



A Report on the Law Foundation of Silicon Valley Poll Monitoring Project for the November 4, 2008, Presidential General Election

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I. INTRODUCTION

Access to the election process is an essential part of what it means to be a United States citizen. As United States Supreme Court Chief Justice Earl Warren explained in the landmark voting rights case *Reynolds v. Sims*, the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike to the heart of representative government.”¹ Throughout our history, groups have fought for suffrage, understanding that participation in the democratic process is one of the most fundamental rights that individuals have in our society.

The United States Congress passed the Voting Rights Act² in 1965 to ensure that racial minorities—African Americans in particular—had the same right to vote as did their white counterparts. Although the Fifteenth Amendment to the United States Constitution had been ratified nearly a century before, many state and local governments, particularly in the southern states, used literacy tests, poll taxes, and other methods to disenfranchise African American voters. The Voting Rights Act created enforcement mechanisms by which the United States Department of Justice could ensure that the promise of the Fifteenth Amendment was kept by states.

¹ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

² 42 U.S.C. § 1973.

In 1975, Congress amended the Voting Rights Act to include protections for language minorities, finding that, “through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process.”³ Additionally, language barriers to voting disproportionately impact communities of color, and language access to the polls helps ensure that racial minorities can exercise their right to vote. Section 203(c) of the Voting Rights Act therefore requires that jurisdictions must provide bilingual voter materials and voter assistance where one of the following is true:

- more than five percent of the citizens of voting age of the State or political subdivision are members of a single language minority and are limited-English proficient (“LEP”);
- more than 10,000 of the citizens of voting age of the political subdivision are members of a single language minority and are LEP; or
- in the case of a political subdivision that contains all or any part of an Indian reservation, more than five percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are LEP.⁴

Similarly, California’s Elections Code provides for bilingual voter materials and voter assistance where more than three percent of the population speaks a language other than English.⁵

Based on these formulations, Santa Clara County is required to provide bilingual voter materials and voter assistance in the following five languages: English, Spanish, Vietnamese, Chinese, and Tagalog.⁶ In Santa Clara County, a majority of precincts (541 of 785) triggered the California threshold for required assistance in one or more languages other than English. Given the incredible ethnic and language diversity of Santa Clara County, bilingual voter materials and assistance are essential to guaranteeing that all eligible residents may vote.

The Law Foundation of Silicon Valley decided to monitor local polls for the November 4, 2008, Presidential Election after receiving reports from community organizations that LEP voters were having difficulty accessing the polls in Santa Clara County. We met with Elaine Larson, the Santa Clara County Assistant Registrar of Voters, prior to the election, and she provided us with materials regarding the locations of polling places and information about what

³ 42 U.S.C. § 1973aa-1a(a).

⁴ 42 U.S.C. § 1973aa-1a(b)(2)(A)(i); 28 C.F.R. 55.6.

steps the registrar's office had taken to ensure language access to the polls. We sent volunteer poll monitors to the polls throughout Election Day. Our observations varied drastically from precinct to precinct. Workers at many precincts worked actively to provide language assistance to voters. Where we encountered problems or concerns, we contacted the office of the Registrar of Voters (ROV) which was, overall, extremely helpful and responsive. Nevertheless, our observation of the polls raised several concerns regarding the election process in Santa Clara County, and those concerns are the subject of this report.

II. VOTING RIGHTS PROJECT: OVERVIEW

On November 4, 2008, the Law Foundation of Silicon Valley facilitated the monitoring of polling places in Santa Clara County and fielded calls from other community organizations involved in Election Day voter support. We aimed to concentrate poll monitoring efforts in neighborhoods predicting high turn-out of voters for whom English is not their primary language. Though our primary goal was monitoring precincts with a high number of LEP voters, we also sought to monitor a sampling of voting precincts throughout Santa Clara County. Law Foundation poll monitors visited 150 unique polling places, 7 of which received or required multiple visits by poll monitors, for a total of 157 polling place visits. Of the polling places visited, 39 housed two or more precincts, for a total of 188 Santa Clara County precincts. Poll monitoring efforts resulted in the monitoring of 150 unique polling places in the following Santa Clara County cities:⁷

⁵ Cal. Elec. Code § 14201(c).

⁶ Cal. Elec. Code § 12303; 67 F.R. 48872.

⁷ Refer to Attachment A for a complete listing of precincts visited by Law Foundation poll monitors; the list was compiled by the Law Foundation of Silicon Valley.

| Unique Polling Places Monitored | |
|--|--------------|
| City | Total |
| Campbell | 6 |
| Gilroy | 3 |
| Los Altos | 8 |
| Los Altos Hills | 1 |
| Milpitas | 6 |
| Mountain View | 12 |
| Palo Alto | 11 |
| San Jose | 83 |
| Santa Clara | 6 |
| Stanford | 2 |
| Sunnyvale | 12 |
| Grand Total | 150 |

II. METHODOLOGY

The Law Foundation modeled this poll monitoring project after similar projects conducted by the Asian Pacific American Legal Center in Los Angeles and Orange County. Forty-four community members who volunteered to be poll monitors received a 1.5-hour training from Law Foundation staff regarding the purpose of the project, the types of issues we planned to track, and logistical concerns about visiting the polls on Election Day. Each volunteer poll monitor was assigned between three and ten precincts and was provided poll monitoring materials, including the Voter Assistance Telephone Numbers for Santa Clara County, the Santa Clara County “Attention: Poll Watchers” guide, the Preferred Polling Place Layout, and multiple copies of the Law Foundation poll monitor questionnaire and incident report form. The Law Foundation instructed poll monitors to be especially cognizant of issues relating to bilingual election materials, bilingual poll workers, disability access, provisional balloting, and requests for voters to produce identification. The Law Foundation asked poll monitors to observe each precinct for at least 30 minutes.

Volunteer poll monitors visited the polls beginning at 7:00 a.m. on November 4. If they encountered any difficulties at the polls, or if they observed any egregious problems, they were to call a staff person at the Law Foundation. Law Foundation staff responded to problems either by providing information and advice to the volunteer poll monitor, or by calling the ROV directly, if necessary.

