IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the	)	
	)	
2021 REDISTRICTING PLAN.	)	Case No. 3AN-21-08869CI
	)	

ORDER DENYING MOTION TO COMPEL DISCOVERY RESPONSES

I. INTRODUCTION

This case involves five consolidated challenges to the final redistricting plan adopted by the Alaska Redistricting Board ("Board") on November 10, 2021. The Board served the challengers with a discovery request on December 23, seeking the production of a broad range of communications. Four of those challengers[1] ("Plaintiffs") objected to some of the Board's discovery requests and refused to produce the requested documents. Rather than attempt to resolve the dispute, the Board filed a motion to compel on January 5, 2022. The Board argues that the communications are relevant to show bias and motive for impeachment purposes, and that any conferral requirement should be excused in light of the expedited nature of this case. The Plaintiffs opposed, arguing that the requests are burdensome and irrelevant, and that the motion is improper because the Board failed to confer beforehand. The Board replied, and the motion is now ripe.

For the reasons stated below, this court **DENIES** the Board's motion to compel.

II. BACKGROUND

After receiving the 2020 decennial census data and holding public hearings on several proposed redistricting plans, the Board issued its final proclamation of redistricting

[1] The challengers involved in this motion are Felisa Wilson, George Martinez, and Yarrow Silvers ("Wilson"); City of Valdez and Mark Detter ("Valdez"); Matanuska-Susitna Borough and Michael Brown ("Mat-Su"); and Municipality of Skagway Borough and Brad Ryan ("Skagway"). Although challengers Calista Corporation, William Naneng, and Harley Sundown ("Calista") also objected to the Board's production requests, the Board elected not to compel discovery as Calista "was transparent about its special interest in trying to enhance its corporate shareholder's control of a senate district." [Motion 8]

on November 10, 2021. The Plaintiffs then filed applications to compel the Board to correct errors in the final plan in the first half of December.

On December 23, the Board served the Plaintiffs with discovery requests. At issue here are the following three requests for production:

> **REQUEST FOR PRODUCTION NO. 3**: Please produce all Communications (including emails and/or text messages) You have sent to or received from anyone . . . that relate in any way to the 2021 redistricting process.
>
> **REQUEST FOR PRODUCTION NO. 4**: Please produce all Communications (including emails and/or text messages) You have sent or received that relate in any way to Your participation in this lawsuit. If You claim a privilege as to any such Communication, please produce a privilege log.
>
> **REQUEST FOR PRODUCTION NO. 5**: Please produce all Communications between or among the Plaintiffs that relate in any way to the 2021 redistricting process or the subject-matter of their lawsuit. [Motion Ex. A 7-8]

The Board sent similar requests, with slight variation in language, to each Plaintiff. [Motion Exs. A-D] The Plaintiffs responded on January 3-4, 2022, raising a number of objections as to relevance and breadth, and refused to produce all of the requested communications. While raising similar objections, Wilson did respond to the Board's related interrogatories regarding membership in political organizations. [Motion Ex. A 9-13]

The Board did not attempt to confer with Plaintiffs to resolve this discovery impasse. Instead, on January 5, the Board filed a motion to compel discovery from all four Plaintiffs in regard to requests No. 3 and No. 4, and from Wilson and Mat-Su in regard to request No. 5.

III. APPLICABLE LAW

Alaska has long been committed to a system of liberal pretrial discovery.[2] The Discovery rules are to be broadly construed, and relevance for purposes of discovery is

[2] *Jones v. Jennings*, 788 P.2d 732, 735 (Alaska 1990).

broader than for purposes of trial.[3] The superior court has broad discretion in determining the extent of discovery.[4]

Alaska Civil Rule 26(b) supplies the general scope of civil discovery, "[u]nless otherwise limited by order of the court in accordance with these rules." "The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[5] Court-imposed limitations on discovery under Rule 26(b)(2) are reviewed "for abuse of discretion," and such limits will be upheld so long as they are "not manifestly unreasonable."[6]

To discover information beyond mandated disclosures, parties may take depositions,[7] serve interrogatories,[8] serve requests for admission,[9] and serve requests for production.[10]

The Court may limit the frequency or extent of these discovery methods if determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[11]

The concept of proportionality has not received as much attention in the Alaska discovery rules as it has in the federal counterpart. Under Federal Rule 26(b)(1), in

