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Gerald S. Dickinson

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**LANDOWNERS' FCC DILEMMA:
REREADING THE SUPREME COURT'S
ARMSTRONG OPINION AFTER THE
THIRD CIRCUIT'S *DEPOLO* RULING**

Gerald S. Dickinson*

INTRODUCTION

Since *Marbury v. Madison*, federal courts have been venues that can adequately review and respond to private claims of injury.¹ Chief Justice Marshall noted that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,” and it is the “dut[y] of government . . . to afford that protection.”² The Supreme Court has been relatively consistent by implying private claims against the government where a particular statute is silent as to

* Assistant Professor of Law, University of Pittsburgh School of Law.

¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

² *Id.*

whether there is a private cause of action.³ Indeed, private actors have called upon federal courts to review unconstitutional government action.⁴

The Supreme Court has historically been quite content to allow private causes of action based on common law.⁵ *Ex parte Young* is one of the better-known examples of the Supreme Court's recognition of the ability of private actors to challenge state regulations as forms of monetary confiscations in violation of the Fourteenth Amendment and the Commerce Clause.⁶ There, the Court allowed railroad stockholders to sue a state official instead of the state.⁷ The Court explained that federal courts, like state courts, "should, at all times, be opened" to claimants "for the purpose of protecting their property and their legal rights."⁸ Indeed, property rights were at the center of the debate in *Ex parte Young*, and it would seem to be in contravention of basic principles of property law for courts to shutout property owners from pursuing private causes of action in federal court against governments allegedly violating federal statutory or constitutional law.

Yet, in *Armstrong v. Exceptional Child Ctr., Inc.*, the Court has taken a turn in the other direction, by refusing to provide avenues for relief to private actors against the state in federal court and finding that the Supremacy Clause does not provide for an implied right of action to sue to enjoin unconstitutional actions by state

³ Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804 (2016).

⁴ *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1390 (2015) (Sotomayor, J., dissenting).

⁵ See Resnick, *supra* note 3, at 2804.

⁶ *Ex parte Young*, 209 U.S. 123 (1908).

⁷ *Id.* at 129.

⁸ *Id.* at 165. See generally Barry Friedman, *The Story of Ex Parte Young: Once Controversial, Now Canon*, in FEDERAL COURTS STORIES 247-99 (Vicki C. Jackson & Judith Resnik eds., 2010).

officers.⁹ Many critics, including the four dissenting Justices, question the wisdom of the ruling generally.¹⁰ But from a property rights perspective, the decision sheds light on a dilemma unforeseen by many scholars and made most apparent by a recent Third Circuit decision, *Jeffrey DePolo v. Board of Supervisors Tredyffrin Township, et al.*¹¹

The *Armstrong* decision extends beyond foreclosing private parties from invoking equitable powers of the federal courts to require states to comply with portions of the Medicaid Act. The decision also forecloses an inconspicuous subset of private landowners—amateur radio enthusiasts desiring to construct amateur radio towers on their property—from pursuing equitable relief where local zoning ordinances directly conflict with federal regulation 47 C.F.R. § 97.15(b) and Federal Communications Commission (FCC) declaratory ruling, PRB-1. This article brings to light an uncomfortable result for private landowners seeking relief in federal court against local government actions that violate federal regulations.

I. ARMSTRONG FORECLOSES PRIVATE CAUSE OF ACTION

In *Armstrong*, the Court held that the federal Medicaid Act does not authorize a private right of action in light of the Supremacy Clause's prohibition against conferring such action.¹² The case came out of Idaho, where the state's Medicaid Plan has provisions that reimburse providers of "habilitation services" by the State's Department of Health and Welfare.¹³ Section 30(A) of the Medicaid Act provides that Idaho's plan must "assure that payments are

⁹ *Armstrong*, 135 S. Ct. at 1383.

¹⁰ *Id.* at 1390 (Sotomayor, J., dissenting).

¹¹ *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, 835 F.3d 381 (2016).

¹² *Armstrong*, 135 S. Ct. at 1384.