We asked poll monitors to return their completed questionnaires to the Law Foundation immediately after they finished their assignments. While the majority of monitors returned the questionnaires immediately, questionnaires for three precincts are outstanding at this time.

On November 13, 2008, we produced a press release and preliminary report of our findings based on an initial hand-count of the questionnaires we received. Then, we entered the information from all questionnaires received into a Microsoft Access database. Due to inconsistencies in the ways in which individual poll monitors completed reports, compiling accurate numerical data based on the reports presented significant challenges. As such, this report is based largely on anecdotal evidence. Where numbers or percentages are provided, we provide an explanation of how we reached those figures.

IV. MULTILINGUAL WRITTEN MATERIALS AND BILINGUAL ELECTION OFFICERS

Under the federal Voting Rights Act and the California Elections Code, the ROV must provide language assistance in a number of ways, including translated voting guides, translated ballots and signs, Bilingual Election Officers, and voter hotlines staffed by bilingual operators⁸. Given the diversity of Santa Clara County—San Jose in particular—it is critical that elections officials adhere to language requirements in order to make voting accessible to all of the County's citizens.

⁸ U.S.C. *supra* note 3; Cal. Elec. Code § 2103(d); Cal. Elec. Code § 14201(a)-(f).

A. Summary of Relevant Findings

1. In 35 of 137 responses, the polling places did not have or did not display some or all required bilingual sample ballots, Voter Bill of Rights posters, or how-to-vote instruction cards.

2. In 62 of 120 responses, poll monitors noted that Election Officers did not have, were not aware of, or did not display a handout⁹ regarding the language assistance hotline for the ROV. The ROV has indicated that it does provide a welcome poster in multiple languages with phone numbers; however, we think it is important that Election Officers distribute these handouts to LEP voters who need assistance with voting. Many voters go directly to the table when they arrive at the precinct and may be too intimidated to ask for help; presenting these voters with a handout encouraging them to contact the ROV if they have problems voting is a more pro-active and effective way to ensure that such voters get the help they need. Additionally, having such a handout makes it more likely that such voters will contact the ROV after their voting experience if they have complaints.

3. No polling places had signs indicating where bilingual workers were seated, although such signage is a regular practice in other diverse counties such as Los Angeles County.¹⁰

4. At 11 polling places, Bilingual Election Officers failed to appear. In several instances, our monitoring staff had to call the ROV to request replacement Bilingual Election Officers. Monitors also observed sites which needed additional Bilingual Election Officers, even though the ROV reports that it generally overstaffed Bilingual Elections Officers for this election. The following table shows the 11 polling places where Bilingual Election Officers did not appear:

⁹ This document is referred to by the Santa Clara County Registrar of Voters as the “Calling Card.”

¹⁰ Los Angeles County Registrar-Recorder/County Clerk, “Election Guide and Checklist,” (2008), 22, available at http://www.lavote.net/Voter/POLLWORKER/PDFS/ELECTION_GUIDE_CHECKLIST.pdf.

| City | Precinct Number |
|---------------|------------------------|
| Milpitas | 4406 |
| Mountain View | 2428 |
| San Jose | 1039 |
| San Jose | 1103 |
| San Jose | 1343 |
| San Jose | 1505 |
| San Jose | 1506 |
| San Jose | 1508 |
| San Jose | 1513 |
| San Jose | 1519 |
| Sunnyvale | 4021 |

5. Bilingual Law Foundation poll monitors and staff members from at least one other community organization assisted some voters who needed bilingual assistance. In some of these instances, those poll monitors who attempted to interpret for LEP voters encountered resistance from Precinct Inspectors. In Precinct 1506, the lone bilingual, Spanish-speaking Election Officer was at lunch when two monolingual Spanish-speaking voters arrived to vote. The poll monitor began to interpret for the voters, but was told by the Precinct Inspector that she needed to stop. The Precinct Inspector then requested that the bilingual Election Officer return from lunch to help the two voters. In Precinct 1513, a bilingual Law Foundation poll monitor was able to accompany a voter to the voting booth and provide language assistance where the bilingual Spanish-speaking poll worker had not shown up. Had the poll monitor not been present, no one at that precinct would have been able to assist the voter.

6. Monitors found that Bilingual Election Officers routinely failed to wear badges identifying themselves as bilingual. We found this deficiency at 35 of 117 precincts. In one instance (Precinct 2386), the Precinct Inspector erroneously told the monitor that the site was not required to have Bilingual Election Officers and refused to instruct workers to wear badges indicating their language capability.

7. In 44 of 114 polling places, bilingual provisional voting instructions were not displayed. At no polling place were the provisional ballot envelopes available in languages

other than English, although, in some precincts, photocopies of translated provisional ballot instructions were provided to voters along with the English provisional ballot envelopes.

8. Some Precinct Inspectors seemed ignorant of the language needs of their precincts or of their duty to provide language-appropriate assistance. For example, Precinct 1039 was designated as needing a bilingual Chinese-speaking Election Officer, but the Precinct Inspector insisted repeatedly that there were no non-English-speaking voters in that precinct and that they were not required to provide bilingual assistance. Similarly, the Precinct Inspector at Precinct 2308 told a poll monitor that “all voters in the precinct speak English” when questioned about some missing bilingual elections materials. While Precinct 2308 was not designated as needing any Bilingual Elections Officers, it is likely that at least some voters in that precinct were non-native English speakers; for this reason, every precinct is required to display bilingual voter materials in all five Santa Clara County target languages.

9. Trained poll monitors observed that, when polling places failed to provide translated voting materials or Bilingual Election Officers as required by law, LEP voters faced difficulty in casting their ballots when they attempted to vote at those sites.

B. Deficiencies in Materials Regarding LEP Voters’ Rights Provided to Santa Clara County Election Officers

The materials that Santa Clara County Election Officers receive contain some useful information to help ensure that LEP voters are able to exercise their right to vote in accordance with state and federal law. However, as outlined below, these materials are deficient in several respects, especially when compared with other California counties.

1. Santa Clara County’s written guidance to Election Officers regarding LEP voting is generally incomplete and scattershot.

