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COURT OF APPEALS
STATE OF NEW YORK

GARCIA,

Respondent,

-against-

No. 64

NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE,

Appellant.

20 Eagle Street
Albany, New York
June 6, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

RICHARD DEARING, ESQ.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorney for Appellant
100 Church Street
New York, NY 10007

AARON SIRI, ESQ.
SIRI & GLIMSTAD LLP
Attorney for Respondent
200 Park Avenue, 17th Floor
New York, NY 10166

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 64, Garcia v. New
2 York City Department of Health and Mental Hygiene.

3 MR. DEARING: Good afternoon. May it please the
4 court, I'm Richard Dearing for the City. I'd like to
5 reserve two minutes for rebuttal if I could?

6 CHIEF JUDGE DIFIORE: You may, sir.

7 MR. DEARING: The Board of Health's flu vaccine
8 daycare rule here is of a piece with a long history of
9 vaccination requirements running all the way back to 1866.
10 All of them - - -

11 CHIEF JUDGE DIFIORE: Is the flu vaccine required
12 in any other body of law?

13 MR. DEARING: It is required in - - - in New York
14 State or outside of New York State?

15 CHIEF JUDGE DIFIORE: Both.

16 MR. DEARING: I'm not aware of its being required
17 in New York State otherwise. I mean there is a require - -
18 - a State reg for healthcare workers that say they either
19 must be vaccinated or must wear a mask if they choose to be
20 unvaccinated.

21 CHIEF JUDGE DIFIORE: So is that alone an
22 indication that the department was engaged in policymaking?

23 MR. DEARING: No, I don't think so because the -
24 - - the deeper practice of - - - of mandatory vaccine rules
25 is well-established not just in New York State but across



1 the country, and the Board of Health was, in fact, a leader
2 in those rules. It has enacted them, as I said, running
3 all the way back to 1866. It's had - - -

4 JUDGE RIVERA: But the State has chosen not to do
5 it. So if they've chosen not to do it how are you able to
6 decide that you're going to impose this requirement?

7 MR. DEARING: That's the essence of power - - -
8 of the existence of authority in New York City to - - -

9 JUDGE RIVERA: Yeah, but - - - but no, I'm sorry.
10 But the question I - - - that I'm trying to get to is if
11 the State has made a decision that that is - - - that
12 mandating vaccines is not the appropriate way to respond to
13 a health concern, can the City decide otherwise?

14 MR. DEARING: Well, the State has - - - has made
15 a decision in general that mandating vaccines is an
16 appropriate step. This is similar in the sense to the - -
17 - the point made in Acevedo that that strategy - - -

18 JUDGE RIVERA: With respect to the flu vaccine.

19 MR. DEARING: With respect to flu, I think that
20 the - - - the state of affairs is that the State has not
21 yet adopted a mandatory flu vaccine.

22 JUDGE STEIN: But isn't that true of almost every
23 vaccine - - - vaccination that the State has ultimately
24 adopted, that the City adopted it first?

25 MR. DEARING: Precisely. The City adopted - - -



1 the City was in this space long before the State ever was.
2 The State modeled - - - modeled what is now Public Health
3 Law 2164 on the City's prior efforts, including the
4 definition of daycare that is in - - - was included in that
5 statute. The legislative history referred specifically to
6 the efforts of the Board of Health in that regard. The
7 point being that the Board of Health has led in this area
8 for over a century. And - - -

9 JUDGE WILSON: So the State - - - the State could
10 have expressly preempted the City, correct?

11 MR. DEARING: Yes, Your Honor.

12 JUDGE WILSON: And it could have impliedly also,
13 right?

14 MR. DEARING: I don't think in this instance - -
15 -

16 JUDGE WILSON: No, no. I am ask - - - just as a
17 theoretical legal matter.

18 MR. DEARING: In theory, yes, sir.

19 JUDGE WILSON: In theory, there is a - - -

20 MR. DEARING: Yes, Your Honor.

21 JUDGE WILSON: - - - doctrine of implied
22 preemption and they could have - - - and there's something
23 that would be implied preemption that is short of
24 expressed. So what more here than what the State did would
25 have been necessary to get to implied preemption without



1 getting to expressed preemption?

