UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON, *Plaintiffs*, v. ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation, *Defendants*.	:	No. 18-cv-00443-CCC

MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

Common Cause hereby seeks leave to participate in this case as *amicus curiae* in support of Defendants. Movant's proposed brief is attached as Exhibit A.

A district court has broad discretion to permit an *amicus curiae* to participate in a pending action. *Wayne Land & Mineral Grp. v. Del. River Basin Comm'n,*

No. 3:16-CV-00897, 2016 WL 7256945, at *1 (M.D. Pa. Dec. 15, 2016); *Waste Management of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995).

Common Cause is nonpartisan democracy organization dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. Its interest in this litigation derives from its long history at the forefront of efforts to combat gerrymandering, no matter what party is responsible. Common Cause has a significant interest in ensuring that this Court, in its examination of the Pennsylvania Congressional Redistricting, is fully informed about all aspects of relevant redistricting law.

WHEREFORE, Movant, Common Cause, requests that this Court grant its Motion for Leave to Participate as *Amicus Curiae*.

Respectfully submitted,

/s/ Thomas J. Miller

Martin J. Black (PA I.D. No. 54319)
Sharon K. Gagliardi (PA I.D. No. 93058)
Kelly A. Krellner (PA I.D. No. 322080)
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Counsel for *Amicus Curiae* Common Cause

CERTIFICATE OF CONCURRENCE

Pursuant to Local Rule 7.1, I, Thomas J. Miller, hereby certify that counsel for Plaintiffs, Defendants, and Defendant Intervenors all either concur with or do not object to Common Cause's Motion for Leave to Participate as *Amicus Curiae*.

/s/ Thomas J. Miller

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Counsel for *Amicus Curiae* Common Cause

Dated: March 2, 2018

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON, *Plaintiffs*, v. ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation, *Defendants*.	:	No. 18-cv-00443-CCC

BRIEF FOR *AMICUS CURIAE* COMMON CAUSE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Common Cause is a non-profit corporation organized and existing under the laws of the District of Columbia. It is a nonpartisan democracy organization with over 1.1 million members and local organizations in 35 states, including Pennsylvania. Common Cause in Pennsylvania has over 30,000 members and followers. Since its founding by John Gardner in 1970, Common Cause has been dedicated to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people. "For the past twenty-five years, Common Cause has been one of the leading proponents of redistricting reform." Jonathan Winburn, *The Realities of Redistricting* 205 (2008).

Gerrymanders have been used by both Democrats and Republicans to entrench their power almost since the founding of this Nation. Whether done by Democrats or Republicans, partisan gerrymanders are antithetical to our democracy. Common Cause is at the forefront of efforts to combat gerrymandering, no matter what party is responsible, in the belief that when election districts are created in a fair and neutral way the People will be able to elect representatives who truly represent them. To that end, Common Cause has organized and led the coalitions that secured passage of ballot initiatives that created independent redistricting commissions in Arizona and California and

campaigned for ratification of an amendment to the Florida Constitution prohibiting partisan gerrymandering. Common Cause is a co-founder of the Fair Districts PA coalition, sponsor of the annual Gerrymander Standards Writing Competition, and the lead plaintiff in the challenge to the congressional gerrymander in North Carolina pending in *Common Cause v. Rucho,* 1:16-CV-1026 (M.D.N.C. filed Aug. 5, 2016), heard by a three-judge federal district court and now awaiting decision.

For Common Cause, these are issues of principle, not of party, and it is committed to eliminating the harm caused to its members and all citizens by these practices.

No person or entity other than the amicus curiae, through its counsel, either paid for the preparation of this brief, or authored any part of it.

ARGUMENT

Common Cause submits this brief to address a crucial flaw in Plaintiffs' submissions – the erroneous assumption that the Court has the power to order an election under the unconstitutional 2011 Pennsylvania congressional map.[1] *See* Memorandum of Law in Support of Plaintiff's Motion for Temporary Restraining

[1] Common Cause strongly support Defendants' position that Plaintiffs have failed to state a cause of action, much less demonstrate the right to injunctive relief. This brief is directed to a narrow issue that might otherwise be lost in these expedited proceedings.