First, neither the Santa Clara County *Election Officer Manual, Presidential Election 2008* (“*E.O. Manual*”)¹¹ or the *What To Do If... Election Day Procedure Booklet* (“*W.T.D.I. Booklet*”)¹² contains centralized sections addressing language access; both booklets would benefit from an easy reference guide and overview of responsibilities for Election Officers regarding language access. In contrast, Orange County provides a helpful explanation of the legal requirement for bilingual voter assistance, as well as a useful overview of how to assist LEP voters, in the “Voter Service” section of its *Poll Worker Training Manual*.¹³

In fact, any discussion of LEP voters is completely absent from both the “Election Day Overview” section of Santa Clara County’s *E.O. Manual*,¹⁴ and, incredibly, the “Expediting and Dealing with Voters” section.¹⁵ The lengthy “Processing a Voter” section¹⁶ contains a few passing references to language issues but lacks important basic information. For example, Election Officers are not told to refer LEP voters to bilingual Election Officers when appropriate. Moreover, this section does not cross-reference other materials regarding bilingual voters; it fails to mention the helpful discussion regarding voter assistance set out in the *W.T.D.I. Booklet*, for instance.¹⁷

2. Santa Clara County’s information regarding bilingual election materials is too general and incomplete.

Further, the information that Santa Clara County does provide to Election Officers is incomplete. The sections of the *E.O. Manual* that discuss the materials that poll workers must provide to the public contains incomplete or no discussion of bilingual materials. For instance:

¹¹ County of Santa Clara Registrar of Voters, November 4, 2008 Election, “Election Officer Manual, Presidential Election 2008,” (2008).

¹² County of Santa Clara Registrar of Voters, November 4, 2008 Election, “What To Do If... Election Day Procedure Booklet,” (2008).

¹³ Orange County Registrar of Voters, “Poll Worker Training Manual,” (2009), 8, available at <http://www.ocvote.com/volunteer/manual.htm>.

¹⁴ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 17.

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 25-41.

¹⁷ County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 4-5.

- a. The list of “Voter Processing Table Items”¹⁸ fails to list bilingual provisional voting materials (see also *W.T.D.I. Booklet*¹⁹); nor are these materials discussed in the provisional voting section;²⁰
- b. The list of materials to be found in the Precinct Inspector’s Briefcase describes only two of the seven publications as “multilingual;”²¹ and
- c. The list of posters to be hung the night before Election Day omits all non-English materials except for the “Voter Bill of Rights” posters.²²

The *E.O. Manual* does contain a general instruction to poll workers to “[e]nsure all bilingual voting materials in all languages are clearly displayed,”²³ but, in the context of trying to ensure that harried volunteers perform the complex tasks required of them on Election Day such general exhortations are of limited value. Poll workers should be provided with specific, easy-to-follow instructions regarding which bilingual materials to display; Los Angeles County’s *Election Guide and Checklist* provides a good model in this regard.²⁴ In fact, L.A. County devotes an entire page to a photo modeling how multilingual materials should be displayed.²⁵

3. Santa Clara County’s training regarding the identification of bilingual Election Officers and voter assistance to non-English-speaking voters is insufficient.

The *E.O. Manual* specifically requires that bilingual Election Officers wear badges throughout the day indicating the language they speak.²⁶ The widespread lack of compliance

¹⁸ *Id.* at 15.

¹⁹ County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 17.

²⁰ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 37.

²¹ *Id.* at 52.

²² *Id.* at 16.

²³ *Id.* at 19.

²⁴ Los Angeles County Registrar-Recorder/County Clerk, “Election Guide and Checklist,” *supra* note 8 at 8, 11-13, 17, 20-22.

²⁵ *Id.* at 22.

²⁶ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 19.

encountered by our poll monitors—in spite of the ROV’s provision of satisfactory written instruction—points to a need for more training on this topic.

The *W.T.D.I. Booklet* also sets out clear direction to poll workers on LEP voters’ right to obtain assistance from third parties as they seek to exercise their right to vote.²⁷ The *W.T.D.I. Booklet*’s language is consistent with the California Elections Code, which provides that “When a voter declares under oath, administered by any member of the precinct board at the time the voter appears at the polling place to vote, that the voter is then unable to mark a ballot, the voter shall receive the assistance of not more than two persons selected by the voter, other than the voter’s employer, an agent of the voter’s employer, or an officer or agent of the union of which the voter is a member.”²⁸ Again, given the significant deviations from ROV’s written direction to Election Officers that we found concerning voter assistance from third parties, it appears that training on this point needs to be augmented.

It is apparent that Santa Clara County made efforts to provide language assistance to LEP voters. We understand that ensuring the presence of bilingual assistance in every precinct with a significant number of LEP voters is difficult. Still, we hope the ROV will commit to improving its plan to ensure access for these voters. For many LEP voters, access to language assistance is the determining factor in whether they can cast a ballot. In light of the growing linguistic diversity of California’s population, robust voter participation can be achieved only if jurisdictions fully comply with their legal obligation to provide language assistance.

²⁷ County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 4. A later reference to voter assistance, however, discusses only voters with disabilities’ right to assistance and makes no mention of LEP voters. This type of inconsistency within the Election Officer training materials can and did lead to confusion among poll workers on Election Day. *Id.* at 7.

²⁸ Cal. Elec. Code § 14282(a).

V. IDENTIFICATION

Only first-time voters in a Federal election who registered by mail are required to present identification in order to be processed as a regular voter.²⁹ If a first time voter is unable to present acceptable identification, he or she can vote provisionally.³⁰ No other voter should be asked for identification.

At the following five polling places, Election Officers inappropriately asked voters to show identification.

| <u>Precinct</u> | <u>Description of Problem</u> |
|-----------------|---|
| 1340 | Poll monitor observed poll workers requesting identification from voters; when the monitor reminded the Precinct Inspector not to ask voters for ID unless the roster required it, the Precinct Inspector responded rudely. |
| 2542/2544 | Poll monitor observed Elections Officers requesting identification at a polling place where voters from two precincts were attempting to vote. |
| 3954 | Poll monitor noted that an Elections Officers asked a voter for identification “for no apparent reason.” |
| 1446 | Precinct Inspector mistakenly believed that <i>all</i> voters must present ID before voting. |

The *E.O. Manual* contains appropriate instructions in this regard, telling poll workers in bold and all-caps “**DO NOT ASK FOR ID** unless the Roster Index states ‘ID Required.’”³¹ However, the *W.T.D.I. Booklet* does not contain a similar admonishment, an omission that may lead to confusion.³² Los Angeles County’s *What To Do If...* manual is much clearer on this point, as it clearly states that only new voters are required to present ID and then lists residency or identity documents that are legally acceptable in California.³³

²⁹ 2 C.C.R. § 20108.38(c)-(d) (2008).