2 MR. DEARING: Well, first, an observation, sort
3 of a follow-up on the interjection I had a minute ago which
4 is that this case comes in a little bit of a different
5 posture which makes preemption not the right framework for
6 looking at this. And the reason is that the State
7 legislature - - - the board's history of acting in this
8 area is not - - - did not occur in a vacuum. It occurred
9 pursuant to an enactment of the State legislature in 1866.
10 February 1866 the State legislature enacts a - - - a
11 statute that creates the - - -

12 JUDGE RIVERA: Yeah, but isn't the question
13 whether or not in the more recent past, a more current
14 century, New York State has acted in a way that, as I think
15 Judge Wilson is asking you, falls somewhere between that
16 impliedly and expressly preemptive - - -

17 MR. DEARING: Fair. Two points, and I - - - I
18 apologize for building up to this point. I should start -
19 - - I should have - - - I buried the lead on it and the
20 point was that this isn't really a preemption question.
21 It's an implied repeal question, and that's because the
22 Board of Health has - - - is acting pursuant to an
23 expressed legislative authorization. And there is abundant
24 authority from this court - - - and I cite the case of
25 Plunkett and Burke, which are cited in our briefs, and a -



1 - - and a more recent Second Department case, Steinmann,
2 that says that when you have a special law there is no
3 concept of an implied repeal by a later General Law. And
4 that - - - and that makes perfect sense is that when the
5 legislature has called its attention to the needs of a
6 particular locality, as it has here, and it is seen the
7 board repeatedly exercise that granted authority, any step
8 it takes that is general and statewide is not - - - without
9 expressly saying we want to repeal that prior special law,
10 does not do so. And that's sufficient to resolve this
11 question.

12 If we move onto the second point, though, if - -
13 - even if we put that to one side and treat it like a
14 preemption question, this is quite short of what you see in
15 other preemption cases from this court in a couple key
16 respects. The first is - - - and this is - - - the first
17 point is less about what the State has done but - - - and
18 more about the backdrop against which this occurs, is that
19 here you do have this long history of action by the City in
20 this area. You don't have that in these other preemption
21 cases. It's not something that the State was unaware of.
22 In fact, the State in 1966 acknowledged it. The State
23 Board of Health in recent years has repeatedly said you - -
24 - you need to go follow the additional requirements of the
25 City Board of Health. It did that in 2010 regarding the



1 number of doses for - - - for diphtheria. It did it again
2 in 2015 when it enacted new vaccination rules. And in
3 fact, the legislature in Public Health Law - - -

4 JUDGE RIVERA: You're basically suggesting
5 there's no way to see this as implied - - - as an implied
6 preemption, so what would the State have to do for
7 expressed? Just expressly say we are now choosing to
8 decide that the flu vaccine will not be mandated?

9 MR. DEARING: I think you'd also have to say - -
10 - I mean the - - - the State has never done even that.

11 JUDGE RIVERA: No, no. I - - - that's why I'm
12 asking.

13 MR. DEARING: I think - - - I think in this
14 instance if I - - - if we go back to the implied repeal
15 point what would really need to happen is to say we hereby
16 repeal, in part, in appropriate part, you know,
17 Administrative Code 17-109. But even - - - even if we put
18 all that to one side - - -

19 JUDGE RIVERA: It has to go that far? Can - - -
20 can it not be targeted - - -

21 MR. DEARING: But that's what - - -

22 JUDGE RIVERA: - - - just to the flu vaccine?

23 MR. DEARING: That's what you're - - - well,
24 insofar as it pertains to flu vaccines. I mean that - - -
25 that would be the way it would be done. But even if we put



1 all that to one side, we - - - what you see typically in an
2 implied preemption case - - - and it's the Diack case and
3 many other cases, you see some - - - you may not see it in
4 a statute where there - - - where there is an expressed
5 declaration that we hereby preempt local actions, but you -
6 - - you usually see either in some declaration of policy or
7 in some legislative material, whether it's a governor's
8 statement, whether it's - - - whether it's a legislative
9 history or bill, you see at least some indication that
10 either there was an importance placed on a uniform state
11 rule, either there were problems that had arisen.

12 You know, the Consolidated Edison v. Red Hook
13 case, which is relied on heavily by the petitioners, what
14 the - - - what the legislative record showed there is that
15 there were problems with uncoordinated side - - - local
16 activity in the siding of electric generating plants. You
17 ordinarily see that. You don't - - - you don't usually
18 just see an enactment - - - you know, a statutory enactment
19 that establishes certain standards. You see something
20 more.