Order and Preliminary Injunction at 18 ("Conversely, if injunctive relief is granted, the upcoming primary will be held under a plan in existence, and unchallenged, since 2011") (hereinafter "Plaintiff's Memorandum"). Plaintiffs have overlooked 2 U.S.C. § 2a(c)(5), which mandates that in the absence of a legally-created map, Pennsylvania must conduct an at-large election for all 18 Congressional districts. There is no going back to the 2011 map, which is a legal nullity. Thus, even if this Court were to conclude that Plaintiffs have stated a cause of action (they have not), the remedy they seek is simply unavailable as a matter of law.

I. The 2011 Map is a Legal Nullity

Pennsylvania creates its Congressional districts through legislation, and the 2011 map was passed in the form of the Pennsylvania Congressional Redistricting Act of 2011 (the "2011 Act"). On February 7, 2018, the Pennsylvania Supreme Court ruled that the 2011 Act violated Article I, Section 5 of the Pennsylvania Constitution. *League of Women Voters v. Commonwealth*, No. 159 MM 2017, 2018 WL 750872, at *51 (Pa. Feb. 7, 2018). The effect of that ruling was to render the 2011 Act a legal nullity, as if it had never existed. *See Commonwealth v. Barnes*, 637 Pa. 493, 503 (2016) ("As that [statute] has now been rendered unconstitutional on its face…it is as if that statutory authority never existed); *Commonwealth v. Wolfe*, 636 Pa. 37, 53 (2016) ("…a sentence based on an unconstitutional statute that is incapable of severance is void"); *Commonwealth v.*

Michuck, 686 A.2d 403, 407 (Pa. Super. Ct. 1996) ("An unconstitutional statute 'is ineffective for any purpose since its unconstitutionality dates from the time of its enactment and not merely from the date of the decision holding it so'"). Accordingly, as a matter of Pennsylvania law, the citizens of Pennsylvania are in the same position as if the legislature had never drawn a map after the 2010 census.

II. In the Absence of Valid State Redistricting Legislation, the Court is Bound to Follow 2 U.S.C. § 2a(c)(5) and Order an At-Large Election.

Plaintiffs fail to appreciate the import of the declaration of unconstitutionality. Even if this Court were to somehow find a flaw in the Pennsylvania Supreme Court's map drawing process, there would be no refuge in the old unconstitutional map, which now forms no part of the law of the Commonwealth of Pennsylvania.

Fortunately, Congress contemplated the possibility that political gridlock or other circumstances could result in the failure of a state to redistrict in time for a Congressional election, and Congress provided the solution outlined in 2 U.S.C. § 2a(c):

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner…**(5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.**

(emphasis added).[2] The text of 2 U.S.C. § 2a(c)(5) could not be more clear. If a State has not redistricted in the manner provided by state law, and if there is a decrease in the number of Representatives and the number of districts exceeds that decreased number, all Representatives shall be elected at large.

The Supreme Court, in considering § 2a(c), has described it as "a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one." *Branch v. Smith*, 538 U.S. 254, 274 (2003) (plurality opinion). If the state legislature and state courts have all failed to produce a map that complies with state and federal law, then Congress's fallback provision, expressed in § 2a(c)(5), applies.

The *Branch* test is met here. The 2011 Pennsylvania congressional reapportionment reduced the size of Pennsylvania's delegation to the House of Representatives by one. *League of Women Voters*, 2018 WL 750872 at *3. The legislature then failed to draw a legal map. Given the timing of these proceedings

[2] The Supreme Court has noted on multiple occasions that § 2a(c)(1)-(4) are likely unconstitutional under its subsequent election law jurisprudence. *See Arizona State Legislature v. Arizona Indep. Redistricting Com'n*, 435 S.Ct. 2652, 2670 (2015); *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion). However, this does not apply to § 2a(c)(5), and the Court has explicitly stated that use of § 2a(c)(5) might be necessary in some circumstances. *Branch*, 538 U.S. at 273-74 (plurality opinion).

and the impending election, if the Plaintiffs are successful, the courts will have no time to draw a new map. That is precisely the circumstance envisioned under *Branch*. Accordingly, the Congressional fallback of 2 U.S.C. § 2a(c)(5) would become operative, requiring an at-large election.