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[3] *Lee v. State*, 141 P.3d 342 (Alaska 2006).
[4] *Jones,* 788 P.2d at 735.
[5] *Id.*
[6] *Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d 573, 594 (Alaska 2007).
[7] Alaska R. Civ. P. 27.
[8] Alaska R. Civ. P. 33.
[9] Alaska R. Civ. P. 36.
[10] Alaska R. Civ. P. 34.
[11] Alaska R. Civ. P. 26(b)(2) (discovery limitations). This particular provision of the Rule also contains a special carve-out for electronically stored information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. Still, on a motion to compel, the Court retains the authority to order such discovery if the requesting party shows good cause. Alaska R. Civ. P. 26(b)(2)(B).

addition to relevance, the discovery sought must be "proportional to the needs of the case."[12] Nonetheless, the concept is implicit in the scope of discovery in Alaska. As noted above, the Court has the express power to limit discovery when the burden of the proposed discovery outweighs its likely benefit, considering the importance of the proposed discovery in resolving the issues.[13]

IV. ANALYSIS

A. The Burden Of The Board's Discovery Request Outweighs Any Likely Benefit In Light Of The Expedited Nature Of This Proceeding And The Tangential Relevance Of Plaintiffs' Potential Testimony To The Central Controversy.

The Board seeks to compel Plaintiffs to respond to the Board's discovery requests regarding potential bias and credibility. Alaska Civil Rule 26(b)(1) describes the broad scope of civil discovery as extending to "any matter" that is "not privileged" and "relevant to the subject matter involved in the pending action," including information relevant "to the claim or defense of the party seeking discovery." But Rule 26(b)(2) provides for some reasonable limitations:

> The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[14]

And because this case is an expedited redistricting challenge, Rule 90.8 applies and "supersedes the other civil rules to the extent that they may be inconsistent with this

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[12] Federal R. Civ. P. 26(b)(1). The express proportionality requirement was added to the Federal Rules in the 2015 Amendments to address the problem of over-discovery. In particular, the Advisory Committee sought to restore proportionality as an express component of the scope of discovery in light of the explosion of electronic messages. Previously, the need for discovery to be proportional was implicit in the federal rules, but is now expressly included in Rule 26(b)(1). *See* 2015 Advisory committee notes regarding Rule 26(b)(1).
[13] See Alaska R. Civ. P. 26(b)(2) (discovery limitations), and Alaska R. Civ. P. 26(c) (protective orders)..
[14] Alaska R. Civ. P. 26(b)(2)(A).

rule."[15] Rule 90.8 additionally states that the record for review may be "supplemented by such additional evidence as the court, in its discretion, may permit."[16]

"Although Alaska provides for liberal civil discovery," it is the court's role to ensure that discovery requests and motions to compel "are supported by sufficient justifications."[17] At a minimum, this standard "requires parties to act reasonably."[18] Whether information is discoverable "depends on the circumstances of the case, and this question is entrusted to the discretion of the trial judge."[19] "[T]he superior court may limit the use of discovery" in light of the various factors provided in Rule 26(b)(2).[20] The Alaska Supreme Court has affirmed Rule 26(b)(2) discovery limits under a variety of circumstances.[21] And while the Court has acknowledged that "evidence of bias is relevant and probative" in most instances,[22] the Court has also affirmed reasonable limits on discovery where the parties are sufficiently capable of eliciting the same information through other means.[23]

Here, the Board argues that it "is entitled to present basic evidence of bias and agenda that bears on those Plaintiffs' credibility." [Motion 4] In essence, the Board complains that it "should be able to obtain reciprocal discovery" on bias in light of the Plaintiffs' similar requests, [Motion 2] and that no case law supports "permitting one party

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[15] Alaska R. Civ. P. 90.8(a).
[16] Alaska R. Civ. P. 90.8(d).
[17] *State v. Doe*, 378 P.3d 704, 705-06 (Alaska 2016).
[18] *Powercorp Alaska, LLC v. Alaska Energy Auth.*, 290 P.3d 1173, 1192 (Alaska 2012), *as amended on reh'g* (Jan. 7, 2013).
[19] *Id.*
[20] *Id.* (quoting *Prentzel v. State, Dep't of Pub. Safety*, 169 P.3d 573, 594 (Alaska 2007)); *see also Maurer v. Alaska Airlines, Inc.*, No. S-17727, 2021 WL 3179404, at *5 (Alaska July 28, 2021) (explaining that the superior court must "consider the appropriate factors" under Rule 26(b)(2) and "weigh[] the relative burdens and benefits to the parties" before granting or denying a motion to compel discovery).
[21] *See, e.g., Alvarez v. State, Dep't of Admin., Div. of Motor Vehicles*, 249 P.3d 286, 295 (Alaska 2011) (affirming discovery limits where it was unclear how the testimony sought "supports any of [the party's] defenses" and the party did not explain how the evidence would be relevant); *Gibson v. GEICO Gen. Ins. Co.*, 153 P.3d 312, 317 (Alaska 2007) (affirming ruling that "burden of the discovery outweighed its likely benefit" where a witness's "testimony was likely to be tangential to the [central] issue").
[22] *Ray v. Draeger*, 353 P.3d 806, 811 (Alaska 2015).
[23] *See, e.g., Marron v. Stromstad*, 123 P.3d 992, 999 (Alaska 2005) (affirming denial of motion to compel production of expert witnesses' tax records for "alleged pro-defense bias" when that information was sufficiently elicited through cross-examination).