³⁰ Cal. Elec. Code § 14310.

³¹ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 25.

³² County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 8.

³³ Los Angeles County Registrar-Recorder/County Clerk, “What To Do If... Election Day Problems Occur at the Polls,” (2009), 12, available at http://www.lavote.net/VOTER/POLLWORKER/PDFS/WHAT_TO_DO_IF.pdf.

VI. VOTING MACHINES

The federal Help America Vote Act (“HAVA”) requires that, in elections for federal office, each polling place be equipped with at least one voting system that is “accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.”³⁴ In Santa Clara County, the Direct Record Electronic (“DRE”) automated voting machine fulfills this requirement and enables voters with disabilities to cast a vote. Additionally, voters may receive assistance throughout the voting process.³⁵ However, not all voters feel comfortable receiving assistance with such an important matter from a stranger. Law Foundation volunteers visited twelve sites with broken voting machines. Another community organization reported a broken voting machine at one other site.

This chart details the twelve precincts with broken voting machines:

| City | Precinct Number |
|-----------------|------------------------|
| Gilroy | 3957 |
| Los Altos | 2309 |
| Los Altos Hills | 2386 |
| Los Altos Hills | 2381 |
| Palo Alto | 2119 |
| Palo Alto | 2014 |
| San Jose | 1101 |
| San Jose | 1447 |
| San Jose | 1422 |
| San Jose | 1451 |
| San Jose | 1435 |
| San Jose | 1449 |

One poll monitor reported Election Officer resistance to encouraging voting machine use. When asking the Precinct Inspector at Precinct 2436 about the voting machine, the poll monitor was told that if one person uses it, it adds 30 minutes to the closing time; the Precinct Inspector added, “So you can ask about it, but if you use it I’ll kill you,” followed by laughter. Discouraging voters from using the voting machines is especially troubling given the fact that,

³⁴ 42 U.S.C. 15481(a)(3)(A); Cal. Elec. Code § 19227(b).

for some disabled voters, using a voting machine is the only way to guarantee an anonymous, independent vote.

Again, some of these problems may stem from deficiencies in the written materials distributed to poll workers. The *E.O. Manual* states that “per the Secretary of State; [sic] If one (1) voter uses the touch screen voting machine; [sic] four additional voters must vote a touch screen ballot.”³⁶ These instructions are misleading and may cause poll workers to either discourage voters from exercising their right to use the touch screen machine or force other voters to use it to reach the supposed magic number of four voters. According to verbal reports from several community members received by Law Foundation advocates, both of these undesirable outcomes did in fact take place in prior election cycles. Importantly, because these machines are most often used by people with disabilities, these faulty instructions would disproportionately affect members of this protected class.

VII. POLLING PLACE LOCATION AND ACCESSIBILITY

A. Voters with Disabilities

The California Elections Code requires elections officials, when selecting polling places, to undertake “necessary measures in the locating of polling places to ensure that polling places meet the guidelines promulgated by the Secretary of State for accessibility by the physically handicapped.”³⁷ The Secretary of State has developed a comprehensive checklist for county elections officials to utilize in order to ensure that each location selected to be a polling place is accessible to individuals with disabilities.³⁸ In addition, California allows for “curbside voting” in the event that a disabled voter is unable to enter that voter’s assigned polling place.³⁹ While Law Foundation poll monitoring project did not focus specifically on accessibility of polling

³⁵ Cal. Elec. Code § 2300 (6); 14282(a) *supra* note 26.

³⁶ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 22.

³⁷ Cal. Elec. Code § 12280.

³⁸ Secretary of State of California, “Polling Place Accessibility Checklist,” (updated 2004; supplemented 2006), available at http://www.sos.ca.gov/elections/final_ppas_supp_0317.pdf.

places to disabled voters, several poll monitors noted that poll workers did follow “curbside voting” provisions on those occasions when voters were unable to enter the polling place.

B. Other Problems with Accessibility at the Polls

Unfortunately, the legal requirements governing polling place accessibility fall short of ensuring a calm, comfortable voting environment. On November 4, 2008, Law Foundation poll monitors noted how polling places housed in very small spaces contributed to an overall feeling of chaos and confusion, and how a lack of sufficient table space made it impossible for all of the bilingual elections materials to be displayed. In eight precincts, Law Foundation poll monitors noted various peripheral problems resulting from insufficient space in the polling place.

| <u>Precinct</u> | <u>Description of Problem</u> |
|-----------------|---|
| 1072 | Poll monitor reported that provisional ballot instructions were displayed on the floor by the registration table. |
| 1513 | Voting for this precinct was originally supposed to take place in the school’s library, but was moved to a classroom. Poll monitor noted that the classroom was cluttered with school supplies and boxes already, leaving little room for voting materials, poll workers, booths and voters. A physically disabled voter using a shopping cart as a mobility aid had difficulty in both entering the polling place and accessing the voting booth due to space constraints. |
| 1446 | Two precincts were housed in a space inadequate for one; a voter needing wheelchair accessibility would not have been able to enter to precinct. |
| 2002 and 1449 | There was not enough table space available to present all the required materials. |
| 1633 | Cramped quarters resulted in increased tension between poll workers and voters. |
| 1453 | Two precincts were housed in one small space; poll monitor noted that people were “literally tripping over each other to get through the line to vote.” |
| 1506 | Voting took place in the living room of a small residence. Though voting materials were spread on furniture throughout the room and on the floor, there still was not enough space to display all required materials. |

³⁹ Cal. Elec. Code § 14282(c).

