

No. 06-56211

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**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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THE LEAGUE OF RESIDENTIAL NEIGHBORHOOD ADVOCATES, ET AL.,

*Plaintiffs-Appellants,*

vs.

CITY OF LOS ANGELES, ET AL.,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the Central District of  
California, Case No. CV-03-4890-CAS (Ex)

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**DEFENDANT-APPELLEE CONGREGATION ETZ CHAIM'S**  
**PETITION FOR REHEARING AND**  
**SUGGESTION FOR REHEARING *EN BANC***

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TABLE OF CONTENTS

	Page
I. INTRODUCTORY STATEMENT.....	1
A. Grounds For Rehearing.....	1
B. Suggestion For <i>En Banc</i> Rehearing.....	2
II. REASONS FOR GRANTING REHEARING.....	3
A. The Panel Misapprehended Material Facts.....	3
B. The Panel’s Conclusion That “Congregational Worship” Is A “Conditional Use” Contravenes Federal And Local Law.....	6
C. The Panel Misapplied <i>Trancas</i> And The California Constitution.....	9
D. The Opinion Contravenes RLUIPA’s Express Preemption Provision.....	13
E. The Panel’s “Actual Violation” Rule Expands Existing Ninth Circuit Law, Creates An Inter-Circuit Split And Contravenes Supreme Court Precedent.....	15
F. The Panel Decided An Issue Of First Impression That Was Not Presented To Or Decided By The District Court And Reversed On Grounds Not Briefed.....	20
III. REASONS FOR GRANTING REHEARING <i>EN BANC</i> .....	21
IV. CONCLUSION .....	22

## TABLE OF AUTHORITIES

CASES	Page
<i>108 Holdings, Ltd. v. City of Rohnert Park</i> , 136 Cal. App. 4th 186 (Ct. App. 2006).....	9, 10, 11
<i>Anza Parking Corp. v. City of Burlingame</i> , 195 Cal. App. 3d 855 (Ct. App. 1987).....	8
<i>Cawdrey v. City of Redondo Beach</i> , 15 Cal. App. 4th 1212 (Ct. App. 1993).....	12
<i>City and County of San Francisco v. Patterson</i> , 202 Cal. App. 3d 95 (Ct. App. 1988).....	12
<i>City of Glendale v. Super. Ct. of Los Angeles</i> , 18 Cal. App. 4th 1768 (Ct. App. 1993).....	10
<i>City of Walnut Creek v. County of Contra Costa</i> , 101 Cal. App. 3d 1012 (Ct. App. 1980).....	8
<i>Cleveland County Ass'n for Gov't By The People v. Cleveland County Bd. of Comm'rs</i> , 142 F.3d 468 (D.C. Cir. 1998).....	17, 19
<i>County Mobilehome v. Positive Action Comm., Inc. v. County of San Diego</i> , 62 Cal. App. 4th 727 (Ct. App. 1998).....	11
<i>Delucchi v. County of Santa Cruz</i> , 179 Cal. App. 3d 814 (Ct. App. 1986).....	10
<i>Dibb v. County of San Diego</i> , 8 Cal. 4th 1200 (1994) .....	12
<i>Doe v. Pataki</i> , 481 F.3d 69 (2d Cir. 2007).....	19
<i>Domar Electric, Inc. v. City of Los Angeles</i> , 9 Cal. 4th 161 (1994) .....	13

<i>Galvan v. Alaska Dep't of Corr.</i> , 397 F.3d 1198 (9th Cir. 2005) .....	21
<i>Gee v. Tenneco, Inc.</i> , 615 F.2d 857 (9th Cir. 1980) .....	8
<i>Hemmings v. Tidyman's Inc.</i> , 285 F.3d 1174 (9th Cir. 2002) .....	7
<i>Jeldness v. Pearce</i> , 30 F.3d 1220 (9th Cir. 1994) .....	5
<i>Keith v. Volpe</i> , 118 F.3d 1386 (9th Cir. 1997) .....	5, 15, 16, 18
<i>Lawyer v. Dep't of Justice</i> , 521 U.S. 567 (1997).....	2, 19, 21
<i>Malibu Mountains Recreation, Inc. v. County of Los Angeles</i> , 67 Cal. App. 4th 359 (Ct. App. 1998).....	8
<i>Martin Marietta Corp. v. Int'l Telecomm. Satellite Org.</i> , 991 F.2d 94 (9th Cir. 1992) .....	5
<i>Mesalic v. Slayton</i> , 689 F. Supp. 416 (D.N.J. 1988), <i>aff'd</i> , 865 F.2d 46 (3d Cir. 1988) .....	2, 18, 19
<i>Mescall v. Burrus</i> , 603 F.2d 1266 (7th Cir. 1979) .....	5
<i>Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights</i> , 616 F.2d 1006 (7th Cir. 1980) .....	2, 17, 18
<i>MHC Operating Ltd. P'ship v. City of San Jose</i> , 106 Cal. App. 4th 204 (Ct. App. 2003).....	8
<i>Morrison Homes Corp. v. City of Pleasanton</i> , 58 Cal. App. 3d 724 (Ct. App. 1976).....	10
<i>Page v. Schweiker</i> , 786 F.2d 150 (3d Cir. 1986).....	21

