Exhibit D
State and Federal Law Governing Redistricting in Texas

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Table of Contents

Introduction....................................................................................................................................1

Chapter 1
The Texas Redistricting Process ......................................................................................................5

Chapter 2
One Person, One Vote: The Equal Population Requirement.........................................................23

Chapter 3
Minority Vote Dilution and Section 2 of the Voting Rights Act ....................................................55

Chapter 4
Federal Preclearance: Section 5 of the Voting Rights Act ............................................................79

Chapter 5
Constitutional Prohibitions Against Racial
Discrimination and Racial Gerrymandering............................................................................101

Chapter 6
Partisan Gerrymandering .............................................................................................................121

Chapter 7
Substantive Redistricting Standards in the Texas Constitution ...................................................137

Chapter 8
Court-Ordered Redistricting Plans...............................................................................................153
Chapter 7
Substantive Redistricting Standards in the Texas Constitution

I. Introduction

Although the substantive standards that govern statewide redistricting plans are provided primarily by federal law, the Texas Constitution contains several significant provisions that also govern some of those plans. The Supremacy Clause, contained in Article VI of the U.S. Constitution, provides that federal law is the supreme law of the land. In the event of a conflict, the federal constitution or a federal statute controls over state law. However, state law may impose requirements in addition to or not inconsistent with those imposed by federal law. This chapter discusses the substantive redistricting standards provided by the state constitution and the interrelationship between those standards and the federal law governing redistricting.1

II. Congressional Districts; State Board of Education Districts

The Texas Constitution does not provide substantive standards directly applicable to the state’s congressional or State Board of Education redistricting plan. Therefore, under state law, the composition of the state’s congressional and State Board of Education districts is left entirely to the discretion of the legislature.2

The number of State Board of Education districts is established by statute,3 and the legislature could increase or decrease the number of board districts from the current 15 when it redistricts the board.

III. Legislative Districts: Interrelationship Between State and Federal Law

Sections 25 and 26, Article III, Texas Constitution, provide substantive standards for state senate and house districts. Section 25 governs redistricting of the Texas Senate and was substantially amended in 2001. Section 26, which governs redistricting of the Texas House of Representatives, has not been amended since the current state constitution was adopted in 1876. These state constitutional provisions were originally adopted during an era in which the redistricting of state legislatures was a matter left to the discretion of the states, with the federal government claiming no authority over the content of state legislative redistricting plans. However, since adoption of Sections 25 and 26, the federal government has entered the political thicket of legislative redistricting.

In 1964, the U.S. Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution requires that state legislative districts be substantially equal in population.4 One year later, Congress enacted the Voting Rights Act of 1965 to enforce the rights guaranteed by the Fifteenth Amendment to the U.S. Constitution. The act, as amended, prohibits states from enacting a redistricting plan that dilutes the voting strength of racial or language minority groups.

In past redistricting cycles, the substantive redistricting standards provided by Sections 25 and 26 have been sometimes at odds with the federal constitutional and statutory provisions that govern
redistricting. The conflicts, unforeseeable when these provisions of the Texas Constitution were adopted, injected significant uncertainty into the redistricting process. In 2001, several provisions of Section 25 that were likely invalid because of federal law were repealed.

As a result of conflicting federal law, Section 26 cannot be given full effect as written. In Smith v. Craddick, the Texas Supreme Court considered the interrelationship between the state constitutional provisions governing house redistricting plans and federal law. The plaintiffs asserted that the legislature’s 1971 house redistricting plan failed to comply with the state constitution. The court, noting the supremacy of federal law, held that if application of a substantive standard provided by the state constitution violates federal law, the state standard cannot be fully enforced. However, the court also held that a state substantive standard yields only to the extent necessary to comply with federal law and that compliance with the state substantive standards that do not conflict with federal law remains necessary for enactment of a valid redistricting plan. The court stated that “[w]e understand some of the difficulties of every undertaking to redistrict this state. However, this court may not abrogate any provision of the [state] constitution for the sake of simplicity.” In summary, the legislature or Legislative Redistricting Board must comply with each valid substantive standard provided by the Texas Constitution or be prepared to prove in state court that each violation of the state constitution is necessary to comply with federal law. Given the evolving condition of both federal and state law governing redistricting, the proper balance between the two is not always clear.

IV. Texas Senate Districts

Section 2, Article III, Texas Constitution, provides that “[t]he Senate shall consist of thirty-one members.”

Section 25, Article III, Texas Constitution, the only provision of the state constitution that provides substantive standards directly applicable to senate redistricting plans, states:

The State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator.

The substantive standards provided by Section 25 may be listed as follows:

1. each senate district elects only one senator; and

2. each senate district must be composed of contiguous territory.

A. Single-Member Districts

The requirement that each senate district elect only one senator does not conflict with federal law, and, therefore, a senate redistricting plan must be composed entirely of single-member districts.

B. Contiguity

The requirement that senate districts be composed of contiguous territory is consistent with federal law. A legislative district is composed of contiguous territory if all the territory within the district shares a common boundary line. The requirement that legislative districts be composed of contiguous territory is intended to ensure that, to some extent, persons residing in a district have common interests and an opportunity to communicate among themselves and with their legislator.
Use of Federal Census. Section 26 requires that the most recent federal census be used to apportion the Texas House of Representatives. When the current Texas Constitution containing that section was adopted in 1876, the only “federal census” was the federal decennial census required by Section 2, Article I, of the U.S. Constitution. That decennial census is clearly the census Section 26 refers to. Section 28, Article III, Texas Constitution, adopted in 1948, requires redistricting of the Texas House and Senate after each federal decennial census, and Section 26 apparently refers to that same census.