VIII. LINES

Poll monitors observed long lines of over 20 voters at seven polling places: Precincts 2542, 2544, 1336, 4002, 4015, 4416 and 4411. A poll monitor at one polling place housing two precincts—2542 and 2533—reported a line of 150 voters. These lines, which may have been caused by the long and complex ballot, highlight the need for language assistance. Poll monitors at several polling places observed Bilingual Election Officers helping voters navigate the process of voting. As mentioned above, bilingual poll monitors and community workers had to assist a number of voters who needed bilingual assistance due to the lack of Bilingual Election Officers.

Santa Clara County’s Election Officer training materials lack any guidance for poll workers about long lines. Other counties’ materials address this issue head-on. Orange County’s Poll Worker Training Manual explicitly states that “[d]ecreasing lines and voters’ wait time should be a key priority for poll workers.”⁴⁰ Likewise, for the November 4, 2008, Presidential Election, Los Angeles County created a specific position known as a “Line Monitor Clerk” to address this problem and provided detailed instructions for how that person could help alleviate long lines.⁴¹ Santa Clara County should give serious consideration to creating such a position.

⁴⁰ Orange County Registrar of Voters, “Poll Worker Training Manual,” *supra* note 11 at 91.

⁴¹ Los Angeles County Registrar-Recorder/County Clerk, “What To Do If...” *supra* note 31 at 3, (November 4, 2008 version).

IIX. PRECINCT MAPS

The *E.O. Manual* instructs Election Officers to use precinct locator maps if a voter does not show up on either of the voter indices, the Voter Roster Index or the Supplemental Index.⁴² The purpose of the maps is to allow an Election Officer to direct a voter to his or her correct precinct. A close examination of a “Field Inspector Map” for “Center 4 Area 2” of Santa Clara County shows that not all streets on the map are named and no highway or exit information is listed. Perhaps most troubling is that the map presents only a very small area of Santa Clara County and would not be helpful in directing a voter to his or her precinct if that precinct were located within Santa Clara County, but outside of the mapped area. Our monitoring demonstrated that these maps are riddled with inaccuracies and, in many instances, are virtually useless as a means of directing voters to the proper polling place. Thus, these maps should either be revamped to make them useful, by expanding them to include all of Santa Clara County and naming all streets and highways, or poll workers should be instructed to contact the central office for this information rather than rely on such a faulty source of information and send the voter on a frustrating wild goose chase for his or her polling place.

IX. PROVISIONAL BALLOTS

A. Summary of Problems Regarding Provisional Ballots

Poll monitors observed a number of irregularities with respect to the use of provisional ballots. Frequently, Election Officers did not explain the difference between provisional ballots and regular ballots to voters; they also failed to provide voters with information about their options before furnishing provisional ballots.

- In 12 precincts (1346, 4058, 1513, 1343, 1877, 1723, 1724, 2015, 2428, 1434, 1421 and 2119), voters whose names did not appear on the roster were automatically given provisional ballots by Election Officers without any explanation of the meaning of a

provisional ballot or investigation into whether the voter might be able to vote on a regular ballot in another precinct. In some instances, Election Officers would attempt to find out where the voter was registered but did not utilize all of the methods suggested in the EO Manual.

- In 6 precincts (1506, 1521, 1446, 2333, 1533 and 1343), when vote-by-mail voters appeared at a polling place without their vote-by-mail ballot, Election Officers failed to give voters a choice between using a provisional ballot and retrieving their vote-by-mail ballot from home, nor did these Election Officers explain the implications of filing one type of ballot instead of the other.
- In two instances (Precincts 2333 and 1533), poll monitors observed Election Officers turning voters away to retrieve their vote-by-mail ballots rather than offering them the choice between voting provisionally and returning with the vote-by-mail ballot later in the day.
- In two precincts (Precincts 4058 and 1405), voters whose names did not appear in the address index were forced to vote provisionally even though their names appeared in the official roster. In those instances, the Precinct Inspectors mistakenly believed that voters' names had to appear on both lists. At precinct 1405, the polling place ran out of provisional ballots and temporarily sent voters to a neighboring site to cast provisional ballots. The ROV delivered more provisional ballots to the site.

As mentioned above, 44 of 114 polling places did not display bilingual provisional voting instructions. Moreover, poll monitors observed that all voters casting provisional ballots were provided with an English-only provisional ballot envelope. Printed directly on the provisional ballot envelope is critical information, including a section entitled "Voter Must Complete" which sets out the steps that a voter must complete in order for the ballot to be counted. The directions on the envelope also explain that the voter is required to sign the provisional ballot envelope in

⁴² County of Santa Clara Registrar of Voters, "Election Officer Manual," *supra* note 9 at 29.

order for the ballot to be accepted as valid. All of these critical instructions appear in very small print, in a confusing lay-out, and ONLY in English on the provisional ballot envelope. Translated versions of the information on the provisional ballot envelope were available for voters; however, poll monitors observed that the translated provisional ballot envelope information was rarely proactively provided to voters.

Santa Clara County voters cast 27,000 of California's hundreds of thousands of provisional ballots. Although Santa Clara County reports a high acceptance rate for provisional ballots, there are other known problems with this form of voting that give reason to be concerned about the potential for disenfranchisement of our county's registered and eligible voters. While there are legitimate reasons voters may be instructed to complete a provisional ballot, delays in vote tabulations—which could be important in close races—and unacceptable risks that valid votes will be rejected due to avoidable errors suggests that provisional ballots should be used only when the voter is fully informed of his or her options. Additionally, failing to inform voters of their options before advising them to vote provisionally may have caused voters to unwittingly and unnecessarily vote at a precinct other than their home precinct. As a result, voters may have been denied the chance to vote on certain issues which pertain only to their home precinct.

B. Problems with Materials Provided by the Registrar of Voters to Election Officers Regarding Provisional Ballots

Many of the problems discussed above may stem from deficiencies in the written materials that the ROV distributes to Election Officers. We identified the following specific problems:

- 1. Santa Clara County's direction to Election Officers regarding provisional ballots are confusing, incomplete, and at times misleading.**

There are references to provisional voting in several sections throughout the *E.O. Manual*⁴³ but the actual “provisional voting” section⁴⁴ is not internally complete and does not cross-reference the other sections of the *E.O. Manual* that mention provisional voting or the *W.T.D.I. Booklet*. The *W.T.D.I. Booklet*’s instructions are marginally better⁴⁵ but are still hard to follow and also lack cross-references.

