposition to the State Defendants' Motion to Dismiss; Greater Praise Christian Academy, Alexandria Medlin, and David Wilson, Sr.'s Motion to Dismiss Under Rule 12.02(6); and Bria Davis, Star Brumfield, Natu Bah, and Builguissa Diallo's Joint Motion for Judgment on the Pleadings (Case No. 20-0242-II) ("McEwen Resp.").

public school system—but the Education Clause contains no exclusivity restriction. Finally, Parents incorporate herein the State Defendants' arguments in their reply supporting their motion to dismiss McEwen Plaintiffs' Causes No. 4 (Tenn. Code Ann. §§ 49-3-351, *et seq.*, "BEP Statute") and No. 5 (Tenn. Const. art. II, § 24 and Tenn. Code Ann. § 9-4-601), and rest on their opening brief, *see* Parents' MJP (McEwen).

Perhaps the most striking part of the Plaintiffs' response briefs is that their constitutional claims require treating Tennessee families and their children as mere conduits for directing money into public school districts—as a matter of constitutional law. But the power exercised by the General Assembly to pass the ESA Pilot Program is power that derives from the people, not school districts, and thus elevating school districts above children conflicts with both the structure and spirit of the Tennessee Constitution. *See* Tenn. Const. art. I, § 1 ("That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness[.]"). The Court should reject Plaintiffs' invitation to turn the Tennessee Constitution on its head.

I. Plaintiffs Misstate and Misapprehend Key Aspects of the ESA Pilot Program.

Plaintiffs' responses to Parents' motions for judgment on the pleadings rely heavily on facts at odds with the Pilot Program's statutory text. For example, both Metro Plaintiffs and McEwen Plaintiffs assert that the ESA Pilot Program applies to counties. *See* Metro Resp. at 4; McEwen Resp. at 2. It does not. The plain text of the Pilot Program makes it unambiguously clear that it applies to students in Local Education Agencies ("LEAs"), Tenn. Code Ann. §§ 49-6-2602; 49-6-2603(a)(3), a defined term that refers to "school

districts" and in no way to county governments, *see id.* § 49-1-103(2).[4] As Parents explain in Part II, *infra*, Plaintiffs' theory under the Home Rule Amendment requires treating LEAs and counties as interchangeable, and ignoring statutory text that confirms they are not. Metro Plaintiffs also incorrectly assert that the Pilot Program's Education Savings Accounts (ESAs) are "funded by . . . local funds." Metro Resp. at 2. That is incorrect. Only state funds are used to fund ESAs, not local funds.[5] Tenn. Code Ann. § 49-6-2605(b)(1) ("The ESA funds for participating students must be subtracted from the state BEP funds otherwise payable to the LEA.").

II. Plaintiffs Have Failed to State a Claim Under the Home Rule Amendment.

Plaintiffs' response briefs confirm that their claims require re-writing the Home Rule Amendment. They repeatedly assert in their briefs that the ESA Pilot Program violates the Home Rule Amendment because it "affects" Shelby County and Metro. *See* Metro Resp. at 8–9 (using "affects" instead of "applicable" to describe the relationship between the Pilot Program and a county's governmental or proprietary functions); McEwen Resp. at 19–22 (same). But the framers of the Home Rule Amendment insisted that a law must be "applicable" to a county or municipality in its "governmental or proprietary capacity." *See* Tenn. Const. art. XI, § 9. If the framers wanted to broaden the scope of the Amendment they could have easily done so—but chose not to. The Court should uphold "the

[4] "Local Education Agency" unambiguously refers to any "public school system or school district created or authorized by the general assembly." Tenn. Code Ann. § 49-1-103(2).

[5] The Pilot Program is funded through state dollars as explained in the statute. *See* Tenn. Code Ann. § 49-6-2605. First, the *amount* of the ESA is calculated: "The maximum annual amount to which a participating student is entitled under the program must be equal to the amount *representing* the per pupil state and local funds generated and required through the basic education program (BEP)" under state law. *Id.* § 49-6-2605(a) (emphasis added). Second, after the *amount* is determined, the next step is to disburse it to the student using only *state*—not local—BEP funds: "The ESA funds for participating students must be subtracted from the *state* BEP funds otherwise payable to the LEA." *Id.* § 49-6-2605(b)(1) (emphasis added). Contrary to Plaintiffs' assertion, the counties are not using their local tax revenue to fund ESAs.

intentions of the persons who ratified the constitution." *See Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995).

