

## Promptness of a Special Election to Fill a Congressional Vacancy

*Fox v. Paterson* (David G. Larimer,  
W.D.N.Y. 6:10-cv-6240) and *Rossito-Canty v. Cuomo*  
(Jack B. Weinstein, E.D.N.Y. 1:15-cv-568)

Three voters filed a federal complaint in the Western District of New York on Monday, May 3, 2010, seeking an order requiring the governor to call a special election to fill a congressional vacancy created by a resignation on March 9.<sup>1</sup> With their complaint, the voters filed motions for a temporary restraining order and a preliminary injunction<sup>2</sup> and expedited hearing.<sup>3</sup>

Judge David G. Larimer heard the motions on Friday and ordered briefing on venue.<sup>4</sup> On the following Wednesday, the governor announced that he would call a special election for the day of the general election, November 2, so the winner of the special election would serve until January, at which time the winner of the regular election would assume the office.<sup>5</sup> On Thursday, May 13, 2010, Judge Larimer ruled that venue in the Western District was proper, because the congressional district at issue was wholly within the district and the governor had an office there.<sup>6</sup>

Following a May 25 hearing,<sup>7</sup> Judge Larimer decided on June 4 against requiring the governor to order a special election in advance of the general election date.<sup>8</sup> Judge Larimer determined that the U.S. Constitution required the governor to call a special election, but a decision to hold the special election

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1. Complaint, *Fox v. Paterson*, No. 6:10-cv-6240 (W.D.N.Y. May 3, 2010), D.E. 1; *Fox v. Paterson*, 715 F. Supp. 2d 431, 432–33 (W.D.N.Y. 2010); see Ray Finger, *Lawsuit Filed for Special Election*, *Elmira Star-Gazette*, May 5, 2010, at A3; Jim O’Hara, *Local Attorney’s Suit Seeks Special Election in 29th District*, *Syracuse Post-Standard*, May 7, 2010, at A5; Joseph Spector, *Paterson: Special Election for Massa Seat Not Imminent*, *Poughkeepsie J.*, May 5, 2010, at A9; Jill Terreri, *Lawsuit Seeks Special Election in 29th District*, *Elmira Star-Gazette*, May 4, 2010, at A12; see also Jerry Zremski, *Massa to Resign Southern Tier House Seat*, *Buffalo News*, Mar. 6, 2010, at A1.

2. Motion, *Fox*, No. 6:10-cv-6240 (W.D.N.Y. May 3, 2010), D.E. 3.

3. Motion, *id.* (May 3, 2010), D.E. 2.

4. Docket Sheet, *id.* (May 3, 2010) (D.E. 5).

In advance of [the hearing], the Court advised counsel by letter that they “should be prepared to discuss whether venue is proper in the Western District of New York in a suit against Governor Paterson, who performs his official duties in, and is therefore deemed a ‘resident’ of, the Northern District of New York.”

Opinion at 3, *id.* (May 13, 2010), D.E. 9 [hereinafter May 13, 2010, Opinion].

5. *Fox*, 715 F. Supp. 2d at 432–33; May 13, 2010, Opinion, *supra* note 4, at 3–4 & n.1; see Tom Precious, *Vote for Massa Seat Will Be Nov. 2*, *Buffalo News*, May 13, 2010, at B1.

6. May 13, 2010, Opinion, *supra* note 4, at 6–14; see Ray Finger, *Judge Upholds Special Election Lawsuit*, *Elmira Star-Gazette*, May 14, 2010, at A3.

7. Docket Sheet, *supra* note 4 (D.E. 18); see Ray Finger, *Decision Delayed on Election Lawsuit*, *Elmira Star-Gazette*, May 27, 2010, at A3.