¹³ *Id.* at 1382.

consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers" while "safeguard[ing] against unnecessary utilization of . . . care and services."¹⁴

The providers sued the Idaho Health and Welfare Department officials, claiming that the reimbursement rates were lower than what § 30(A) allows, and sought to enjoin the Department to increase these rates.¹⁵ The Idaho District Court found for the providers at summary judgment and the Ninth Circuit affirmed.¹⁶ The overarching reasoning behind both decisions was that the Supremacy Clause gave the providers an *implied* right of action.¹⁷ Thus, the providers could sue to seek an injunction requiring Idaho to comply with § 30(a).¹⁸

The Supreme Court reversed.¹⁹ The opinion, authored by Justice Antonin Scalia, said that nothing in the Supremacy Clause's text suggests a conferral of a private right of action.²⁰ Scalia wrote that it is unlikely that the Constitution gave Congress broad discretion with regard to the enactment of laws, while simultaneously limiting Congress's power over the manner of their implementation, as this would result in federal actors being unable to enforce federal law.²¹ The Court noted, however, that suits could proceed in federal courts in equity, if the statute did not explicitly or implicitly prohibit private enforcement. Yet, the Medicaid Act at issue in *Armstrong* establishes "Congress's intent to foreclose equitable

¹⁴ Medicaid Act § 30(A), 42 U.S.C. § 1396a(a)(30)(A).

¹⁵ *Armstrong*, 135 S. Ct. at 1382.

¹⁶ *Id.*

¹⁷ *Id.* at 1383.

¹⁸ *Id.*

¹⁹ *Id.* at 1388.

²⁰ *Id.* at 1383.

²¹ *Id.* at 1383-84.

relief.”²² Traditionally, the ability to sue against state and federal officers’ unconstitutional actions was a creation of the courts of equity, but the Court in *Armstrong* ruled that such a “judge-made remedy” does not rely upon an implied right of action under the Supremacy Clause.

Justice Sotomayor, dissenting, argued that *Ex parte Young* is the Court’s guiding case, “giving ‘life to the Supremacy Clause,’”²³ and that a “long history” of jurisprudence supports the proposition that private actors may enforce the Supremacy Clause by suing to enjoin preempted state action; federal courts, by extension, may grant injunctive relief against state actors violating federal law.²⁴ The crux of Sotomayor’s disagreement is that the majority’s decision permits federal suits to “enjoin unconstitutional actions by state and federal officers [as] . . . the creation of courts of equity,” rather than resting “upon an implied right of action contained in the Supremacy Clause.”²⁵

²² *Id.* at 1385 (quoting *Verizon Md., Inc. v. Public Serv. Comm’n of Md.*, 535 U.S. 635, 647 (2002)) (internal quotation marks omitted).

²³ *Id.* at 1391 (Sotomayor, J., dissenting) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

²⁴ *Id.* at 1391.

²⁵ *Armstrong*, 135 S. Ct. at 1384. When federal courts enforced common law rights, questions have emerged about whether such rights were part of a general common law and could thus be interpreted and shaped by federal judges, or whether such rights derived from remedial structures provided by states. See Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. Rev. 609 (2015). Bellia and Clark interpret the history to demonstrate that “the local law of a particular sovereign . . . determined the causes of action that its courts could adjudicate,” *id.* at 638, and that variation existed in “the forms and modes of proceeding” in England and various of the American states, *id.* at 637. The compromise, in their view, in the First Judiciary Act was that causes of action “were matters of local law,” to which Section 34 required federal courts to apply state law, just as the federal courts had to borrow forms of proceeding from the states in which they sat. *Id.* at 639.