In their opening briefs, Parents explained that in the first decade after the Home Rule Amendment was ratified the Tennessee Supreme Court twice rejected attempts to expand its scope, as Plaintiffs attempt to do here. *See* Parents' MJP (Metro) at 6–7 (citing *Fountain City Sanitary Dist. v. Knox Cty. Election Comm'n*, 308 S.W.2d 482 (Tenn. 1957), and *Perritt v. Carter*, 325 S.W.2d 233 (Tenn. 1959)); Parents' MJP (McEwen) at 6–7 (same). In response, Plaintiffs *ignore both cases*—binding precedent—and fail to explain why the Court should do the same.

Tennessee Supreme Court precedent provides no support for Plaintiffs' attempt to expand the scope of the Home Rule Amendment by including laws "affecting" counties. Plaintiffs' novel legal theory relies on two cases. First, Plaintiffs cite *Chattanooga-Hamilton County Hospital Authority v. City of Chattanooga*, 580 S.W.2d 322 (Tenn. 1979). Metro Resp. at 9; McEwen Resp. at 23. But Plaintiffs fail to note that the law challenged in that case, *on its face*, concerned a hospital district "acting *on behalf of the County*," and for this reason the Supreme Court found there existed "an obvious basis for requiring [local] approval." *Id.* at 328 (emphasis added). It is thus unremarkable that the Tennessee Supreme Court noted the law could "affect the County" when the challenged law itself directly references the county. Plaintiffs ignore what the Court found "obvious," *see id.*, but it directly undermines their attempt to expand the Home Rule Amendment in order to strike down a law that makes no reference at all to counties. Second, Plaintiffs also cite *Davidson County v. City of Nashville*, 228 S.W.2d 89 (1950). *See* Metro Resp. at 10; McEwen Resp. at 22. But Plaintiffs fail to mention that *Davidson County* does not interpret the Home Rule Amendment because it wasn't yet part of the Tennessee Constitution—the

Amendment was ratified *three years later*, in 1953. *See Chattanooga-Hamilton Cty. Hosp. Auth.*, 580 S.W.2d at 324 n.1. These two cases do not support Plaintiffs' novel legal theory.

Plaintiffs fare no better when claiming it is "irrelevant" that the charters for Shelby County and Metro[6] prohibit the counties from controlling public education in local school districts. *See* Metro Pls.' Resp. at 9–11; McEwen Pls.' Resp. at 23. According to Plaintiffs' legal theory, the Home Rule Amendment allows a county to insist on local approval of an educational option before it becomes available to children assigned to school districts—even when the county is legally prohibited by its charter from controlling public education in those school districts. That is transparently illogical. The charters are relevant because they reflect the scope of Shelby County's and Metro's power—and that power is not broad enough to act on the relief that Plaintiffs are asking of the Court.

Plaintiffs have failed to state a claim under the Home Rule Amendment because their claims conflict with the plain text of the Amendment, the ESA Pilot Program, and binding precedent. Nor do the counties' charters empower them to act on the relief that Plaintiffs ask of this Court. Thus, the Court should grant Parents judgment on Plaintiffs' Home Rule Amendment claims.

III. The ESA Pilot Program Does Not Violate the Equal Protection Guarantees of the Tennessee Constitution. Those Protections Belong to Tennesseans, Not Districts.

Although their claims slightly differ,[7] the equal protection claims raised by Metro Plaintiffs and McEwen Plaintiffs both suffer from the same structural defect: Casting the Tennessee Constitution's equal protection guarantees as protecting school districts rather

[6] Parents will refer to Plaintiff Metropolitan Government of Nashville and Davidson County as "Metro" and Plaintiff Shelby County Government as "Shelby County."