to explore credibility while entirely shielding the other parties." [Reply 6] But the Plaintiffs respond that the Board's requests are overbroad and irrelevant.

Wilson argues that, whereas "the objectives and motivations of the Board members" are "material and relevant" to this constitutional challenge, the "Plaintiffs' private communications regarding the redistricting process" do not affect "the legality of [the Board's] actions." [Wilson Opp. 4-5] Mat-Su likewise asserts that, while bias may be relevant for eye-witness testimony, the requested communications are "wholly removed from . . . the Board's process." [Mat-Su Opp. 3] Valdez and Skagway freely admit their motive to advance the "municipalities' interest," and note that "both parties stated their redistricting positions to the Board in its public meetings." [Valdez-Skagway Opp. 3] Moreover, "the Board has not explained why its opportunities to depose or cross-examine Plaintiffs' witnesses is inadequate for its stated purpose." [Valdez-Skagway Opp. 3] The Board replies that "Plaintiffs have filed the direct testimony of 19 witnesses," and "[t]here is simply not enough time . . . for the Board to take the depositions." [Reply 4] While the Board is correct in regard to the general relevance of impeachment evidence,[24] in light of the expedited nature of this case and the breadth of the Board's request for private communications, this court must weigh the factors in Rule 26(b)(2) to determine whether the requested discovery is reasonable.

The Plaintiffs also make a plausible case that "the discovery sought . . . is obtainable from some other source that is more convenient, less burdensome, or less expensive."[25] The Board's stated purpose for these production requests is to elicit "basic evidence of bias and agenda" for impeachment. [Motion 4] Wilson has already provided that requested information through interrogatory responses pertaining to membership in political organizations,[26] and at least two of the municipality Plaintiffs likewise admit bias

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[24] Although impeachment evidence is usually relevant, that is only true for testifying witnesses. *See United States v. McGowan*, 58 F.3d 8, 15-16 (2d Cir. 1995) (reasoning that informant's credibility was irrelevant when he "was not a witness at trial, and his out-of-court statements were not admitted for their truth"). The Board does not state that the Plaintiffs are witnesses, nor is the Board's discovery request tailored to seek only those communications from individuals who might testify at trial.
[25] Alaska R. Civ. P. 26(b)(2)(A)(i).
[26] The Board does not describe what kinds of communication it hopes to find from the requested discovery or how that would show bias more than the Plaintiffs' party affiliation or membership status.

toward their own local interests.[27] When the Plaintiffs present testimony at trial, the Board is more than capable of eliciting further evidence of bias through cross-examination.[28]

The Plaintiffs also argue that "the burden or expense of the proposed discovery outweighs its likely benefit."[29] Of particular relevance here are the first and last factors in Rule 26(b)(2)(A)(iii): "the needs of the case" and "the importance of the proposed discovery in resolving the issues."[30] Because this case is highly expedited, there is a great need for the parties to cooperate and limit their discovery requests to what is reasonably necessary. But here, as Mat-Su pointed out in its objections, the Board's requests are so broad that they encompass the private communications of "hundreds of employees." [Motion Ex. D 2-3] The Plaintiffs also observe that the Board failed to confer beforehand to find a reasonable resolution to this dispute.[31] [Wilson Opp. 2-3; Mat-Su Opp. 2]

And perhaps most importantly, the impeachment evidence sought here, *i.e.*, the Plaintiffs' political bias, is simply not important to resolving the issues this case presents. The superior court in *In re 2001 Redistricting Cases* offered the following explanation:

> To the extent that there is evidence that groups . . . submitted plans for the Board's consideration that may have taken into account the likely effect of their proposal on incumbents, this was entirely legal and constitutionally permissible. Indeed, the evidence establishes that the Board received plans and proposals from groups of all political persuasions. The Board was not

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[27] The Board also does not explain how it intends to show bias or motive with government entities such as Mat-Su, Valdez, and Skagway, comprised of countless officials and employees. The Plaintiffs have been fairly straightforward about their reasons for challenging the Board's final plan from the outset. Although the Board acknowledges this fact as to Calista, motive is fairly obvious for the Plaintiffs as well.