Sotomayor's dissent could be interpreted as a warning call to a broad array of private actors seeking relief against local and state governments acting in violation of federal law. But her dissent also offers a through-line that directly implicates landowners seeking relief from local zoning ordinances in conflict with federal regulations. She notes:

A suit, like this one, that seeks relief against state officials acting pursuant to a state law allegedly preempted by a federal statute falls comfortably within this doctrine. A claim that a state law contravenes a federal statute is "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause."²⁶

Indeed, as a result of the *Armstrong* decision, the "vitality" of *Ex parte Young* and the implied right of action are under siege, throwing into limbo many private actors who attempt to obtain equitable relief against state officials who violate federal laws, rules, or regulations. Sotomayor raises a pertinent question of preemption that comes directly into play for an inconspicuous subset of landowners who seek to engage in activity on land to satisfy a particular hobby. In an odd turn of decades of jurisprudence providing for an implied right of action under the Supremacy Clause, ham radio enthusiasts may be left without federal avenues of relief where local zoning ordinances and board decisions are arguably preempted by federal regulations.

²⁶ See *Armstrong*, 135 S. Ct. at 1392 (Sotomayor, J., dissenting) (citing *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 271-272 (1977)) (emphasis added).

II. FEDERAL PREEMPTION IN ZONING

In *DePolo*, the landowner was an experienced amateur radio operator holding an amateur radio license issued by the FCC.²⁷ Licensed radio amateurs are sometimes referred to as “hams.”²⁸ This advanced form of radio use requires antennas that are higher than local trees and terrain obstructions in order to communicate with remote locations.²⁹ Amateur radio communications are routinely conducted across international borders.³⁰ There are nearly 700,000 hams in the United States,³¹ and most of these hams use their access to radio spectrum for recreational purposes.³² These hobbyists engage in radio communications experimentation and operations, but they have also been given a mandate by the federal government to provide emergency communications support when necessary.³³ Government officials have recognized the usefulness of the hams’ voluntary role in communications emergencies and have provided funding to further prepare hams for such duties.³⁴

As with many land use activities, local governments and neighbors have had negative reactions to antenna structures and towers, particularly when the ham antenna towers are located in residential neighborhoods.³⁵ Local governments have enacted zoning provisions restricting the height of ham radio antenna

²⁷ See *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, 835 F.3d 381, 382 (2016).

²⁸ *Id.*

²⁹ *Id.* at 383-383.

³⁰ See Brennan T. Price, *Reasonable Accommodation of Amateur Radio Communications by Zoning Authorities: The FCC’s PRB-1 Preemption*, 37 CONN. L.R. 321, 325 (2004).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 324.

³⁴ *Id.* at 325.

³⁵ See *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, 835 F.3d 381, 385 (2016).

towers.³⁶ Most land use experts and scholars recognize that such land arrangements and regulations invite property disputes.³⁷

Such local ordinances impinge on radio hams' ability to utilize radio technology. The concern for hams is that zoning regulations sometimes preclude the operation of the radio antennae by restricting the height to a point where the frequency bands for communication are completely cut off, thus inhibiting the hams' ability to communicate, and at worst, blocking correspondence during emergency events, such as natural disasters.³⁸ There is a direct connection between a ham's antenna height and his or her ability to properly transmit signals.³⁹ Indeed, the overarching concern is that zoning ordinances may hinder the use of amateur stations or totally preclude amateur communications.

As a result of the hams' concerns, Congress established policy to protect ham communications under Section 10(a) of the Federal Communications Authorization Act of 1988.⁴⁰ Congress recognized

³⁶ See, e.g., *id.* at 383.

³⁷ ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 1 (4th ed. 2013) (discussing contexts of land use disputes between landowners, neighbors and local government). See also *Appeal of Lord*, 368 Pa. 121, 121, 128-29, 81 A.2d 533, 537 (1951). Chief Justice Bell of the Pennsylvania Supreme Court once stated:

Does the antenna mast which the petitioner-appellant intends to build in the back yard of his home and which is used for amateur radio communication violate the ordinance of the [town]...Does the fact that this mast (and antenna) are considerably larger than the usual mast (and antenna) take it out of the permitted and customary uses? We believe that to so hold would place an unnecessary and unwarranted block in the road of progress and in the legitimate enjoyment of private property. The Township Commissioners wish to protect and improve their community; they do not wish it to become unsightly or to have their property depreciate in value; and they believe both of these results would occur if a large number of property owners were permitted to erect similar or perhaps larger masts.