Neither the *E.O. Manual* nor the *W.T.D.I. Booklet* contains step-by-step, easy-to-follow instructions for poll workers to follow when they are processing provisional ballots; rather, the poll worker is required to puzzle through incomplete single-spaced instructions and search the remainder of the publication for information on how to handle specific situations where provisional voting might be appropriate. The *W.T.D.I. Booklet*, in its “Vote By Mail Flowchart” for non-provisional voting,⁴⁶ does direct Election Officers to a “Provisional Voting Step-by-Step Guide.” The guide, however, located on page 10 of the *W.T.D.I. Booklet* and entitled “Provisional/Fail-Safe Voting: A Step-By-Step Guide,” provides confusing direction, is printed in small type and, as a result, is very difficult to read. Finally, it appears that visual aids were planned for the bottom of page 17 of the *W.T.D.I. Booklet* but were not part of the final version. Again, not only are these instructions incomplete and not helpful, but they could be detrimental to the voting process.

In contrast, Orange County’s *Poll Worker Training Manual* contains simple, comprehensive, step-by-step instructions with ample visual aids to assist the election worker;⁴⁷ Los Angeles County’s *Election Guide and Checklist* also has simple instructions and cross-references other resources that poll workers can reference if necessary.⁴⁸ While formatting issues and the like may not seem to be critical to ensuring that poll workers properly carry out their duties, these procedures are quite complex. It is essential that harried Election Officers

⁴³ *Id.* at 25, 27-29, 31-34, 36.

⁴⁴ *Id.* at 37-38.

⁴⁵ County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 16-17.

⁴⁶ *Id.* at 15.

⁴⁷ Orange County Registrar of Voters, “Poll Worker Training Manual,” *supra* note 11 at 77-84.

have easy-to-follow instructions. Other counties' materials are more user-friendly in general. For instance, Orange County's *Poll Worker Training Manual* includes a glossary,⁴⁹ index,⁵⁰ and quizzes⁵¹ to help poll workers, all of which are absent from Santa Clara County's *E.O. Manual*.

At times the *E.O. Manual* and *W.T.D.I. Booklet* were outright misleading in ways that almost certainly led to excessive use of provisional balloting. For example, the *E.O. Manual*'s "Provisional Voting" section instructs Election Officers that, if the "voter is a VBM voter with no ballot to surrender, the voter can cast a provisional ballot;"⁵² these instructions are actually set forth twice in this section of the *E.O. Manual*. Similar verbiage appears repeatedly in the *W.T.D.I. Booklet*;⁵³ in fact, it is stated in even stronger terms: "[v]oter must vote a Provisional ballot **DO NOT** allow voter to vote a regular ballot."⁵⁴ Nowhere is the poll worker instructed to ask the voter if he or she can retrieve the ballot from home, which would likely result in the voter being able to submit their original ballot (or, if they so choose, to surrender the ballot and vote at the polls) rather than vote provisionally.

In a similar vein, ROV materials do not contain explicit instructions to warn voters that their provisional ballots may not be counted, a warning that might have led significant numbers of voters to employ a more certain method of voting. The definition of a "Provisional Ballot" provided in Santa Clara County's Election Officer materials hints at this possibility, stating that a "Provisional Ballot is a regular ballot that is held and not counted until the [ROV] determines the voter's eligibility . . . [voters are to] call the [ROV] 28 days after Election Day and find out if his/her ballot has been counted,"⁵⁵ but this language is not explicit. Perhaps more importantly, poll workers are not told to discuss this important issue with the voter.

⁴⁸ Los Angeles County Registrar-Recorder/County Clerk, "Election Guide and Checklist," *supra* note 8 at 35-37.

⁴⁹ Orange County Registrar of Voters, "Poll Worker Training Manual," *supra* note 11 at 128-135.

⁵⁰ *Id.* at 136-137.

⁵¹ *Id.* at 117-126.

⁵² County of Santa Clara Registrar of Voters, "Election Officer Manual," *supra* note 9 at 37.

⁵³ County of Santa Clara Registrar of Voters, "What To Do If... Booklet," *supra* note 10 at 15-16.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 16; County of Santa Clara Registrar of Voters, "Election Officer Manual," *supra* note 9 at 37.

Another warning that voters should receive before they vote provisionally is that, if they are not in their home precinct, they might be foregoing the opportunity to vote on issues that are not on the ballot of the precinct in which they plan to vote. A reference to this issue is in the “Processing a Voter” section,⁵⁶ but not in the provisional voting sections of the *E.O. Manual* and *W.T.D.I. Booklet*, where poll workers are likely to be looking for information.

2. Best practices call for specialized and/or experienced poll workers to handle provisional voting at a dedicated work area.

Los Angeles County assigns a “Provisional Clerk” to handle all provisional voters;⁵⁷ Orange County requires that the Inspector assist all provisional voters.⁵⁸ These requirements are likely to lead to more consistent and correct application of provisional voting standards than Santa Clara County’s approach of leaving individual poll workers—many of whom will be working their first election—to handle this complex task.

In addition, both Los Angeles and Orange Counties dedicate a separate area for processing provisional voters, which assures that this takes place away from the often hectic main processing table.⁵⁹

3. Santa Clara County’s manual should include language regarding the proper role of the election officer in the context of the most important use of provisional ballots: challenged voters.

Clearly, the worst-case scenario in any election is when an Election Officer turns an eligible voter away from the polls. In California, a voter may be “challenged” at the polls by an Election Officer at the voter’s precinct only in certain specific situations when the voting eligibility of the would-be voter is in question, such as if the Election Officer has received appropriate evidence that the voter may not be a U.S. citizen.⁶⁰ If a voter is challenged by an Election Officer at the precinct where he or she is attempting to vote, the law requires that

⁵⁶ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 33.

⁵⁷ Los Angeles County Registrar-Recorder/County Clerk, “Election Guide and Checklist,” *supra* note 8 at 35-37.