[28] This court is also skeptical of the Board's motivations for filing this motion when it refuses the opportunity to depose the Plaintiffs' witnesses who will actually be testifying at trial.

[29] Alaska R. Civ. P. 26(b)(2)(A)(i).

[30] There is no "amount in controversy," and "the parties' resources" do not appear to be relevant here. While the main "issue[] at stake in the litigation," *i.e.*, the constitutionality of the final redistricting map, is of utmost importance, the Board does not explain how the Plaintiffs' credibility is in any way related to that issue.

[31] Under Rule 37(a)(2)(B), when a party refuses a discovery request, "the discovering party may move for an order compelling" the requested discovery, but "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." No such certification is attached to the Board's motion. The Board argues "that the truncated nature of the litigation and weekly discovery hearings excuse any requirement of repeated conferral." [Motion 1] But the Board cites nothing in support, despite asserting that its motion was "filed [*sic*] with legal authority." [Reply 8] The Board thus appears to be relying on Rule 90.8 to excuse compliance, but its own arguments undercut this position. The Board asserts elsewhere that "the Civil Rules does not exempt or carve out redistricting matters from their reach," and because "Rule 90.8 is silent as to the discovery process, . . . the discovery rules found throughout the Civil Rules . . . plainly apply to redistricting cases." [Reply 2] The Board cannot have it both ways.

> required to inquire into [the proposing group's] motives (or the motives of any other group), nor was it required to reject a plan merely because some of the developers of the Plan might have had political motivations. *The constitutionality of the Final Plan is not effected* [*sic*] *by the motivations of the citizen groups that advocated for or against the plan.* Redistricting is an inherently political process. A plan is not invalid merely because districts are drawn with a political agenda or with an awareness of the likely political consequences.[32]

The central question here is whether the Board complied with the constitution and the applicable statutes. The Plaintiffs' motivations for bringing suit are irrelevant or tangential at best. Indeed, the Plaintiffs do not deny that their challenges are motivated by politics, including membership in political organizations, [Wilson Opp. 4 & n.3] or local interests. [Valdez-Skagway Opp. 3] The Board does not raise the Plaintiffs' bias as a defense in its answers, nor is it clear how that would be a viable defense.

This is not a situation in which the discovery sought has potential direct relevance to a particular claim or defense. In a different case, the Board's discovery might well be reasonable. But here, the Board's only stated justification for its very broad discovery is that it bears on the issue of credibility. While it is true that credibility is always an issue, that does not mean the parties are entitled to unfettered discovery of the other party's communications in the hope of finding some wayward comment. In this case, the Board's discovery is overly broad and burdensome given the importance of its proposed discovery to the issue for which it is sought. This is particularly true where the Plaintiffs all have an inherent bias in bringing their challenges.

The Court is conscious of the Board's repeated pleas in the Court's discovery conferences that discovery needs to be reciprocal. With that basic concept, the Court agrees. But, reciprocal discovery does not necessarily equate to numerical reciprocity. As noted by the Advisory Committee on the Federal Rules when discussing proportionality,

> The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in [the present rule.] Some cases involve what is often called "information asymmetry." One party – often an individual plaintiff – may

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[32] No. 3AN-01-08914CI, 2002 WL 34119573, at 51-52 (Alaska Super., Feb. 01, 2002) (emphasis added).

have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.[33]

Although it may seem one-sided that all of the Board's communications pertaining to the redistricting process are relevant and discoverable while the Plaintiffs' communications are not, that is simply the nature of these types of constitutional challenges.

Accordingly, the Plaintiffs have sufficiently shown the burden of the Board's requests outweighs any likely benefit due to the expedited nature of this case and the tangential relevance of the Plaintiffs' bias to the central claims.

V. CONCLUSION

For the reasons stated above, this court therefore **DENIES** the Board's January 5, 2022 motion to compel discovery responses.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 15th day of January, 2022.

Thomas A. Matthews
Superior Court Judge

[33] Fed. R. Civ. P 26(b)1) 2015 Advisory Committee Notes.

I certify that 1/15/22 a copy of this Order
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