<i>Pardee Constr. Co. v. City of Camarillo</i> , 37 Cal. 3d 465 (Ct. App. 1984).....	9
<i>Perkins v. City of Chicago Heights</i> , 47 F.3d 212 (7th Cir. 1995) .....	17, 18, 19
<i>Professional Engineers v. Dep't of Transp.</i> , 13 Cal. App. 4th 585 (Ct. App. 1993).....	10
<i>Santa Margarita Area Residents v. San Luis Obispo County Bd. of Supervisors</i> , 84 Cal. App. 4th 221 (Ct. App. 2000).....	9, 11
<i>Singleton v. Wulff</i> , 428 U.S. 106 (1976).....	21
<i>Southern Cal. Edison Co. v. Lynch</i> , 307 F.3d 794 (9th Cir. 2002) .....	7, 13
<i>Stephens v. City of Vista</i> , 994 F.2d 650 (9th Cir. 1993) .....	9
<i>Trancas Prop. Owners Assoc. v. City of Malibu</i> , 138 Cal. App. 4th 172 (Ct. App. 2006).....	9, 11, 13
<i>Tucker v. State of Cal. Dep't of Educ.</i> , 97 F.3d 1204 (9th Cir. 1996) .....	8
<i>United States v. Broadus</i> , 7 F.3d 460 (6th Cir. 1993) .....	21

## STATUTES

42 U.S.C. § 1983.....	22
42 U.S.C. § 2000cc(b)(3)(A) .....	14
42 U.S.C. § 2000cc-3(e) .....	14
Cal. Govt. Code § 65906 (2007).....	13
Fed. R. Civ. P. 12(b)(6).....	4, 5
Los Angeles, Cal., Code § 12.08 .....	7, 20

Los Angeles, Cal., Code § 12.24 .....	passim
Los Angeles, Cal., Code § 12.24(A).....	8
Los Angeles, Cal., Code § 12.24(T) .....	6, 7
Los Angeles, Cal., Code § 12.24(T)(3)(b).....	6
Los Angeles, Cal., Code § 12.24(W).....	6, 7

**OTHER AUTHORITIES**

146 Cong. Rec. S 7774 (daily ed. July 27, 2000).....	14
David W. Swift, <i>A State’s Power to Enter into a Consent Decree that Violates State Law Provisions: What “Findings” of a Federal Violation Are Sufficient to Justify a Consent Decree That Trumps State Law?</i> , 10 Tex. J. on C.L. & C.R. 37 (2004).....	21
Los Angeles, Cal., Charter § 273(c) .....	11, 13
Los Angeles, Cal., Charter § 101 (2007).....	12

**CONSTITUTIONAL PROVISIONS**

Cal. Const., art. 11, § 5(a).....	12
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## I. INTRODUCTORY STATEMENT

### A. Grounds For Rehearing.

Defendant-Appellee Congregation Etz Chaim (“Congregation”) seeks rehearing of the Panel’s August 21, 2007, Opinion (“Opinion”) invalidating the Settlement Agreement between the Congregation and the City of Los Angeles (“City”) which settled claims under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). The Panel found that (1) “congregational worship” in a residential zone is illegal *per se* under state law absent a conditional use permit (“CUP”); (2) the City Charter power to settle litigation could not authorize the Settlement Agreement; and (3) the district court could not approve the Settlement Agreement absent a finding of an “actual violation” of RLUIPA.

The Congregation respectfully submits that rehearing is necessary. The Panel’s construction of the zoning code to ban all congregational worship in a residential zone expands existing state law and contravenes basic First Amendment and Equal Protection principles. The Opinion also conflicts with established California law, which requires an express waiver of sovereign power before invalidating a municipal contract, and which holds a City’s express charter power supersedes conflicting ordinances and general state law. The Opinion also misapprehends record facts, which demonstrated that the limited religious use permitted in the Settlement Agreement was not a “synagogue” and was subjected to full administrative review, public notice and hearings during the CUP process.

More fundamentally, the Opinion strips the City of its power to compromise its position in litigation, to contract to allow a permissible ancillary residential use and to change its practices to avoid the preemptive force of federal law. The Opinion undermines the purpose of RLUIPA, which is to remedy discrimination in the land use approval process and contravenes RLUIPA’s express preemption provision, which allows the City to change its practices to avoid a violation.