³⁸ See Price, *supra* note 30, at 326.

³⁹ Pentel v. City of Mendota Heights, 13 F.3d 1261, 1263 (8th Cir.1994).

⁴⁰ See Price, *supra* note 30, at 324.

the emergency communication benefits of hams to strike a balance between the federal interest in promoting the amateur operations and the legitimate interests of local governments in regulating local zoning matters.⁴¹ What followed was a comprehensive set of rules that the FCC adopted to regulate the amateur radio service.

First, the FCC concluded that it would not “specify any particular height limitation below which a local government may not regulate,” nor would it “suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits.”⁴²

However, the FCC was also confident that state and local governments would afford appropriate recognition to the important federal interest at stake. The FCC regulation, 47 C.F.R. § 97.15(b), concerning amateur radio activity at the local level, states:

Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority’s legitimate purpose. *See* PRB-1, 101 FCC 2d 952 (1985) for details.)⁴³

Thus, the FCC imposed a reasonableness restriction on zoning ordinances. The FCC mandated that local regulations involving

⁴¹ In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 101 F.C.C.2d 952, 960 ¶ 22 (1985) (emphasis added) [hereinafter PRB-1].

⁴² PRB-1, 101 F.C.C.2d 952, 960 (1985) (emphasis added).

⁴³ Station Antenna Structures, 47 CFR § 97.15(e) (1999).

placement, screening, or height requirements for antennas based on health, safety, or aesthetic considerations must be crafted to “reasonably accommodate” amateur communications.⁴⁴

The FCC then issued a limited preemption policy.⁴⁵ PRB-1 was intended “to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters.”⁴⁶ The rule has limited, rather than complete, federal preemptive effect on local zoning ordinances, and is only preempted when a local municipality fails to enact or apply a local zoning ordinance in a manner that reasonably accommodates amateur communications.⁴⁷ The preemptive effect of PRB-1 has been upheld by several federal appeals courts.⁴⁸

III. THE PRIVATE PROPERTY DILEMMA IN *DEPOLO*

A. BACKGROUND: DEPOLO'S 180-FOOT TOWER REQUEST

On November 25, 2013, DePolo submitted a building permit to the Tredyffrin Township zoning officer to construct a 180-foot professionally installed amateur radio tower in his own backyard.⁴⁹ His application stated that the proposed tower would be made of steel lattice with a fifteen-foot wide base and nine-inch wide legs and would enable DePolo to communicate by radio with other

⁴⁴ *Id.*

⁴⁵ PRB-1, 101 F.C.C.2d at 959-60 ¶ 24.

⁴⁶ *Id.* at 959 ¶ 22.

⁴⁷ *Id.* at 960 ¶ 25.

⁴⁸ *See, e.g.,* Evans v. Bd. of Cnty. Comm'rs of Cnty. of Boulder, 994 F.2d 755, 760-61 (10th Cir.1993); Thernes v. City of Lakeside Park, 779 F.2d 1187, 1188-89 (6th Cir.1986) (per curiam); Williams v. City of Columbia, 906 F.2d 994, 998 (4th Cir.1990); Howard v. City of Burlingame, 937 F.2d 1376, 1380 (9th Cir.1991); Pentel v. City of Mendota Heights, 13 F.3d 1261, 1261 (8th Cir. 1994).

⁴⁹ *See* DePolo v. Bd. of Supervisors Tredyffrin Twp., 835 F.3d 381, 385 (2016).

operators as far away as Europe.⁵⁰ Upon review, the Township zoning officer denied DePolo's application.⁵¹ In doing so, the zoning officer relied on § 208-18(G) of the Tredyffrin Township zoning ordinance, which limits the height of structures in the R½ Residence zoning district to 35 feet.⁵² The zoning officer recognized the tension between the Township's height restriction and existing Pennsylvania state law, which provides that no "ordinance, regulation, plan or any other action shall restrict amateur radio antenna height to less than 65 feet above ground level,"⁵³ and offered DePolo a compromise whereby he could construct a 65-foot antenna and tower.⁵⁴