⁵⁸ Orange County Registrar of Voters, “Poll Worker Training Manual,” *supra* note 11 at 77-80.

⁵⁹ *Ibid.* 33; Los Angeles County Registrar-Recorder/County Clerk, “Election Guide and Checklist,” *supra* note 8 at 7.

⁶⁰ Cal. Elec. Code § 14240-14241.

Election Officers follow certain procedures when conducting the “challenge.”⁶¹ Provisional ballots, while overused in some cases, are the final backstop against preventing a would-be voter from casting a vote. Unfortunately, the “Challenged Voter” section of the *E.O. Manual*⁶² does not discourage poll workers from turning would-be voters away from the polls; indeed, arguably the language encourages them to do so. While the *W.T.D.I. Booklet*⁶³ sets out a procedure to allow a challenged would-be voter to vote, it seems inadvisable to have Election Officers making decisions about challenges in the field under the tremendous pressures of Election Day; rather, they should issue a provisional ballot to the voter and let the ROV make the final determination as to the voter’s eligibility. Further, the oral oath-taking procedure seems time-consuming, intimidating, and likely to be misapplied by Election Officers.

Orange County’s *Poll Worker Training Manual* contains a more sensible procedure and helpful language regarding this issue. We recommend that this or a similar procedure be adopted, and analogous language be included in Santa Clara County’s *E.O. Manual*:

As a poll worker, your duty is to help administer the election to the public; you should *not* turn a voter away from the polls. On the rare occasion you have doubts regarding a voter’s eligibility to vote, call the Help Desk to ask for permission from the Registrar of Voters to challenge the voter. Record the voter’s information on the “Challenge List” of the Roster and issue a provisional ballot. The Registrar of Voters will determine whether or not the ballot is eligible to be counted.⁶⁴

⁶¹ Cal. Elec. Code § 14243-14253.

⁶² County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 35.

⁶³ County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 21.

⁶⁴ Orange County Registrar of Voters, “Poll Worker Training Manual,” *supra* note 11 at 77.

X. POLL MONITORS

Pursuant to the California Elections Code, poll monitors are permitted to enter polling places, observe the elections process, ask questions, and have questions answered by Election Officers.⁶⁵ Law Foundation poll monitors were trained to comply with Santa Clara County ROV guidelines for poll watchers. Most Precinct Inspectors and Election Officers cooperated with the poll monitors. However, a surprising number were uncooperative.

In the following three instances, Precinct Inspectors refused to answer poll monitors' routine questions:

| <u>Precinct</u> | <u>Description of Problem</u> |
|-----------------|--|
| 2413 | Poll Inspector informed the poll monitor that she would not "do surveys." |
| 1340 | Poll monitor pointed out a problem taking place at the precinct to the Precinct Inspector who became very defensive. The poll monitor left the precinct in order to avoid further hostility from the Precinct Inspector. |
| 4408 | When poll monitor attempted to ask questions of the Precinct Inspector, the Precinct Inspector said that the Field Inspector had given instructions to answer any questions "except language access questions." |

In the following five instances, Law Foundation poll monitors were asked to leave the precincts they were attempting to monitor:

| <u>Precinct</u> | <u>Description of Problem</u> |
|-----------------|---|
| 1446 | When Poll monitor challenged the Precinct Inspector about the fact that all voters were being asked to present ID, Poll monitor was told to leave; the Precinct Inspector grabbed the poll monitor's arm and threatened to call the police. Poll monitor left the precinct. |
| 4058 | Poll monitor was ejected for "interfering" after asking a bilingual worker to put a badge on. |
| 2002 | When asking routine questions, a Poll worker was terse with the poll monitor and asked him to leave. Poll monitor explained that it was his right to observe the voting process and pointed |

⁶⁵ Cal. Elec. Code § 2300(a)(9).

| | |
|------|---|
| | out the posted Poll Watcher Rights and Responsibilities notice. |
| 1516 | A Law Foundation employee volunteering with another organization reported being ejected—along with other volunteers—from the precinct for attempting to help monolingual Spanish-speaking voters with the voting process at the voters’ requests. |
| 2428 | Voters were given provisional ballots without being told the implications of voting provisionally. When the poll monitor asked about this, the Precinct Inspector was very rude and asked the poll monitor to leave. |

These problems may stem in part from the written materials that are provided to poll workers. The *E.O. Manual*⁶⁶ and *W.T.D.I. Booklet*⁶⁷ contain almost identical discussions of “poll watching;” the discussion lacks balance in that it contains a number of negative statements about the limits on poll monitors, and few clear statements of the monitors’ right to be performing this important watchdog function. Orange County’s *Poll Worker Training Manual*⁶⁸ and Los Angeles’s *What To Do If...* manual⁶⁹ contain better examples, emphasizing the legal right of people to monitor the polls within, appropriate limits. Orange County also provides a specific staff person in the ROV’s office for poll workers to call if issues arise around poll watchers, which seems an advisable practice.⁷⁰

XI. RESPONSIVENESS OF THE REGISTRAR OF VOTERS

We understand that it is extremely difficult for the ROV to respond to all of the calls it receives on Election Day. Therefore, we commend the ROV for being able to address many of the problems we encountered as they arose. Our own calls to the ROV about the issues we have described above were uniformly met with a positive and helpful response, as well as a “we’ll-fix-

⁶⁶ County of Santa Clara Registrar of Voters, “Election Officer Manual,” *supra* note 9 at 51.

⁶⁷ County of Santa Clara Registrar of Voters, “What To Do If... Booklet,” *supra* note 10 at 23.

⁶⁸ Orange County Registrar of Voters, “Poll Worker Training Manual,” *supra* note 11 at 92.

⁶⁹ Los Angeles County Registrar-Recorder/County Clerk, “What To Do If...” *supra* note 31 at 22. (November 4, 2008 version).

⁷⁰ Orange County Registrar of Voters, “Poll Worker Training Manual,” *supra* note 11 at 92.

it” attitude. We do, however, recommend that the County explore ways of providing status updates to organizations conducting poll monitoring efforts, perhaps via text messaging or email.