Moreover, in concluding that the Settlement Agreement is void under federal law, the Panel reached out to decide an issue that was not briefed by the parties or presented or decided below. The sole question presented to the district court, and to the Panel, was whether the Settlement Agreement was valid under state law. The Panel should rehear this issue or, at minimum, remand so the district court can determine in the first instance whether there was an “actual violation” of RLUIPA.

**B. Suggestion For *En Banc* Rehearing.**

If the Panel declines to rehear the appeal, rehearing *en banc* is warranted. The Panel’s new rule significantly expands existing Ninth Circuit law, which has never required a finding of an “actual violation” of federal law in order to settle. The Opinion creates a split with the Seventh and Third Circuits, which have recognized district court power to approve settlements abrogating state law based on colorable federal claims. *Mesalic v. Slayton*, 689 F. Supp. 416 (D.N.J. 1988), *aff’d*, 865 F.2d 46 (3d Cir. 1988); *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1010-15 (7th Cir. 1980). The Opinion also conflicts with established Supreme Court precedent, which has expressly rejected a requirement of formal adjudication of unconstitutionality before approving settlement. *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 578 (1997). Given the strong fundamental policy in favor of settlement and the potentially devastating impact of this Opinion on federal civil rights claims, consideration by the full court is necessary.

This case involves issues of exceptional importance, as it has usurped charter cities’ powers to construe their own municipal codes and has impermissibly elevated general law over charter power in violation of the California Constitution. Moreover, in declaring illegal all congregational worship in a residential zone, the Opinion implicates serious First Amendment and Equal Protection concerns, as secular meetings will be permitted in homes whereas religious meetings will not.

The Opinion also effectively precludes settlement in state and municipal civil rights cases by requiring trial before settlement. The Opinion, if it stands, will subject existing settlements to after-the-fact collateral attack by third party objectors and render future settlements virtually impossible. Such an onerous rule undermines longstanding public policy in favor of settlement, ignores RLUIPA in its entirety and stands the Supremacy Clause on its head.

## II. REASONS FOR GRANTING REHEARING

### A. The Panel Misapprehended Material Facts.

The Panel's conclusion that the City allowed the Congregation to "operate a synagogue" misapprehends material facts. The Panel found that the Congregation sought, and the Settlement Agreement granted, "permission to operate a synagogue on the Highland property." Slip. Op. 10190. The Panel reasoned that the Settlement Agreement granted the Congregation permission to engage in a "conditional use" as defined by the municipal code, which is forbidden in a residential zone absent a CUP. *Id.* From that premise, the Panel concluded that the City impermissibly circumvented substantive and procedural requirements applicable to CUPs and, thus, the Settlement Agreement was void not only under state law but under federal law as well. *Id.* at 10192-10194.

The Congregation respectfully submits that the Opinion in its entirety is premised on an impermissible finding of fact. The Settlement Agreement did not permit the Congregation to "operate a synagogue" or any other conditional use in the residential zone. The Settlement Agreement permits limited religious use of a private residence by a small group of Orthodox Jews. ER 23-31 (emphasis added).<sup>1</sup> The Agreement expressly provides that the "single family use of the

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<sup>1</sup> All cites to "ER" herein refer to Appellants' Excerpts of Record and are included in the Appendix filed concurrently herewith.

property” shall be restored and maintained, and categorically prohibits institutional synagogue uses including, weddings, receptions, day care and funerals. ER 25 (emphasis added). Nothing in the Settlement Agreement, expressly or otherwise, purports to allow the Congregation to “operate a synagogue” or engage in any other institutional or “conditional use” as defined by the Los Angeles Municipal Code (“LAMC”), section 12.24. ER 23-31.

Critically, the City determined that the limited religious use the Settlement Agreement allows is not a “synagogue” – but rather a permissible use ancillary to residential use. ER 25, 831-41, 987-88; Appellee City’s Brief in Opposition (“City’s Brief”) at 9-13. The record shows that the Settlement Agreement did not grant the full-fledged institutional “synagogue” use the Congregation originally sought. *See* Congregation’s Supplemental Excerpts of Record in *Younis v. Congregation Etz Chaim*, Case No. 05-56180 (“SER”) at 287 (noting Settlement Agreement represented “major compromises” in the parties’ positions, City consented to “limited use as a shul (a place of worship of less magnitude than a synagogue) . . . , and the Congregation “gave up rights to a broader use of the property.”) (emphasis added).<sup>2</sup> In finding that the Settlement Agreement permits a “synagogue” in violation of the municipal code, the Panel has impermissibly resolved a question of fact and effectively adjudicated the merits of plaintiffs’ claims contrary to Fed. R. Civ. P. 12(b)(6) and beyond the relief even the League of Residential Neighborhood Advocates (“LRNA”) has asked for. ER 891-900; 979-84, 989-90; Appellants’ Reply Brief (“LRNA’s Reply”) at 8-11. LRNA’s allegations that the Settlement Agreement permits a “synagogue” are just that and,