21 And if I could just spend just a second talking
22 about what I think is probably the - - - the nub of this
23 argument, if you get past all of these steps, this clause
24 that was added in 2004 that says, "Nothing in this
25 subdivision shall authorize" - - - really, two key points



1 to make about that. The first thing is that if you look at
2 the bill jacket of that enactment, that was a purely status
3 quo bill. The State Department of Health came to the
4 legislature and said we've reviewed our programs, we've
5 been engaging in programs for adult immunization, we looked
6 at the statute, and we noticed we don't - - - we don't have
7 explicit authorization for that. We would like you to
8 authorize it. Codify something that we're already doing,
9 and along with that adult immunization. Along with that,
10 that statute added that language. "Nothing in this
11 subdivision shall authorize mandatory immunization." It
12 was a status quo bill. It was not a bill - - - there's no
13 indication in anything related to that bill that it meant
14 to reach out and abrogate a separate authority that the New
15 York City Board of Health had.

16 And the second point, if you - - - just a simple
17 textual point about that clause. What it says is, "Nothing
18 in this subdivision authorizes mandatory immunization." It
19 does not say there shall be no mandatory immunization. It
20 does not say any other statute that purports to do so is
21 hereby abrogated. We are not relying on that - - -

22 JUDGE RIVERA: You're saying we have to read it
23 as it's just saying we're not authorizing it.

24 MR. DEARING: This - - -

25 JUDGE RIVERA: It doesn't matter if someone else



1 has, some other entity has. We're not going to authorize
2 it. Is that what you're saying?

3 MR. DEARING: This - - - that's what it says. It
4 says, "This subdivision does not authorize" it. It does
5 not purport to abrogate independent authorization.

6 JUDGE RIVERA: And that - - - and that doesn't
7 reflect on some policy choice about whether or not any
8 other entity could?

9 MR. DEARING: There's no indication that it does,
10 and if you - - - if you really look at the legislative
11 history, it suggests that there was no - - - no reflection
12 on that fact. And if you compare - - - if you - - -

13 JUDGE RIVERA: So given under the City's choice,
14 because it's the only choice I think it could make, that
15 you're not mandating this for all children because they're
16 not all in your facilities - - -

17 MR. DEARING: Right.

18 JUDGE RIVERA: - - - what - - - what is the
19 administrative expertise that's deployed to decide that
20 nevertheless that carries with it some - - - some health
21 value, some health policy value? That we don't need to do
22 everybody.

23 MR. DEARING: Right.

24 JUDGE RIVERA: How do you get to that point?
25 Because I know they raise that issue.



1 JUDGE FAHEY: Can - - - can we - - - before you -
2 - - see, that goes to the - - - one of the things I've been
3 concerned about is the Boreali - - - Boreali analysis
4 that's been used throughout the case. And it falls - - -
5 just to follow up on Judge Rivera's question on the opt-out
6 policy and whether that undermines your claims in and of
7 itself for the individuals that come in and you're allowed
8 to opt out, to refine whether or not that's an actual opt
9 out. And then secondly, applying it to only a percentage
10 of the facilities and not to all the facilities seems to
11 underline the public health basis of your analysis, and it
12 undermines your program as far as Boreali, any Boreali
13 analysis, goes.

14 MR. DEARING: Well, I'll try to take those in
15 order.

16 JUDGE FAHEY: Yes.

17 MR. DEARING: And the second one obviously - - -

18 JUDGE FAHEY: The red light's on. I wanted to
19 get them out there. You can - - - you can even respond to
20 me later on if you can't get to them now.

21 MR. DEARING: I'm happy - - - well, I'm happy to
22 take them now because they overlap - - -

23 JUDGE FAHEY: It's up to the judge.

24 MR. DEARING: - - - with Judge Rivera's question.

25 JUDGE RIVERA: Please. Please.



1 MR. DEARING: The so-called opt-out is a - - - is
2 a complete misnomer. It is not an opt out. It is a
3 mandatory rule and the - - - and any daycare that permits a
4 child to attend after the date in the rule, December 31,
5 who has not been vaccinated will incur a fine of up to
6 \$2,000 for each day of that child's non-attendance. The -
7 - - the First Department - - - I do not understand how - -
8 - how that - - -

9 JUDGE FAHEY: So you're basically - - - you're
10 basically just saying they were wrong on that point because
11 in effect it's not an opt-out because no one could
12 financially afford to do it.