One possible effect of the reference in Section 26 to the federal census is that of prohibiting the use of population projections or other legislative adjustments to the federal census in apportioning house districts. As noted in Chapter 1 of this publication, federal law does not require the use of the federal census in redistricting a state legislature, although any other population data used must be shown to be valid. In addition, federal law allows the states to make nondiscriminatory adjustments to the census, such as eliminating certain nonresidents, for purposes of redistricting. However, the requirement of Section 26 that the federal census be used appears to prohibit the legislature from making such adjustments to the census for use in apportioning house seats among the counties. Section 26 does not, however, expressly require the use of the federal census for drawing districts within multidistrict counties.

Apportionment of Representatives Among Whole Counties: The County Line Rule. Apportionment is the allocation of representatives among already established units of government. For example, the distribution of congressional seats among the states under Section 2, Article I, of the U.S. Constitution constitutes an apportionment. Section 26, Article III, of the Texas Constitution provides for the apportionment of Texas House seats among the state’s counties, and the proviso that concludes Section 26 provides specific guidelines for that apportionment.

The proviso that concludes Section 26 clearly prohibits the division of counties between districts in apportionment and generally limits the redistricting body to the creation of districts that consist of whole counties or groups of whole counties. This Section 26 prohibition against dividing counties is commonly referred to as the “county line” rule. Preserving the integrity of counties in redistricting promotes several significant state interests. Each county has its own identifiable representative or delegation of representatives, an important factor in a state in which a significant amount of legislation directly affects individual counties and county government. The natural constituencies and communities of interest that form within a county are not divided. Voter confusion regarding district boundaries is minimized, and administering elections, organizing constituencies, and conducting campaigns are facilitated. In addition, the opportunity for gerrymandering is limited.

Interrelationship of County Line Rule and Federal Law. No house district divided a single county before 1965. Beginning in 1964, the federal courts began to enforce the one-person, one-vote requirement, making the state’s interest in preserving county integrity subservient to the federal mandate of substantial population equality between districts. Initially, some persons apparently assumed that the federal equal population requirement had eviscerated the state county line rule, and in 1971 the legislature adopted a house plan that divided 33 counties between multicounty districts in violation of the county line rule. As previously discussed in this chapter, the Texas Supreme Court in Craddick held that the provisions of Section 26 must be enforced as written to the extent possible without violating federal redistricting standards, and that the state failed to show that the splitting of each divided county in the legislature’s 1971 house plan was necessary in order to comply with federal law.
A decade later, in *Clements v. Valles*, the Texas Supreme Court reiterated its previous position when it invalidated the legislature’s 1981 house redistricting plan. The court reaffirmed the rule announced in *Craddick* that plaintiffs may establish a *prima facie* violation of Section 26 by showing that the adopted plan divides one or more counties between house districts in violation of Section 26, and that the burden then shifts to the state to prove that each county split is necessary to comply with federal law. In that case, the plaintiffs established a *prima facie* violation by showing that 34 counties had been divided between districts. The state offered an explanation for each such county, arguing that dividing it was necessary to comply either with the one-person, one-vote standard or with Section 5 of the Voting Rights Act, to which Texas had become subject in 1975. The court refused to accept all of the state’s rationale for the divided counties, in large part because plaintiffs presented numerous alternative plans that complied with those federal laws without dividing nearly as many counties as the legislature’s plan. The court held that the plan violated the county line rule of Section 26 and permanently enjoined its implementation.21

**Apportionment of Representatives in Compliance With Section 26 Proviso.** The proviso that concludes Section 26 imposes three conditions on the apportionment of representatives among the counties. Part of the third condition is completely unenforceable under federal law. Balancing the remainder of the proviso with federal law, in particular with the one-person, one-vote requirement, is a crucial step in formulating a house redistricting plan that will survive a challenge in both state and federal courts.

1. **Single County Entitled to Exactly One Representative.** The first clause of the proviso requires that a county be formed into a separate district if it has sufficient population to be entitled to a representative. Therefore, a county with sufficient population for exactly one representative may be divided between two or more districts that extend outside the county only if failure to divide the county would violate federal law. The Texas Supreme Court has twice interpreted this clause to mean that a county must constitute a separate district by itself if the population of the county is “slightly under or over” the population of an ideal district.22 Neither decision defines what range of population deviation constitutes “slightly under or over.” Balancing the requirements of this clause and federal law requires that three difficult legal determinations be made: (1) what range of population variance constitutes “slightly under or over” the population of an ideal district; (2) what degree of population inequality is allowed by the federal one-person, one-vote standard in the context of this clause; and (3) whether application of the clause to a particular county violates the Voting Rights Act.23 On the basis of those determinations, each county with a population that is “slightly under or over” the population of an ideal district must be formed into a separate district unless forming the county into a separate district would result in a violation of the one-person, one-vote standard or the Voting Rights Act. As a practical matter, the conflict between this clause and federal law most likely to occur would be a situation in which maintaining a county as a single whole district would prevent the equalizing of populations among other districts because of the location of the county in question.

Federal case law suggests that the legislature may create as a single house district any whole county whose population falls within an overall range of population deviation of 10 percent without violating the federal one-person, one-vote standard.24 If the legislature does not draw such a county as a single district, that failure is likely to be held invalid under the first clause of the Section 26 proviso.

Whether the first clause of the proviso requires any counties outside the 10 percent range of population deviation to be maintained as single-county districts is unclear. However, because