Nor can this statutory provision be brushed aside in favor of vague notions of equity. Equity follows the law, not the other way around, and when Congress legislates in an area, courts are not free to substitute their own judgment for that of Congress. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978), *overruled on other grounds by Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33 (1990). Section 2a(c)(5) constitutes the considered judgment of Congress as to the proper manner for conducting an election when no valid state map exists and there is no time for court-ordered redistricting. Indeed, the language of the provision is mandatory, stating that representatives "***shall be*** elected in the following manner . . . ." There is no equitable wiggle room if this Court were to conclude that the Pennsylvania Supreme Court's map is invalid. The remedy Plaintiffs seek is simply unavailable as a matter of law, and on this independent basis the motion for injunctive relief should be denied.

Respectfully submitted,

/s/ Thomas J. Miller

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UNPUBLISHED OPINIONS

Pursuant to Local Rule 7.8(a)

2016 WL 7256945
Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Wayne Land and Mineral Group, LLC, Plaintiff,
v.
Delaware River Basin Commission, Defendant,
and
Delaware Riverkeeper Network and
Maya K. Van Rossum, the Delaware
Riverkeeper, Interveners-Defendants

3:16-CV-00897
|
Filed 12/15/2016

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Opinion

MEMORANDUM OPINION

Robert D. Mariani, United States District Judge

***1** Presently before the Court are two "Motions for Permission to Appear, File Brief, and Make Oral Argument, if necessary, as Amicus Curiae on Behalf of the Plaintiff." (Docs. 37, 53). The first motion was filed by non-parties Lackawaxen Honesdale Shippers Association, Northern Wayne Property Owner's Alliance, Inc., and Landowner Advocates of New York, Inc., (Doc. 37), and the second motion was filed by non-parties County of Wayne and the Wayne Economic Development Council. (Doc. 53). For the reasons that follow, the motions will be granted in part and denied in part.

I. INTRODUCTION AND PROCEDURAL HISTORY

On May 17, 2016, Plaintiff Wayne Land & Mineral Group LLC filed a Complaint against Defendant Delaware River Basin Commission. (Doc. 1). In the Complaint, Plaintiff asks the Court to enter a declaratory judgment holding that the Defendant lacks jurisdiction or the authority to require it to seek prior approval for Plaintiff's intended plan to construct a well pad and drill a natural gas well on property which Plaintiff owns in Wayne County, Pennsylvania (75 acres of which is located in the Delaware River Basin).

The Delaware Riverkeeper Network and Maya K. Van Rossum, the Delaware Riverkeeper, filed a motion to intervene on July 5, 2016, (Doc. 10), which the Court granted on September 12, 2016. (Doc. 26). Thereafter, non-parties Lackawaxen Honesdale Shippers Association, Northern Wayne Property Owner's Alliance, Inc., and Landowner Advocates of New York, Inc. filed the instant motion on October 13, 2016. (Doc. 37). Non-parties County of Wayne and the Wayne Economic Development Council filed their motion on November 30, 2016. (Doc. 53).

II. ANALYSIS

"Meaning friend of the court, *amicus curiae* has historically been used to describe an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another." *Sciotto v. Marple Newtown Sch. Dist.*, 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999) (internal citation and quotation marks omitted).

> Amici status is typically granted where the following conditions are present: (1) petitioner has a 'special interest' in the particular case, *see Waste Management of Pa. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995); (2) petitioner's interest is not represented competently or at all in the case, *see Liberty Lincoln v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993); (3) the proffered information is timely and useful, *see Hoptowit v. Ray*, 682 F.3d 1237, 1260 (9th Cir. 1982); and (4) petitioner is not partial to a particular outcome

in the case, *see Yip v. Pagano*, 606 F. Supp. 1566 (D.N.J. 1985), *but see Hoptowit*, 682 F.2d at 1260 ("there is no rule ... that amici be totally disinterested.").

Id at 555.

Courts in this Circuit have found that participation as *amicus* at the level of the trial court, as opposed to the appellate court, "is rather more the exception than the rule." *Abu-Jamal v. Price*, Civ. A. No. 95-618, 1995 WL 722518, at *1 (W.D. Pa. Aug. 25, 1995); *see also Yip*, 606 F. Supp. at 1568 ("At the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level."). Nevertheless, "[t]he extent, if any, to which an *amicus curiae* should be permitted to participate in a pending action is solely within the broad discretion of the district court." *Waste Management*, 162 F.R.D. at 36 (citations omitted); *see also In re Nazi Era Cases Against German Defendants Litig.*, 153 Fed.Appx. 819, 827 (3d Cir. 2005) ("[A] district court's decision to accept or reject an amicus filling is entirely within the court's discretion.").