13 MR. DEARING: They were flatly wrong on that
14 point. It is a mandatory rule. And even before that fine
15 structure went into effect - - -

16 JUDGE FAHEY: Okay. So go to the second - - -

17 MR. DEARING: - - - there were already - - -

18 JUDGE FAHEY: Go to the second point.

19 MR. DEARING: - - - increasing levels of
20 immunizations. The second point, the second point - - -
21 the essence of this point as it pertains to Boreali is did
22 you - - - and I think it was put quite well by Judge Kaye,
23 as usual, in - - - in the Higgins case. She said did you
24 make an exception as an accommodation to special interests?
25 Similar, the footnote in - - - in the NYC C.L.A.S.H case,

1 the - - - you know, the soda - - - the sugary drinks rule,
2 a modification of the rule as an accommodation to the
3 beverage industry, don't interfere with the beverage
4 industry. In Boreali, it was don't interfere with bars and
5 conventions and political clubs those kinds of - - - those
6 kinds of - - -

7 What we're talking about here is just a
8 recognition of the jurisdictional division that has
9 occurred among daycare regulation for - - - for decades in
10 the State of New York, which is that very - - - small
11 daycares, family - - - family and group family daycares are
12 regulated by the State, large congregate daycares which are
13 really what the rule - - - what the rule focuses on, and
14 rightly so, are regulated by the City. And this - - - this
15 division of jurisdiction is not specific to the flu vaccine
16 rule. If you look at that specific section of the code, it
17 says nothing about it. It's just a result of the fact that
18 the - - - that the regulatory structure for daycares in the
19 health code reflects that jurisdictional division among
20 City and State law.

21 And just parenthetically, the Appellate Division
22 was wrong here too, really, when it said 20 percent - - -
23 you know, if you count by facilities perhaps 20 percent,
24 but the - - - but the facilities regulated by the State are
25 very, very small. And it is the bulk of children in



1 daycare in New York and the ones in the larger congregate
2 centers which are the hub of disease transmission, not just
3 for these children that are extremely - - - at extreme high
4 risk but their - - - but their families - - -

5 JUDGE RIVERA: Does that - - - yeah, does that
6 necessarily go to - - - I know the point you're making
7 numerically. I understand it. I appreciate it. It's not
8 that it's not compelling on some level. But aren't you
9 missing a little bit of the argument that of course there
10 is commercial value and pressure on having so many children
11 have to be mandated to have this flu vaccine? I mean
12 somebody's making money off of it is the bottom line. Just
13 as they might have through some of these other choices.
14 They may also have public health benefits.

15 MR. DEARING: Sure.

16 JUDGE RIVERA: But there is a money part of it,
17 so I'm not so sure I'm fully persuaded about your argument
18 that there's no commercial pressure involved in this.

19 MR. DEARING: Well, but I think it's important
20 under Boreali not to confuse every criticism or - - - or
21 someone might - - - or objection someone might craft about
22 a regulation with what gives rise to separation of powers
23 concerns under Boreali. And so when you talk about
24 selectivity under Boreali, what you're really talking about
25 is I think an agency that - - - that chooses to make an



1 exemption from a rule not because of - - - I mean chooses
2 to make an exemption for a rule I think said well in
3 Boreali for purely social or economic reasons. You know,
4 and - - - and I mean I think theoretically someone - - -
5 sure, a vaccine manufacturer I guess benefits to some
6 degree from the sale of additional vaccines, but that's not
7 - - - there's no reason why that consideration raises any
8 kind of - - -

9 JUDGE RIVERA: Well, the government pays for them
10 if someone can't afford them.

11 MR. DEARING: Yeah, the government pays for them.

12 JUDGE RIVERA: So it's a done deal. They're
13 going to get paid.

14 MR. DEARING: They're going to get paid for them,
15 right. The government - - - the government does pay for
16 them for people who can't afford them, and it's a good
17 thing that it does. And - - - but nothing about that - - -
18 when you - - - when you come back to the core point of
19 Boreali, is this a separation of powers problem? Have you
20 - - - have you jumped the rails off into something that's
21 larger than you can do? The fact that you could - - - you
22 could find grounds to object to a reg or even that you
23 might think that a regulation may be less effective than
24 another version of the regulation may be is not a
25 separation of powers issue.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 MR. DEARING: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MR. SIRI: Good afternoon, Your Honors. May it
5 please the court, Aaron Siri on behalf of respondents.