DePolo, unhappy with the denial of his 180-foot tower request, appealed to the Tredyffrin Township Zoning Hearing Board, arguing that the zoning officer erred in denying the permit for a 180-foot tower, because PRB-1 preempts the Township ordinance from restricting antenna height at 35 feet.⁵⁵ The Zoning Hearing Board rejected DePolo's argument and instead, granted DePolo a variance for a 65-foot tower.⁵⁶ The Board reviewed the matter by juxtaposing the three levels of regulation at issue—the municipal ordinance, the state statute, and the FCC regulation⁵⁷—concluding

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Restriction on Municipal Regulation of Amateur Radio Service Communications, 53 PA. CONS. STAT. § 302(b) (2008).

⁵⁴ See *DePolo*, 835 F.3d at 385.

⁵⁵ See *DePolo v. Bd. of Supervisors of Tredyffrin Twp.* 105 F. Supp. 3d 484, 487 (2015).

⁵⁶ See *DePolo*, 835 F.3d at 385.

⁵⁷ Tredyffrin Zoning Ordinance §208-18, 19(G) (stating "Height. *The height of any building shall not exceed 35 feet*"). 53 PA. CONS. STAT. §§ 302(a)-(b) (2008):

(b) Reasonable accommodations.--A municipality may impose necessary regulations to ensure the safety of amateur radio antenna structures, but must reasonably accommodate amateur service communications. *No ordinance, regulation, plan or any other action shall restrict amateur radio antenna height to less than 65 feet above ground level.* *Id.* (emphasis added).

that the proposed 180-foot tower was “not compatible” with the surrounding residential neighborhood and “would create an adverse visual impact on the neighborhood,”⁵⁸ as the proposed height of 180-feet would greatly exceed the height of the residences in the area.⁵⁹

Further, the Board stated that the tower’s “height, mass, and latticework design” was “of a type universally associated with . . . a factory area or industrialized complex” and posed a safety hazard because its fall radius extended well into neighboring properties.⁶⁰ While acknowledging that PRB-1 still gave local municipalities the right to regulate the height of structures, the Board noted that a local community that wants to preserve residential areas as livable neighborhoods may adopt zoning regulations that forbid the construction and installation in a residential neighborhood of the type of antenna that is commonly and universally associated with those that one finds in a factory area or an industrialized complex.⁶¹

With respect to DePolo’s preemption argument, the Board stated that “[r]egardless, where the height limitations of the Zoning Ordinance are not absolute and can . . . be varied or modified, they

Station Antenna Structures 47 C.F.R. § 97.15(b) (1999):

(b) Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (*State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. See PRB-1, 101 FCC 2d 952 (1985) for details. Id. (emphasis added).*)

⁵⁸ See *DePolo*, 105 F. Supp. 3d at 487.

⁵⁹ See *DePolo*, 835 F.3d at 385.

⁶⁰ *Id.*

⁶¹ See *In re Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, and Amendment of Section 97.15 of the Commission's Rules Governing the Amateur Radio Service*, 15 F.C.C.R. 22151, 22154 (2000).

cannot be considered absolute or unvarying.”⁶² DePolo did not appeal that decision to the state trial court and instead, filed in federal district court.⁶³ The U.S. District Court for the Eastern District of Pennsylvania subsequently granted the Township’s Board of Supervisors and the Zoning Hearing Board’s motions to dismiss, concluding that the 65-foot variance offered was a reasonable accommodation and the zoning ordinance was not preempted by PRB-1.⁶⁴ DePolo then appealed to the Third Circuit.