More importantly, our poll monitors observed that the County’s own internal troubleshooting processes—including establishing ROV hotlines for poll-workers and instructing Election Officers to call the Field Inspectors for technical assistance—appeared to be disregarded at times. Although it is obviously ideal for Election Officers to handle some troubleshooting themselves, we observed that a number of Election Officers seemed unaware of or unwilling to use the internal solutions that had been provided to them.

XII. RECOMMENDATIONS

Based on our findings during the November 4, 2008, General Election, the Law Foundation has developed the following recommendations. We recommend that the ROV:

- A.** Develop strategies to help increase attendance of Bilingual Election Officers on Election Day and to encourage Poll Inspectors to contact the ROV immediately when a Bilingual Election Officer fails to appear.
- B.** Emphasize the importance of posting signs indicating the availability of Bilingual Election Officers accurately and in areas obvious to voters. Such posting should reduce any confusion for voters with limited English proficiency about where they can find assistance.
- C.** Display the telephone referral card at the polling place so that voters with limited English proficiency know that language assistance hotlines are available to them. Although Bilingual Election Officers were available to assist voters with limited English proficiency at many polling places, it is important to have an alternative for such voters to in case the Bilingual Election Officers are ineffective, too busy to help, or fail to appear at the polling place.

- D.** Supply all precincts with sufficient provisional ballot envelopes, especially translated provisional ballot envelopes, in case of any unforeseen circumstances. The County should provide actual translated provisional ballot envelopes that voters can fill out, rather than simply provide translated copies of the envelopes for voters to use to complete English-only envelopes; the latter process creates confusion among voters and Election Officers. Additionally, instructions on the provisional ballot envelopes should be printed in larger type and in a more accessible lay-out.
- E.** Continue to caution against improper voter identification checks during Election Officer trainings. We suggest that the County hold post-election counseling sessions with Election Officers who improperly asked voters for identification in past elections. The counseling sessions will help reduce the number of improper identification checks in future elections.
- F.** Discuss voting machine breakdowns with the ROV's voting machine vendor and if the vendor fails to address the breakdown problem by developing an adequate testing and repair program, consider changing vendors.
- G.** Discuss techniques for improving the process for downloading and counting votes cast on voting machines with the voting machine vendor; if the process remains too cumbersome, research other electronic voting options.
- H.** Take additional steps beyond the most basic legal requirements to ensure overall polling place accessibility. The ROV, in future elections, should comply with all guidelines described by the Secretary of State in its HAVA Compliance Manual⁷¹ and in its Polling Place Accessibility Checklist,⁷² including ensuring that public restrooms or portable toilets are available to voters at all polling places and that

⁷¹ Secretary of State of California, "HAVA Compliance Manual: Guidance on implementing the Help America Vote Act of 2002," (August 25, 2006), available at http://www.sos.ca.gov/elections/bidders_library/hava_requirements.pdf.

chairs be made available at all times for those voters waiting in line to vote who may have difficulty standing.

- I.** Determine the amount of table space needed in order to adequately display all required voting materials, including all bilingual voting materials, so that each individual document has a space on a table surface that is visibly separate from other documents and so that each individual document is distinguishable within the larger set of materials. Once the ROV makes that determination, elections officials should ensure that all polling places are equipped with at least the necessary amount of table space. If a polling place is found not to have adequate table space, arrangements should be made with the host facility to get additional tables, or the ROV should facilitate the provision of additional tables to the polling place prior to Election Day.
- J.** Place greater emphasis in its Election Officer trainings on the posting of multilingual materials in visible and identifiable locations.
- K.** Place increased emphasis on the importance of displaying translated sample ballots and other translated voting materials during Election Officer trainings.
- L.** Provide more extensive training to Election Officers on the use and meaning of provisional ballots, as well as on procedures for ensuring that voters are provided the option to cast precinct or vote-by-mail ballots when possible and when the voter so chooses.
- M.** Make clear in its Election Officer training that all poll workers and, in particular, Precinct Inspectors should cooperate with poll monitors. The ROV should instruct Precinct Inspectors that questions and requests by poll monitors do not of themselves constitute interference with the election process.

⁷² Secretary of State of California, "Polling Place Accessibility Checklist," *supra* note 36.

- N. Hold post-election counseling sessions with Election Officers who failed, in a prior election, to follow Election Officer rules and procedures. We also recommend that the ROV systematically evaluate and address complaints that came in from the public about problems at precincts.
- O. Edit and augment the materials provided to Election Officers (e.g., the *E.O. Manual* and *W.T.D.I. Booklet*) as discussed in detail above. The Law Foundation would be happy to provide additional specific feedback in that regard.

XIII. CONCLUSION

The Law Foundation’s poll monitors observed compliance with election requirements in many precincts on Election Day. However, we did observe irregularities in a number of different areas, most prominently in the ROV’s implementation of its language access plan and its apparent failure to provide adequate instructions to Election Officers about how to handle provisional ballots. We are convinced that many of our findings of irregularities can be addressed by improving Election Officer training.

Unfortunately, our poll monitor observations are not inconsistent with the findings of a recent statewide report from State Auditor Elaine M. Howle concerning the county elections officials’ training of Election Officers. The September 18, 2008, report entitled “County Poll Workers: The Office of the Secretary of State Has Developed Statewide Guidelines, but County Training Programs Need Some Improvement”⁷³ contains criticism specific to the Santa Clara County ROV, calling into question the accuracy of the ROV’s training attendance lists by stating that the training lists for previous elections were unreliable and that auditors could not be certain that all Precinct Inspectors attended training. The report also found that the Santa Clara County ROV could not provide auditors with a complaint log showing how the county responded to

⁷³ California State Auditor, *County Poll Workers: The Office of the Secretary of State Has Developed Statewide Guidelines, but County Training Programs Need Some Improvement* (2008) <<http://www.bsa.ca.gov/pdfs/reports/2008-106.pdf>>

complaints in previous elections. We understand that the ROV has now established a unified complaint log for election-related complaints, which we applaud. We would strongly suggest that the ROV analyze the complaints that it received in this election, together with the recommendations that we make here, and come up with a fresh plan to further minimize irregularities in future elections.