[7] Metro Plaintiffs' equal protection claim alleges that the ESA Pilot Program violates Article I, Section 8 and Article XI, Section 8. McEwen Plaintiffs' equal protection claim alleges that the Pilot Program violates Article I, Section 8 and Article XI Sections 8, 12. *See* Parents' MJP (McEwen) at 13.

than individual Tennesseans. As explained below, this defect is fatal. Thus, this Court should enter judgment in Parents' favor on Plaintiffs' equal protection claims. Parents first address Metro Plaintiffs' equal protection claims and turn next to McEwen Plaintiffs' claims.

First, Metro Plaintiffs' equal protection claims fail as a matter of law. *See* Parents' MJP (Metro) at 12–15. Their response brief concedes that equal protection "requires *individuals* in like categories to be treated alike." *See* Metro Resp. at 13 (emphasis added). Parents agree. But in the same breath, Metro Plaintiffs ignore what they write. They fail to frame an equal protection claim based on the guarantees protecting individual parents and children. Rather, Metro Plaintiffs frame their equal protection claim based on the ESA Pilot Program creating an "arbitrary classification" because the General Assembly is "imposing the ESA Act on Davidson and Shelby counties" and not on "equally-poorly performing LEAs." *See id.* at 11. In other words, to create an arbitrary classification, Metro Plaintiffs resort to treating children as mere conduits for funding public school districts—not as the individuals that the equal protection guarantees were framed to protect.

Properly analyzed, the ESA Pilot Program is an educational option that benefits *individuals*. The Pilot Program relies solely on state funds in the Basic Education Program ("BEP"). The Pilot Program does not violate the Tennessee Constitution's equal protection guarantees because BEP funds continue to follow the individual child. If a child uses the ESA Pilot Program,[8] their full state-funded BEP allocation will fund their ESA, *see* Tenn. Code Ann. § 49-6-2605(a), and if a child remains in their assigned public school, their full state-funded BEP allocation will remain with their assigned public school,

[8] Metro Plaintiffs' equal protection claims also suffers from the same problem infecting their Home Rule Amendment claim: treating counties and LEAs as interchangeable. *See* Metro Resp. at 11 (alleging an arbitrary classification between similarly situated "Davidson and Shelby counties" and "equally-poorly performing LEAs").

see id. § 49-3-307(a)(11) ("The formula shall be student-based such that each student entering or exiting an LEA shall impact generated funding."). There is no unequal treatment between individuals who participate in the Pilot Program and those who do not.

Metro Plaintiffs also complain that Parents mischaracterize their equal protection claim under *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) ("*Small Schools I*") as seeking "identical opportunities for every student in Tennessee with identical amounts of money[.]" Metro Resp. at 13 (labeling Parents' characterization of their claim as a "straw man"). But Parents did not mischaracterize what Metro Plaintiffs allege—instead, Parents pointed out the implications of Metro Plaintiffs' legal theory. *See* Parents' MJP (Metro) at 13–14. In other words, Parents showed that in order to accept Metro Plaintiffs' argument under equal protection, the Court must find that *Small Schools I* requires identical educational opportunities to each student that cost exactly the same amount of money—and that any difference whatsoever constitutes an equal protection violation. *See id.* at 13 (arguing that Metro Plaintiffs stretch *Small Schools I* by transforming "substantial equality" into "exactly identical" to prevail on their equal protection claim). In response, Metro Plaintiffs have offered *nothing* to show that the legal theory underlying their claim does not require reading *Small Schools I* in this radical way. This is because they cannot do so. Accordingly, this Court should enter judgment in Parents' favor because Metro Plaintiffs have failed to state an equal protection claim.

Second, McEwen Plaintiffs' equal protection claims also fail as a matter of law. *See* Parents' MJP (McEwen) at 13–16. Their equal protection claims are based on the same two provisions invoked by Metro Plaintiffs, with the addition of the Education Clause which they use to bolster their equal protection claim by arguing that it contains an exclusivity requirement (that does not exist) which prohibits any educational options other than the public school system. *See* McEwen Resp. at 35–36. But as Parents explained in their

opening brief and also explain in Part IV, *infra*, the Education Clause of Article XI, Section 12, does not require the General Assembly to exclusively support a system of free public schools—rather, it may provide Tennessee children with additional educational options *in addition to* a system of free public schools. *See* Parents' MJP (McEwen) at 15, 17–18. As with Metro Plaintiffs' equal protection claims, McEwen Plaintiffs' claims also require stretching *Small Schools I* in order to transform "substantial equality" into "exactly identical"—which is the only way their allegations can be read to state a claim. *See id.* at 14–15. After Parents laid bare the implications of their legal theory, *see id.*, McEwen Plaintiffs offer nothing in response, nor explain why the Court should apply *Small Schools I* in this radical way.