6 CHIEF JUDGE DIFIORE: Counsel, isn't a flu
7 directive precisely the kind of public health initiative
8 you would expect of your Department of Health?

9 MR. SIRI: I would - - - I could see absolutely
10 that being part of what a board of health would consider.
11 But they can only act in accordance with the policy that's
12 been set by the legislature, and the policy here has been
13 clearly set by the legislature in Section 2164 and Section
14 613 of the Public Health Law. Section 2164 explicitly
15 provides precisely which vaccines are required to attend
16 school.

17 CHIEF JUDGE DIFIORE: And no more?

18 MR. SIRI: I'm sorry?

19 CHIEF JUDGE DIFIORE: And no more?

20 MR. SIRI: Well, too, if you read that in
21 conjunction with Section 613 of the Public Health Law, okay
22 - - - and I'll talk specifically about the flu shot for a
23 moment rather than other vaccines because I think it helps
24 - - - it helps makes this - - - it makes - - - it helps
25 bring this into focus. In 2007, the CDC recommended that



1 all preschoolers get the flu shot. That same year, the
2 legislature down the block started debating a bill
3 regarding the flu shot for school. After four years, in
4 and out of committee twelve times, seven times amended at
5 least, and five times it was voted upon at least by the
6 Assembly and House, the end result was a bill that did
7 what? It amended Section 613 of the Public Health Law to
8 direct the State Health Commissioner in participation with
9 the New York City Board of Health to encourage, to educate,
10 to recommend the flu shot, but it did not include the flu
11 shot, as it could have, under Section 2164 as a required
12 vaccine. And what - - - and where - - -

13 JUDGE FEINMAN: But how do you make the jump from
14 that - - -

15 MR. SIRI: I'm sorry.

16 JUDGE FEINMAN: How do you make the jump from
17 that, that the City cannot require it?

18 MR. SIRI: Right, so if you - - - so when the - -
19 - so when the legislature passed that law about encouraging
20 and recommending the flu shot, where did they put it? They
21 put it in Section 613, and what else does Section 613 of
22 the Public Health Law provide? It provides, "Nothing in
23 this subdivision shall authorize" - - - and appellant's
24 counsel never finished the sentence, "Shall authorize
25 mandatory immunization of adults or children except as



1 provided in Section 2164 and 2165."

2 JUDGE WILSON: But saying that nothing in that
3 section authorizes it doesn't mean that something else - -
4 -

5 MR. SIRI: Right.

6 JUDGE WILSON: - - - doesn't authorize it.

7 MR. SIRI: But what's in that section? In that
8 section is the very directive to encourage and recommend
9 the flu shot - - -

10 JUDGE WILSON: Because what I'm asking is why
11 can't we infer from what your accurate description of what
12 the legislature did is the legislature decided it didn't
13 want a statewide rule requiring flu shots, it wanted a
14 statewide rule encouraging flu education and left the City
15 with whatever authority it previously had saying this
16 section doesn't authorize anything new?

17 MR. SIRI: Yeah. I think that there's a field
18 preemption and I think there's also conflict preemption,
19 and I can - - - I'll try to say those very quickly.
20 There's one other provision in Section 613 that helps
21 support I think conflict preemption. In Section 613 it
22 also says, "Municipalities in the State shall maintain
23 local programs of immunization to raise the immunity of the
24 children and adults of each municipality to the highest
25 reasonable level." And it requires that that plan by each



1 municipality, including New York City, has to be approved
2 by the Commissioner. So here you have the legislature
3 directing municipalities, including New York City, to
4 create health - - - local vaccination programs. And what
5 else does that section provide? It says you - - - "Nothing
6 in this subdivision shall authorize mandatory" - - - you
7 can't - - - we're not authorizing you - - - we're saying to
8 you - - -

9 JUDGE WILSON: Well, that section you just read
10 says it has to be approved by the Commissioner?

11 MR. SIRI: Yes. So - - -

12 JUDGE WILSON: You - - - and did the City submit
13 a plan for - - - that includes flu shots and was that
14 approved by the Commissioner?

15 MR. SIRI: I don't know, but I imagine - - -
16 whether they did or didn't didn't change the requirement
17 under the law. You know, there's - - - there's - - - one
18 of the unique things about the Public Health Law - - -

19 JUDGE RIVERA: Wait, is that position that if
20 indeed they submitted such a plan, the Commissioner
21 approved it, that the Commissioner could not approve it,
22 that that would have been an abrogation or in violation of
23 the law?