A. Lackawaxen Honesdale Shippers Association, Northern Wayne Property Owner's Alliance, Inc., & Landowner Advocates of New York, Inc.

***2** The Lackawaxen Honesdale Shippers Association is "a Non-Profit Association organized and existing under the laws of the State of Pennsylvania for the purpose of making available, promoting and protecting interests of railroad users in Wayne County and Pike County Pennsylvania." (Doc. 37-1, at 1). Thomas Shepstone, the manager of the Lackawaxen Honesdale Shippers Association, is further authorized to act on behalf of not-for-profit corporations Northern Wayne Property Owners Alliance, Inc. and Landowner Advocates of New York, Inc.[1] Both the Defendant and the Intervenors-Defendants oppose the motion. (Docs. 41, 42).

1 Nowhere in the Movants submissions do they identify the purposes of Northern Wayne Property Owners Alliance, Inc. or Landowner Advocates of New York, Inc. However, Defendant notes that the Northern Wayne Property Owners Alliance Inc., "is an association of property owners who have leased natural gas and/or mineral interests to energy companies," (Doc. 42, at 3), whereas Landowner Advocates of New York, Inc. is an organization that consists of "referenced landowners in the Southern Tier of New York." (*Id.* at 11).

Turning to the four factors identified in *Sciotto*, the Court first notes that it is the movants burden to demonstrate that it has a "particularized kind of special interest" appropriate for *amici* status. *Sciotto*, 70 F. Supp. 2d at 555. According to the movants, "[t]he question at issue in this case is one that is of vital interest to the Movants and to its members and the general public in that the outcome of this case will significantly affect property rights and values, railroad use, industry growth, business and employment and regional commerce in Wayne and Pike Counties, Pennsylvania and New York's Southern Tier." (Doc. 37, at 2). They further allege that "resolution of the action will have a vital impact on the manner of which members may use their property rights as deeded to them or pay for and use rail service, receive fair and just compensation for their property rights, retain employment and industries in their region and for the members financial well-being, and to succeed in assisting established business and possible growth of new businesses in these areas." (Doc. 37-1, at 2). The Court finds that the movants have articulated a sufficient interest in the litigation and therefore have satisfied the first factor.

Second, the Court finds that the movants interests—specifically those pertaining to railroads, railroad uses, and landowners in the Southern Tier of New York—do not appear to be represented in this matter. Third, the Court finds that the proffered information to be both timely and potentially useful to the resolution of the issues before the Court, and rejects Defendant's argument that the motion is untimely because "[b]riefing on the Motion to Dismiss is complete, and reopening the briefing would delay a ruling." (Doc. 42, at 8).

Finally, the Court considers whether the movant is partial to a particular outcome. Defendant and the Intervenors-Defendants oppose the motion on the basis that the movants are not neutral parties and therefore should not be permitted to file an amicus brief, directing the Court to the affidavit of Thomas Shepstone. (Doc. 41, at 5). The Intervenors-Defendants note that "Mr. Shepstone is an advocate for the shale gas industry. His previous employers include Energy in Depth, an organization dedicated to promoting shale gas exploration. Mr. Shepstone currently works at Natural Gas Now which, as its name suggests advocates for

natural gas development." [2] (Doc. 45, at 5). Accordingly, the Defendant and Intervenors-Defendants maintain that the movant's motion must be denied because they are partial to a particular outcome.

2 The Intervenors-Defendants further note that Mr. Shepstone "refers to the Governor of the State of New York, Andrew Cuomo, as 'Corruptocrat' and accuses the Governor of running the state 'like a mob family.' " (Doc. 41, at 5). Mr. Shepstone has also referred to the Intervenor-Defendants "as 'a bitter fringe group' which has 'morphed into a cult of personality,' " and has argued "that 'fractivism' is a 'mental illness.' " *Id.* Mr. Shepstone is further alleged to refer "to the National Resources Defense Council as a 'den of thieves,' " and has referred to "a Geisinger Health study on natural gas development as a 'hit job' orchestrated by a doctor" he refers to "as a 'radical,' a 'renewables utopian' and a 'shale hater' who has 'produced one junk science study after another.' " (*Id.* at 5-6).