8. *Fox*, 715 F. Supp. 2d at 433; see Jill Terreri, *Judge Upholds Nov. 2 Date for 29th District Election*, *Elmira Star-Gazette*, June 5, 2010, at A4.

on November 2 was within the governor's discretion.<sup>9</sup> In fact, a special election was held on November 2.<sup>10</sup>

On April 21, 2011, Judge Larimer denied the plaintiffs a recovery of attorney fees because (1) the motion for fees was not filed promptly after the June 4, 2010, ruling, and (2) the June 4 ruling did not grant the plaintiffs an election earlier than the date the governor had already announced.<sup>11</sup>

A federal complaint filed in the Eastern District of New York on February 5, 2015, by eight voters sought a special election date to fill a congressional vacancy that arose much longer in time before a general congressional election: January 5, 2015.<sup>12</sup> Judge William F. Kuntz II set the case for hearing before Judge Jack B. Weinstein on February 13.<sup>13</sup> At the hearing, "Defense counsel contended that the Governor would ultimately issue a proclamation for a special election; they denied that this court could decide timing."<sup>14</sup>

On February 16, concluding that "plaintiffs have made a *prima facie* case for a preliminary injunction,"<sup>15</sup> Judge Weinstein ruled, "Unless the Governor announces the date for a special election on or before noon on Friday, February 20, 2015, or justifies a further delay at a hearing to be conducted by this court at that time and date, this court will fix the date for a special election as promptly as the law will allow."<sup>16</sup>

Judge Weinstein concluded, "Special elections in New York to fill vacant congressional seats must be conducted in the shortest space of time reasonably possible."<sup>17</sup>

There are three categories of critical losses when a seat in our nation's legislature body is unfilled: *first*, the loss to persons and institutions in the district who forfeit their power to help decide both the nation's policies at large, and those national decisions that impact the particular needs and views of the district; *second*, the loss to those in the district of a vital, powerful, individual channel to and from the government's bureaucracy and its benefits—the Congressperson and his or her staff acting as an ombudsperson for those in the district; and, *third*, the loss to the nation as a whole which gives up the input from a unique group of people represented by an

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9. *Fox*, 715 F. Supp. 2d at 442.

10. Opinion at 2 n.1, *Fox v. Paterson*, No. 6:10-cv-6240 (W.D.N.Y. Apr. 21, 2011), 2011 WL 1549475.

11. *Id.* at 3–9.

12. Complaint, *Rossito-Canty v. Cuomo*, No. 1:15-cv-568 (E.D.N.Y. Feb. 5, 2015), D.E. 1; *Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 182–83 (E.D.N.Y. 2015).

13. Order to Show Cause, *Rossito-Canty*, No. 1:15-cv-568 (E.D.N.Y. Feb. 5, 2015), D.E. 6; *Rossito-Canty*, 86 F. Supp. 3d at 183.

14. *Rossito-Canty*, 86 F. Supp. 3d at 183; see Minutes, *Rossito-Canty*, No. 1:15-cv-568 (E.D.N.Y. Feb. 13, 2015), D.E. 19.

15. *Rossito-Canty*, 86 F. Supp. 3d at 200.

16. *Id.* at 180; see Alexander Burns, *Cuomo Given Deadline to Schedule House Election*, N.Y. Times, Feb. 18, 2015, at A18.

17. *Rossito-Canty*, 86 F. Supp. 3d at 195; see *id.* at 180 ("The right to representation in government is the central pillar of democracy in this country. Unjustified delay in filling a vacancy cannot be countenanced.").

individual with the opportunity to contribute meaningfully to national debates and policy and whose views should be available to temper those of colleagues.<sup>18</sup>

On February 20, the governor set May 5 as the date for the special election, so Judge Weinstein dismissed the action as moot.<sup>19</sup>

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18. *Id.* at 181.

19. Order, *Rosito-Canty*, No. 1:15-cv-568 (E.D.N.Y. Feb. 23, 2015), D.E. 18; see Minutes, *id.* (Feb. 20, 2015), D.E. 20; see Jesse McKinley, *Special Vote Is Set to Fill Seat Vacated by Grimm*, N.Y. Times, Feb. 21, 2015, at A16; see also Alexander Burns, *Staten Island Prosecutor Wins Congressional Seat Grimm Held*, N.Y. Times, May 6, 2015, at A19 (“The victory makes Mr. Donovan the lone Republican from New York City in the House.”).