24 MR. SIRI: Well, I - - - I would say it's two
25 things. I'd say, number one, the Commissioner can't



1 approve a plan that has that, and I would say, number two,
2 they - - - even before they submit it to the Commissioner
3 they're not allowed to make a plan that includes requiring
4 the flu shot because that very section that requires them
5 to create local programs immunization says that nothing in
6 this section permits you to require any vaccines beyond
7 2164. I think the State legislature's clearly indicating
8 what their intended policy - - -

9 JUDGE RIVERA: What are the adverse health
10 consequences of - - - of the State, if we were to read it
11 this way, saying we're not going not mandate the flu shot.
12 If the City wants to do that, they can do so, but we don't
13 see a need to do that. Is there an adverse health
14 consequence for the State - - - the State to have
15 determined we don't think there's an adverse health
16 consequence, this is the way we're going to deal with the
17 flu shot?

18 MR. SIRI: Are you asking me is there a safety
19 issue there? I'm - - - I'm sorry.

20 JUDGE RIVERA: Well, I'm thinking about adverse
21 health consequences.

22 MR. SIRI: Okay. Well, I mean, it's - - -

23 JUDGE RIVERA: Because you're talking about
24 public health issues.

25 MR. SIRI: I hope this answers your question. If



1 it doesn't, please let me know. I think the answer - - - I
2 think this addresses your question. When this court
3 considered Boreali, it was well aware that secondhand smoke
4 could cause lung cancer and kill people, right.
5 Nonetheless, when it decided Boreali it said the principle
6 at issue had nothing to do with health. It has to do with
7 separation of powers, whether or not the State Health
8 Department had the authority to expand the locations at
9 which second - - - smoking was not permitted. That's the
10 only issue before I believe this court today which is - - -
11 did the Department of the - - - the Board of Health have
12 the authority to require the flu vaccine?

13 JUDGE FAHEY: So 17- now, what is it, -109(a) or
14 -107(a)? Doesn't that give the City expressed authority
15 under the Administrative Code?

16 MR. SIRI: 17-109 of the Administrative Code.

17 JUDGE FAHEY: Yeah, 109 it is. Yes.

18 MR. SIRI: Yes, so 17-109 provides a number of
19 very specific powers to the Board of Health regarding
20 vaccination, including collecting and preserving pure
21 vaccine lymph and producing diphtheria toxin, a number of
22 others. It - - - nowhere in any of the specific grants
23 when you read 17-109, it's only two sentences long - - -
24 nowhere in any of those does it say you can require a
25 vaccine. Where appellant derives that authority - - -

1 JUDGE STEIN: But - - - but the City has done so
2 - - -

3 MR. SIRI: Right.

4 JUDGE STEIN: - - - for many, many decades and
5 never has - - - in anything that I've seen has the State
6 come out and indicated in any manner that it did not
7 approve of that.

8 MR. SIRI: I'll take that in two pieces if I
9 could, and hopefully I'll get to the second piece. The
10 first part is that the - - - the authority that they
11 derive, 17-109, is from 100 years ago, and they derive - -
12 - there is a general provision in there about controlling
13 communicable disease. And it's from that general provision
14 - - -

15 JUDGE FAHEY: I'm sorry. I lost that last line.
16 General provision on controlling - - -

17 MR. SIRI: Regarding controlling communicable
18 disease.

19 JUDGE FAHEY: Right. That's fine. Go ahead.

20 MR. SIRI: So when you read - - - yeah, so when
21 you read it says - - - it just has a general provision
22 about - - -

23 JUDGE FAHEY: Right.

24 MR. SIRI: It's through that provision that I
25 believe that the - - - that the Board of Health has



1 required vaccines in the past. Okay. They haven't done so
 2 in almost fifty years at this point or required new
 3 vaccines. They've required some additional doses, required
 4 - - - no new vaccines. And there are some principles of
 5 statutory - - - of legislative construction I think answer
 6 that - - - answer the question that you pose which is later
 7 more specific laws must yield to earlier general laws.
 8 They don't have to - - - they don't have to preempt. They
 9 - - - we're not - - - we're not arguing that 17-109 is
 10 repealed in any way. It's - - -

11 JUDGE STEIN: But in 2010 and 2015 - - -

12 MR. SIRI: No, in - - -

13 JUDGE STEIN: - - - the State legislature
 14 acknowledged and pointed to and recommended programs of
 15 immunization that the City was conducting.

