

made to avoid treating voters differently based upon the inconsistencies of the U.S. Postal Service throughout the Commonwealth of Kentucky.” [R. 45 at 15.] “If the SBE had conducted the follow-up mailer to the voters whose cards were received before August 8, 2018, the SBE would be treating these voters differently than those whose cards arrived on August 9, 2018.” *Id.* Defendants also argued that they preferred to wait and see if some of those identified by the canvass mailing “actually voted on November 6, 2018.” *Id.*

However, mail is returned at different times and it was foreseeable at the time of the Consent Judgment that responses and undeliverable canvass cards would not be returned by the U.S. Postal Service all at once but at varying times. As Defendants had not sent any Section 8(d)(2) notices since 2009, it was very likely that there would be a large number of registrants who had unreported changes of address during the intervening years. Further, the Consent Judgment is intended to enforce the NVRA. The NVRA specifies that mailing is the proper method for testing whether voters have moved, and elections are used to mark time for removal of voter registrations. 52 U.S.C. 20507(d)(1)(B)(1), 20507(d)(1)(B)(ii), 20507(d)(2)(A). Consistent with the NVRA, the Consent Judgment uses general federal elections as the counters for a statutory waiting period that must elapse before a specific kind of registration is cancelled. [R. 45 at 8.] The Section 8(d)(2) notice commences the statutory waiting period encompassing two general federal elections. *Id.*

The SBE states that 264,711 cards were returned as undeliverable after the initial canvass mailing. [R. 56 at 2.] Of those returned cards, 154,756 were returned prior to August 8, 2018. *Id.* Since Defendants failed to follow up with the Section 8(d)(2) notices to these returned cards prior to August 8, registrations belonging to those with a change of address cannot be cancelled after the November 2020 election. [R. 62 at 3.] Instead, the 154,756 outdated registrations must

remain on Kentucky's voter rolls through at least November 2022. *Id.* Therefore, this inaction delayed Kentucky's progress toward "ensuring an accurate and current voter registration" list, one of the main purposes of the NVRA and Consent Judgment. 52 U.S.C. 20501(b)(4); [R. 39 at 8.]

## B

The second part of *Rufo* requires the Court to determine whether the modification Plaintiffs seek "is suitably tailored to the changed circumstance." 502 U.S. at 383. Plaintiffs have asked the Court to extend the Consent Judgment through March 31, 2025, so as to include the November 2024 general federal election. [R. 45 at 16.] In *Vanguards of Cleveland*, the Sixth Circuit held that a modification which extended the consent decree "for a relatively short period of time, approximately two years" was suitably tailored. 23 F.3d at 1020. Two years, in *Vanguards of Cleveland*, covered two annual promotion examinations, each of which would move the defendants toward their goal of having 23% of supervisor positions held by minorities. *Id.*

In the present case, the initial Defendants breached the Consent Judgment when they failed to timely send the Section 8(d)(2) notices, as previously explained. "Registrants who are sent a Section 8(d)(2) notice become eligible for removal after the second federal general election from the date the notice was sent, unless they respond to the notice, vote or appear to vote, or otherwise affirm or update their voter registration address during that period of time." [R. 55 at 17 (citing 52 U.S.C. 20507(d)(1)(B)).] If Defendants had complied with the Consent Judgment and sent the Section 8(d)(2) notices prior to the 2018 federal general election, the registrants who did not respond, vote or appear to vote, or otherwise affirm or update their address would have been eligible for removal following the 2020 federal general election. *Id.* at