McEwen Plaintiffs' response confirms that their equal protection claims, like Metro Plaintiffs' claims, require treating parents and children as mere conduits for money into school districts. *See* McEwen Resp. at 35 ("The two districts lose . . . BEP funding for each student who leaves . . . ."). As Parents explained above, the Tennessee Constitution's equal protection guarantees protect individuals, not school districts, and McEwen Plaintiffs' failure to conform their claims to this constitutional reality proves fatal. Children are treated equally because the BEP funds follow the child if that child chooses to remain in their assigned public school, or if they choose to leave using an ESA. In both circumstances, the individual child receives their full state-funded BEP allocation. Accordingly, McEwen Plaintiffs have failed to state a claim for unequal educational opportunity and the Court should render judgment in Parents' favor.

IV. The ESA Pilot Program Does Not Violate the Education Clause.

Plaintiffs' claims under the Education Clause fail as a matter of law. Their briefs in response to Parents' motion for judgment on the pleadings confirm that their claims survive only if the Court accepts that the Education Clause operates to accomplish one thing and

one thing only: not funding any educational alternatives outside of a system of free public schools.[9] Metro Resp. at 19–21; McEwen Resp. at 38–43. But as Parents explained in their opening briefs, the Education Clause is framed to protect Tennessee families and their children, not school districts. Parents' MJP (Metro) at 15–16; Parents' MJP (McEwen) at 16–18. Accordingly, it is wrong to view the Education Clause as forbidding educational alternatives that Tennessee chooses to provide outside those districts. *See* Parents' MJP (Metro) at 15–16; Parents' MJP (McEwen) at 16–20.

As Parents explained in their opening briefs, nearly every other state supreme court interpreting similar constitutional provisions has rejected "exclusivity" claims nearly identical to those raised by Plaintiffs here. *See* Parents' MJP (Metro) at 15 n.8 (collecting cases); Parents' MJP (McEwen) at 17–18 (same). Parents will not repeat those arguments here but rather address the three main arguments offered by Plaintiffs in response.

First, Metro Plaintiffs try to distinguish these cases by predictably focusing on funding implications for public school districts, while ignoring what the cases reflect: state high courts across the country have repeatedly rejected exclusivity claims. *Compare* Metro Resp. at 20 *with* Parents' MJP (Metro) at 15–16.

Second, McEwen Plaintiffs invoke *Cain v. Horne*, 202 P.2d 1178, 1183 (Ariz. 2009), for the proposition that the State of Arizona precluded vouchers under Arizona's Education Clause. McEwen Resp. at 41–42. But that is not so—the voucher program at issue in *Cain* was struck down under the state's Blaine amendment, Ariz. Const. art. IX, § 11, and four

[9] Plaintiffs' exclusivity argument will have collateral damage beyond this case. Tennessee has been operating an ESA program for students with special needs since 2015 (Tennessee Individualized Education Program, Tenn. Code Ann. §§ 49-10-1401–1406). Like the ESA Pilot Program, Tennessee's ESA program for special-needs students is an educational option in addition to the state's system of free public schools, and it is also funded with "state funds otherwise payable to the LEA." *Id.* at § 49-10-1405(a)(1). Under Plaintiffs' view of the Education Clause, students with special needs could also lose their ESAs and be forced back into schools that failed to meet their unique needs.

years later an ESA Program took its place and was upheld by the Arizona Court of Appeals in *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. Ct. App. 2013). That ruling and Arizona's ESA program still stand.