16 MR. SIRI: I'm not aware of that being in the
 17 record. The only thing I'm aware of is in 20 - - - the
 18 only thing I'm aware of is that there was a - - - the
 19 Department - - - I believe what you're pointing to is - - -

20 JUDGE STEIN: Well, when - - - when they updated
 21 the regulations associated with 2164 of the Public Health
 22 Law I believe that there was - - -

23 MR. SIRI: Right.

24 JUDGE STEIN: There was some comment in - - -

25 MR. SIRI: Page 19 of the reply brief that was



1 brought up, right. So I didn't get a chance to address
2 this in my - - - because it was in the reply. But, number
3 one, that was part of the dicta to a regula - - - it wasn't
4 in the regulation, this language that - - -

5 JUDGE STEIN: But that may all be true, but
6 aren't we talking about here whether the legislature is
7 aware of what the City is doing and has indicated its
8 disapproval of same? And so whether it - - - you know - -
9 - you know, we're not talking about whether this is a
10 controlling principle of law or not. We're talking about
11 looking at the circumstances and whether - - - and whether
12 there has been - - -

13 MR. SIRI: Yeah, the Public Health Law is unique
14 I think in the following way. Every single time the State
15 legislature wants to exclude New York City from a provision
16 of the - - - it has done so explicitly. I - - - we've
17 counted 209 specific sections in the Public Health Law
18 where the legislature - - - where it says New York City is
19 not included. But you know what's not excluded? It
20 doesn't exclude New York City from Section 613 of the
21 Public Health Law or 2164 of the Public Health Law. It
22 could have done that. It never did that. And - - - and
23 17-109, just to go back to your last point, it doesn't - -
24 - we're not arguing that 17-109 is preempted, repealed in
25 any way. It lives in harmony with the current statutory of



1 the - - - statutory regime of the last twenty, thirty years
2 as codified in Section 613 and 2164. There - - - there's -
3 - - the - - - you know, there are general statutes that all
4 the time must yield to later, more specific statutes, and
5 it's a principle of statutory construction that whenever
6 possible you try to read them in harmony.

7 The general grant of authority regarding control
8 of communicable disease may have been used in the past by
9 the Board of Health unchallenged to require certain
10 vaccines more than fifty years ago. But in the last thirty
11 years, the legislature has enacted a statutory regime that,
12 number one, under 2164 makes clear precisely which vaccines
13 are required, puts a regime that goes from beginning to end
14 every single step along the way with regard to vaccinations
15 and school requirements. And I notice my light is red, so
16 I - - - I don't know if I'm - - - I can keep going or
17 should I - - -

18 CHIEF JUDGE DIFIORE: You may finish your point.

19 MR. SIRI: Okay. And then under - - - under
20 Section 613, as I've pointed out, and so you've got a - - -
21 under 2164 there is field preemption because you have the -
22 - - you have the legislature putting in a very detailed
23 regime that goes from precisely - - - that applies to every
24 State. It applies to every school exactly which vaccines,
25 what a school, parent, and local health official need to do



1 if a child shows up without the required vaccines, what
2 exemptions are permitted, what it is they have to do to get
3 it, what appellate rights are permitted. All of those - -
4 - and it's completely - - - so for that reason, we believe
5 that there's a field preemption.

6 And then there's also field preemption because
7 under Section 613 of the Public Health Law, when you read
8 it it puts - - - it creates a Statewide program of
9 immunization that is under the auspices of the State Health
10 Commissioner. And it - - - part of that Statewide health
11 immunization program includes that municipalities in the
12 State shall maintain local programs of immunization,
13 requires them to. It even - - - it's the same provision
14 that specifically says encourage the flu shot. And it even
15 includes the - - - the City as part of that program of
16 encouragement, and then makes sure to say nothing in here
17 permits requiring any vaccine that we, the legislature,
18 have not required under 2164. And, you know, there's - - -
19 there's been a lot of debate about vaccinations, as I'm
20 sure everybody in this court's aware - - -

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. SIRI: And - - - okay, thank you.