B. THE THIRD CIRCUIT DECISION IN *DEPOLO*

The Third Circuit refused to weigh the merits of DePolo’s preemption claim due to a procedural defect that proved to be fatal.⁶⁵ The panel noted, “[W]hile DePolo was aggrieved by the [Zoning Hearing Board’s] decision limiting the variance to 65-feet, he had adequate opportunity to litigate the matter beyond the [Zoning Hearing Board] by appealing to the appropriate Court of Common Pleas within thirty days of the Zoning Hearing Board’s decision.”⁶⁶ Instead, DePolo filed a lawsuit in federal court, allowing the thirty-day appeal period to expire under Pennsylvania state law. The Court stated that this was fatal, as DePolo was “bound by the final judgment of the [Zoning Hearing Board],”⁶⁷ which was entitled to preclusive effect in federal court.⁶⁸ As such,

⁶² *DePolo*, 835 F.3d at 386.

⁶³ *Id.* at 383.

⁶⁴ *See id.*

⁶⁵ *Id.* at 387.

⁶⁶ *Id.*

⁶⁷ *Id.*; *see also* *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 283 (3d Cir. 2012).

⁶⁸ *See DePolo*, 835 F.3d at 383 (citing *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129, 135 (3d Cir. 1998) (citing *Univeristy of Tennessee v. Elliott*, 478 U.S. 788, 797 (1986)); *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993) (“Decisions of state administrative agencies that have been

the Third Circuit dismissed the suit. The Third Circuit did acknowledge that the decision "leaves amateur radio enthusiasts with limited avenues into federal court."⁶⁹ The federal district court could have narrowly addressed the question of preemption if DePolo had appealed the Zoning Hearing Board's decision to the Court of Common Pleas, and then stayed the matter in Pennsylvania state court until a resolution on his federal claims were completed.⁷⁰

IV. LANDOWNERS' FCC DILEMMA

As a result of *Armstrong*, the door may be effectively closed to private causes of action in federal court against local officials who are allegedly in violation of a federal regulation. Underlying the *DePolo* holding is the inexorable conclusion that, regardless of how the court in *DePolo* decided, similarly situated litigants like DePolo may be unable to file a private cause of action and seek relief in federal court.⁷¹ As noted, *Armstrong* seems to imply that a private right (or cause) of action is prohibited where the statute (or regulation in *DePolo*) at issue either explicitly or implicitly prohibits

reviewed by state courts are...given preclusive effect in federal courts."); *Caver v. City of Trenton*, 420 F.3d 243, 259 (3d Cir.2005).

⁶⁹ See *DePolo*, 835 F.3d at n.18.

⁷⁰ *Id.*

⁷¹ The Court raised the *Armstrong* dilemma with the parties, who had failed to identify the issue, one week before oral argument, by requesting supplemental briefing and then raising the issue briefly at oral argument on January 12, 2016. However, based on the *DePolo* opinion, the Court decided not to entertain *Armstrong* and instead ruled on the preclusive effect issue, effectively leaving the *Armstrong* dilemma a question unanswered for ham landowners who seek relief in federal court. See Clerk's Letter to Counsel (Jan. 4, 2016) *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, No. 15-2495 (835 F.3d 381 (3rd Cir. 2016)). Both litigants in *DePolo* assumed jurisdiction under 28 U.S.C. § 1331 and neither initially raised the issue of whether DePolo had a private cause of action in federal court, 28 U.S.C. § 1331, until the Court sought additional briefing on the issue.

private enforcement. The Medicaid Act at issue in *Armstrong* was explicit in its intent to preclude equitable relief. *DePolo* unveils the potential reach of *Armstrong* beyond Medicaid providers, including ham radio enthusiasts, and possibly many more private actors.

Two issues arise in *DePolo* as a result of *Armstrong*. Did the FCC regulations, as drafted by Congress, expressly authorize private causes of action or did the regulation indicate Congress's clear and unambiguous intent to create a private cause of action for violations of the FCC regulations? If they did not, how can ham radio enthusiasts seek relief in federal court to enjoin similar violations under PRB-1?