***3** When a movant "has a specific pecuniary interest," *Sciotto*, 70 F. Supp. 2d at 555, in a party's perspective of a particular case, or where the "amici represents business interests that will be ultimately and directly affected by the court's ruling on the substantive matter before it, amicus participation is not appropriate." *Id.* (internal citation and quotation marks omitted). However, "[w]hile the partiality of an *amicus* is a factor to consider in deciding whether to allow participation, there is no rule ... that amici must be totally disinterested." *Waste Management*, 162 F.R.D. at 36 (internal citation and quotation marks omitted). Indeed, "[p]arties with pecuniary and policy interests have been regularly allowed to appear as *amici.*" *United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002).

Upon consideration of the relevant factors, the Court will exercise its discretion and grant in part and deny in part the motion as follows: non-parties Lackawaxen Honesdale Shippers Association, Northern Wayne Property Owner's Alliance, Inc., and Landowner Advocates of New York, Inc. may file a joint brief, not to exceed ten pages, as *amicus curiae* on behalf of the Plaintiff. No other participation will be permitted.

B. County of Wayne & Wayne Economic Development Council

Non-parties County of Wayne and the Wayne Economic Development Council, through the same counsel as non-parties Lackawaxen Honesdale Shippers Association, Northern Wayne Property Owner's Alliance, Inc., and Landowner Advocates of New York, Inc., also requests leave to appear as *amicus* on behalf of the Plaintiff and assert that they do so "to protect their governing authority and the property rights of its residents as duly elected members of Wayne County." (Doc. 54, at 4). Both the Defendants and Intervenors-Defendants oppose the motion. (Docs 57, 60).

Applying the four *Sciotto* factors identified above, the Court first finds that the movants have some interest in the litigation, although the Court questions whether the interest is sufficiently specialized and concrete. Second, the Court finds that the movants' interest may not be adequately represented in this matter, but notes that the movants and Plaintiff appear to share the same or similar interests. Third, the Court finds that the movants' submission is timely and that it may have some usefulness to the resolution of matters before the Court. Finally, the Court notes that, although the movants may be partial to a particular outcome, that is not a *per se* bar to participation as *amicus.* Accordingly, the Court will exercise its discretion and grant in part and deny in part the movants motion as follows: the County of Wayne and Wayne Economic Development Council may file a joint brief, not to exceed ten pages, as *amicus curiae* on behalf of the Plaintiff. No other participation will be permitted. [3]

3 The Third Circuit has noted that, as a general rule, an amicus *curiae* may only participate in oral argument "for extraordinary reasons." *Am. Coll. of Obstetricians & Gynecologists Pennsylvania Section v. Thomburgh*, 699 F.2d 644, 646 (3d Cir. 1983) (citing Fed. R. App. P. 29). Because all of the movants have failed to identify any "extraordinary reasons" necessitating their participation in oral argument, the Court will deny the motions in this respect.

III. CONCLUSION

For the reasons set forth above, the motions will be granted in part and denied in part. A separate order follows.

All Citations

Slip Copy, 2016 WL 7256945

End of Document

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JACOB CORMAN, in his official capacity as Majority Leader of the Pennsylvania Senate, MICHAEL FOLMER, in his official capacity as Chairman of the Pennsylvania Senate State Government Committee, LOU BARLETTA, RYAN COSTELLO, MIKE KELLY, TOM MARINO, SCOTT PERRY, KEITH ROTHFUS, LLOYD SMUCKER, and GLENN THOMPSON, *Plaintiffs*, v. ROBERT TORRES, in his official capacity as Acting Secretary of the Commonwealth, and JONATHAN M. MARKS, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation, *Defendants*.	:	No. 18-cv-00443-CCC

[PROPOSED] ORDER

AND NOW, this ____ day of _____, 2018, in consideration of the Motion for Leave to Participate as *Amicus Curiae* filed by Movant, Common Cause, the Motion is hereby GRANTED. *Amicus Curiae* is hereby granted leave to file its Brief.

By the Court,

Kent A. Jordan, Circuit Judge

Christopher C. Conner, Chief District Judge

Jerome B. Simandle, District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Proposed Order, Motion, and Brief was electronically filed with the Clerk of Court on March 2, 2018, using CM/ECF, which will send notification of such filing to counsel of record.

/s/ Thomas J. Miller

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Dated: March 2, 2018