Finally, McEwen Plaintiffs rely heavily on the only outlier, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), in support of their argument that the broad language in the Education Clause's first sentence ("recogniz[ing] the inherent value of education and encourag[ing] its support"), should be "defined and restricted" by the second sentence because it mandates a system of free public schools. McEwen Resp. at 39. But in *Holmes*, the Florida Supreme Court was interpreting a unique provision that imposes a "paramount duty" on the State, *see* Fla. Const. art. IX, § 1(a), and every single state supreme court considering an exclusivity argument based on *Holmes* has rejected it. *See, e.g.*, *Meredith v. Pence*, 984 N.E.2d 1213, 1223–24 (Ind. 2013) (refusing to follow *Holmes*); *Schwartz v. Lopez*, 382 P.3d 886, 898 (Nev. 2016) (holding "plaintiffs' reliance on *Bush v. Holmes* . . . is inapposite" because "Florida's constitutional uniformity provision is different"). On its own merits, *Holmes* is a singularly unpersuasive decision. One has only to compare the majority and dissenting opinions to appreciate how flawed the majority's reasoning was and how glaring its many errors, which are too numerous to catalogue here.[10]

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[10] *See*, *e.g.*, Jamie S. Dycus, *Lost Opportunity: Bush v. Holmes and the Application of State Constitutional Uniformity Clauses to School Voucher Schemes*, 35 J.L. & Educ. 415 (2006) (documenting critical flaws in court's reasoning, including failure to reconcile new interpretation of uniformity provision with past practice and precedent); Lila Haughey, *Case Comment: Florida Constitutional Law: Closing the Door to Opportunity: The Florida Supreme Court's Analysis of Uniformity in the Context of Article IX, Section 1*, 58 Fla. L. Rev. 945, 953 (2006) ("[W]hen the [*Bush v. Holmes*] court additionally required all state-funded education programs to adhere to strict uniformity standards, it abandoned sixty-eight years of state education jurisprudence"); Clark Neily, *The Florida Supreme Court vs. School Choice: A "Uniformly" Horrid Decision*, 10 Tex. Rev. L. & Pol. 401, 412 (2006) ("The majority's opinion in [*Holmes v. Bush*] is among the most incoherent, self-contradictory, and ends-oriented court decisions in recent memory"); *Recent Development*, 33 Fla. St. U.L. Rev. 1227, 1236–39 (Summer 2006) (discussing decision and pointing out that the dissent provides a more logical and persuasive framework than the majority); Editorial, *Why judges matter; School choice*, The Economist, Jan. 14, 2006 (N. Am. edition); George F. Will, *Students disrupted by*

That Plaintiffs continue to frame constitutional claims, including under the Education Clause, that require courts to treat children as mere conduits for money ignores the role that individuals serve in our state charter's constitutional architecture. *See* Tenn. Const. art. I (Declaration of Rights). The Education Clause, properly interpreted and read alongside Article I, does not tolerate what Plaintiffs attempt. It also ignores the pre-existing fundamental constitutional right to opt out of the public-school system and to direct the education and upbringing of children consistent with their own beliefs. *See In re Knott*, 197 S.W. 1097, 1098 (Tenn. 1917) (the interest of a parent "to its [child's] tutorage" is "sacred"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (striking down law requiring every child to attend a public school as "unreasonably interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"). Thus, the Clause must be interpreted in light of who it is framed to benefit—individuals. The ESA Pilot Program conforms to these principles and complies with the Education Clause. Thus, the Court should enter judgment in Parents' favor.

CONCLUSION

The ESA Pilot Program fully complies with the Tennessee Constitution, the BEP Statute, and Tenn. Code Ann. § 9-4-601. None of the three causes of action raised by Metro Plaintiffs, nor the five causes of action raised by McEwen Plaintiffs, states a claim upon which relief can be granted. For these reasons, the Court should grant Parents' motion for judgment on the pleadings.

Dated: April 27, 2020.

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political struggles, The Miami Herald, March 28, 2006, at A19; John Tierney, Op-Ed, *Black Students Lose Again*, New York Times, Jan. 7, 2006, at A11; Andrew Coulson, Op-Ed, *War Against Vouchers*, Wall Street Journal, Jan. 9, 2006, at A13.