

Radon is a harmful gas found in the soil of certain regions of the United States. A state statute requires occupants of residences with basements susceptible to the intrusion of radon to have their residences tested for the presence of radon and to take specified remedial steps if the test indicates the presence of radon above specified levels. The statute also provides that the testing for radon may be done only by testers licensed by a state agency. According to the statute, a firm may be licensed to test for radon only if it meets specified rigorous standards relating to the accuracy of its testing. These standards may easily be achieved with current technology; but the technology required to meet them is 50% more expensive than the technology required to measure radon accumulations in a slightly less accurate manner.

The United States Environmental Protection Agency (EPA) does not license radon testers. However, a federal statute authorizes the EPA to advise on the accuracy of various methods of radon testing and to provide to the general public a list of testers that use methods it believes to be reasonably accurate.

A recently established firm in the state uses a testing method that the EPA has stated is reasonably accurate. The firm is also included by the EPA on the list of testers using methods of testing it believes to be reasonably accurate. The firm applies for a state radon-testing license, but its application is denied because the firm cannot demonstrate that the method it uses to test for radon is sufficiently accurate to meet the rigorous state statutory standards.

The firm sues appropriate state officials in federal court claiming that the state may not constitutionally exclude the firm from performing the required radon tests in the state.

Who will the court likely rule in favor of in this suit?

- A. The firm, because the full faith and credit clause of the Constitution requires the state to respect and give effect to the action of the EPA in including the firm on its list of testers that use reasonably accurate methods.
- B. The firm, because the supremacy clause of the Constitution requires the state to respect and give effect to the action of the EPA in including the firm on its list of testers that use reasonably accurate methods.
- C. The state, because radon exposure is limited to basement areas that, by their very nature, cannot move in interstate commerce.
- D. The state, because the federal statute and the action of the EPA in including the firm on its list of testers that use reasonably accurate methods are not inconsistent with the more rigorous state licensing requirement, and that requirement is reasonably related to a legitimate public interest.

Explanation:

Preemption

(federal law supersedes state law)

Type	Applicability
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- | | |
|----------------|---|
| Express | <ul style="list-style-type: none">• Constitution grants federal government exclusive power to regulate area <i>or</i>• Federal law expressly prohibits state regulation in same area |
|----------------|---|

Implied	Field preemption:
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- Congressional intent to occupy entire field inferred from pervasive regulations that leave no room for state involvement

Conflict preemption:

- Direct conflict makes it impossible (or nearly impossible) to comply with federal & state law *or*
- Indirect conflict frustrates accomplishment of federal law's purpose

The federal government and states can regulate the same subject matter. But the Article VI [supremacy clause](#) renders a **state law void** when a **federal law expressly or impliedly preempts** it. Here, the federal statute authorizing the EPA's actions does not *expressly* preempt the state statute since neither the Constitution nor federal law explicitly forbids the state from regulating radon testers. And there is no *implied* preemption because:

- Congress only regulated the accuracy—not the entire field—of radon testing (no field preemption)
- radon testers can comply with both federal and state requirements (no direct conflict) *and*
- the state statute does not frustrate the federal law or EPA's purpose to prevent radon poisoning (no indirect conflict).

Since the federal statute and the EPA's actions are not inconsistent with the more rigorous state licensing requirement, they do not preempt the state statute. Therefore, the state does *not* need to give effect to the EPA's inclusion of the firm on its list of testers (**Choice B**).

The state's exclusion of the firm also complies with [substantive due process](#), which requires all laws to at least satisfy rational basis scrutiny. That is because the state's testing requirement is **reasonably related** to the **state's legitimate interest** in preventing radon poisoning. Therefore, the court will likely rule in the state's favor.

(Choice A) Under the Article IV full faith and credit clause, a state must respect public acts (eg, legislation), records, and judicial proceedings of other states—not *federal* actions.

(Choice C) The [commerce clause](#) gives Congress broad power to regulate persons and things moving through interstate commerce. And though radon *exposure* is limited to immovable basement areas, Congress may still regulate radon testing since radon *testers* can move between states. But the state can also regulate radon testing since there is no preemption.

Educational objective:

Under the supremacy clause, a state law is void if it is expressly or impliedly preempted by a federal law. And all state laws must at least be reasonably related to a legitimate state interest to comply with substantive due process.

References

- Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (explaining when federal law expressly or impliedly preempts state law).
- 16A Am. Jur. 2d Constitutional Law § 234 (2019) (setting forth the preemption tests).

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