It is possible that Congress did not authorize such causes of action, as the Communications Act of 1934 "did not create new private rights" and the "purpose of the Act was to protect the public interest in communications" and that private actors could only have standing as "representatives of the public interest."⁷² This reading would neatly fit with the *Armstrong* decision, which endorses the notion that the Supremacy Clause does not give private actors a constitutional right to enforce federal law against states.⁷³ Thus, a suit seeking the enforcement of PRB-1 on preemption grounds would, as expressed in *Armstrong*, be prohibited. In other words, peering closely at the *Armstrong* decision, it is possible that ham radio landowners do not have a private right or cause of action under the FCC regulations to enjoin a Zoning Hearing Board officers' denial of a landowner's building permit application; a denial that may conflict with PRB-1's partial federal preemption rule. This is a revelation in private-public disputes between landowners, the state, and the federal

⁷² See *Scripps-Howard Radio, Inc. v. F.C.C.*, 316 U.S. 4, 14 (1941).

⁷³ See *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)).

government that was once unforeseen. So how can DePolo, and future ham radio enthusiasts, sue in federal court to enjoin preemption violations if a private cause of action is prohibited? They cannot. The state has to do it for them.

The plaintiff's "sole remedy" in *Armstrong*, in light of foreclosing private causes of action, is for the Secretary of Health and Human Services to take action. Similarly, for DePolo, the only path to federal court is one over which he has very little control. It requires him to ask the FCC to demand the attorney general to enforce its powers conferring jurisdiction on the district courts upon application by alleging failure to comply with federal regulations.⁷⁴ The Third Circuit in *DePolo* highlighted this rather limited avenue for relief in a footnote in the opinion, stating that "Alternatively, the FCC has enforcement powers, conferring jurisdiction on the District Courts of the United States 'upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions.'" ⁷⁵ To most appellate practitioners, jurists, and scholars, this is clearly an untenable option for private actors seeking to enjoin federal preemption violations by local governments in zoning disputes.

While Medicaid is a massive governmental operation with substantial resources, the FCC has made it clear that it does not have the ability to review all state and local laws that affect amateur operations. The FCC has encouraged state and local governments to legislate in a manner that would avoid conflict with federal policy.⁷⁶ Where land use conflicts at the local level cannot be resolved by state administrative agencies or state courts, the FCC would

⁷⁴ 47 U.S.C. § 401 (1934).

⁷⁵ See *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, 835 F.3d 381, 387 n.18 (2016).

⁷⁶ See PRB-1, 101 F.C.C.2d 952, 960 ¶ 26.

probably prefer that federal courts keep their doors open to resolve the matters once the claimants come knocking. The FCC does not have the resources to be a national zoning board, responsible for adjudicating local land use conflicts, nor was it established to administer decisions and review claims individually.⁷⁷

To leave relief for private actors in the hands of an application by the attorney general on behalf and at the request of the FCC to pursue litigation against a local zoning board's alleged violation of PRB-1 is inadequate. It seems unlikely for such cases to be a top priority for attorneys general, and thus unlikely to be a satisfactory form of judicial review, administration of a federal regulation, and avenue for relief for the landowner.

CONCLUSION

Rereading *Armstrong* after the Third Circuit's *DePolo* decision raises a ham radio landowners' dilemma with very limited plausible federal avenues for relief where preemption of FCC regulations are at issue. This means that ham radio enthusiasts may be effectively closed off from enjoining violations of federal regulations by local municipalities, unless the attorney general and the FCC in coordination seek judicial review on behalf of the private landowner. As noted, the Third Circuit raised the *Armstrong* dilemma with the parties in briefing. However, the Court's ruling focused on the preclusive effect issue, thus effectively leaving the private cause of action issue raised in *Armstrong* a question unanswered for ham landowners who seek relief in federal court. Unlike the Third Circuit, another federal court may invoke the *Armstrong* decision explicitly to preclude a ham radio enthusiast from seeking to enjoin preemption violations by local municipalities. Congress might want to revisit its FCC regulations,

⁷⁷ See *Town of Deerfield, New York v. FCC*, 992 F.2d 420, 436 (2d Cir 1993).

specifically PRB-1, in light of the *DePolo* decision to address the dilemma raised by the Third Circuit and highlighted in this article. Otherwise, it is unclear to what extent ham radio enthusiasts have adequate avenues of relief in federal court.