23 MR. DEARING: Thank you. Just to clarify a
24 couple points about 17-109. The - - - the City - - -
25 firstly, the key language is "measures for general



1 vaccination." It authorizes specifically "measures for
2 general vaccination." That has been in that statute from
3 1866 until the current day. Two months after that statute
4 was passed - - - it was passed in February 1866. Two
5 months later, the City Board of Health adopted a smallpox
6 vaccination mandate. And in the volume that collects that
7 mandate, it says in the - - - in the margin, "Health Bill
8 Section 16" as the authorizing section, and that is this
9 precise language.

10 By the way, the Jacobson case, the big Supreme
11 Court case on vaccines - - - vaccine mandates uses general
12 vaccination - - - the attorney, in that case, used that
13 phrase. The Attorney General of the State of New York in a
14 1903 opinion we cite used that phrase. And as Your Honors
15 have pointed out, we have consistently adopted vaccine
16 requirements pursuant to that language. And this idea that
17 we haven't adopted any in fifty years, also untrue. The
18 State did not catch up to the City until 2004 when the
19 State finally added pertussis and tetanus to the - - - to
20 the Public Health Law 2164 which had been in the City law
21 for quite some time. So the City required additional
22 vaccines from - - - going back to 1866 through 2004, even
23 from 2004 forward it required additional doses of the DPT
24 vaccine up until 2014 when the State caught up, and the DOH
25 consistently referred to the City's additional



1 requirements. And then in 2013, we passed this flu vaccine
2 rule. So really, you're saying 1866 to the present day the
3 City has required additional vaccines.

4 JUDGE WILSON: Do you know the answer to my
5 question about the submission of a plan to the
6 Commissioner?

7 MR. DEARING: I do not, Your Honor, and I can
8 certainly find out that answer and give it to you. I don't
9 think it affects the - - - the resolution of this case.
10 And the reason is that whole section is about State aid.
11 That's the label of the article and the - - - the title on
12 the section, and the - - - so what it says when - - - when
13 he's referring to approval of the Commission - - - approval
14 of the State Commissioner, it's not in the abstract. It's
15 in connection with an application for State aid. And so
16 the reality is the - - - the local boards of health - - -
17 local departments of health across the State do many things
18 that are not funded by State aid, the City Board of Health
19 in particular.

20 And the City - - - New York City actually applies
21 directly to the Centers for Disease Control for - - - for
22 direct funding that covers the City of New York. The State
23 Department of Health applies to the CDC for funding that
24 covers the rest of the State. So those - - - those two
25 things really don't have anything to do with what we're



1 talking about. And as I said, the language - - - that
2 language at the end, it says nothing authorizes it.
3 Nothing authorizes - - - nothing in this section authorizes
4 mandatory vaccination, and we're not claiming that it does.
5 There's no conflict there.

6 Just one last - - - last point about the
7 Statewide Coalition case to try to - - - to add a little.
8 You invited me to answer your question on rebuttal, and I'm
9 going to take you up on it which is - - - which I should
10 have mentioned earlier is that there's a footnote - - - on
11 this issue of coverage, which facilities does it apply to
12 and which does it not, in Statewide Coalition there was a
13 similar issue because the City Board of Health rules about
14 - - - about food service establishments applied to certain
15 kinds of establishments and not others, basically
16 restaurants but not grocery stores or bodegas. And that
17 was an issue in this case, and this court, although
18 striking down the rule, dropped the footnote that
19 specifically said that fact alone would not cause a problem
20 under Boreali. That - - - that's really analogous to
21 what's going on here, and this court has really already
22 held that's not a Boreali issue.

23 If I could just make twenty seconds for one last
24 point?

25 CHIEF JUDGE DIFIORE: You may.



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MR. DEARING: This reliance on the - - - on the so-called unenacted bills or the fact that a bill gets amended or how many times does the bill get amended, I'm not aware that the bill he's referring to that ended up with the education program ever included the flu vaccine mandate. I don't believe it ever did. It was amended in technical ways, eventually passed.

On the idea that bills are introduced, there are 12,000 bills introduced in the New York State Legislature every year. At least by a factor of two, more than any other legislature in the country. Only a small fraction - - we're in the bottom quintile, actually, as to bills passed. The fact that a bill gets introduced - - - merely gets introduced means nothing.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. DEARING: Thank you, Your Honor.

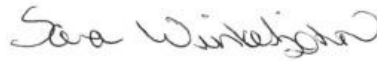
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Garcia v. New York City Department of Health and Mental Hygiene, No. 64 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: June 13, 2018