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<sup>2</sup> All cites to “SER” herein are included in the Appendix filed concurrently herewith. *See also* ER 792-93 (finding that “limited religious use of the Highland property contemplated by the Settlement Agreement does not confer a ‘special benefit’ on the Congregation.”).

while they may be taken as true for the purposes of stating a claim, it is not proper for this Panel to adjudicate factual questions in the first instance. See *Martin Marietta Corp. v. Int'l Telecomm. Satellite Org.*, 991 F.2d 94, 97 (9th Cir. 1992); *Mescall v. Burrus*, 603 F.2d 1266, 1268-69 (7th Cir. 1979). At most, LRNA has stated a claim under Rule 12(b)(6), and the matter should be remanded for a determination of whether the Settlement Agreement requires a conditional use permit as defined by local law. See *Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir. 1994) (“[W]hen a district court’s findings are based upon an incorrect legal standard, the appropriate remedy is to remand so that findings can be made in accordance with the applicable legal standard.”).

Moreover, the Panel’s conclusion that the neighbors were not afforded adequate notice and an opportunity to be heard, and its suggestion that the City issued the Congregation a “blank check” are unsupported. Slip Op. 10184. The CUP application – which sought a broader religious use than the Settlement Agreement allowed – was subjected to full public notice and hearings, and comported with all applicable procedural requirements governing CUPs, including multiple levels of administrative appeals and City Council review. ER 415. The neighbors participated fully. SER 86-145. The record shows that over 100 people appeared at the public hearing, including Hancock Park residents, neighbors and representatives of the Hancock Park Homeowners Association. SER 88 (noting 50% appeared in support of Congregation); SER 90 (noting 275 letters and 245 petition signatures in support). The neighbors were afforded all the notice and opportunity to be heard that the law requires.<sup>3</sup> Having determined that the limited

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<sup>3</sup> This distinguishes *Keith v. Volpe*, 118 F.3d 1386, 1392 (9th Cir. 1997), where the settlement agreement supplanted third-party substantive state law rights. Here, the neighbors are entitled to no more process under state law than they have already had.

religious gatherings permitted by the Settlement Agreement was a residential use under the zoning code, the Settlement Agreement was submitted to and reviewed twice by City Council, and approved in accordance with all City procedures applicable to settling litigation. ER 779-80; ER 418.

**B. The Panel’s Conclusion That “Congregational Worship” Is A “Conditional Use” Contravenes Federal And Local Law.**

The Panel concluded that “[i]n an R-1 zone, congregational worship is a ‘conditional use’ under Section 12.24, and requires a permit.” Thus, the City was required to comply with procedures governing CUPs, and its failure to do so rendered the Settlement Agreement void and unenforceable under state law. Slip Op. 10190. The Panel’s holding that congregational worship in a residential zone – regardless of scope or impact – is a “conditional use” within the meaning of the Los Angeles Municipal Code and thus lawful only if permitted by CUP, is unsupported by state or local law. The Panel provides no contrary authority.

Section 12.24 provides that “Churches/Houses of worship” are among the conditional uses for which a CUP is required. *See* LAMC § 12.24(T)(3)(b) (2007).<sup>4</sup> However, the term “Churches/Houses of worship” is nowhere expressly defined in the code. The district court did not purport to construe or apply the term “Churches/Houses of worship,” nor was it asked to do so. Nothing in the code remotely suggests that the terms “Churches” or “Churches/Houses of worship” include the kind of private non-institutional religious use the Settlement Agreement allows, and the Panel does not even attempt to demonstrate otherwise. To the contrary, in sharp contrast to the limited religious use of a residence the

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<sup>4</sup> The Opinion states that “Churches/Houses of worship” are among the conditional uses that require a CUP. Slip Op. 10189 (*citing* LAMC § 12.24(T)(3)(b)). However, section 12.24(W), not section 12.24(T), applies to conditional church uses in R-1 zones.

Settlement Agreement allows, section 12.24 requires a CUP for plainly institutional non-residential uses, including private elementary and high schools, child care facilities and nursery schools, and private clubs.<sup>5</sup> See LAMC §§ 12.24(T),(W).

No state or federal court has ever found that “congregational worship”, without regard to scope and nature, is a “conditional use” within the meaning of the code. The Congregation respectfully submits that it was improper for the Panel to make that determination as a matter of state law in the first instance. See *Southern Cal. Edison Co. v. Lynch*, 307 F.3d 794, 812 (9th Cir. 2002) (stating that “[f]ederal courts are bound by the pronouncements of the state’s highest court on applicable state law.”); *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002) (stating that in interpreting state law, federal courts must “look to existing state law without predicting potential changes in that law.”). On the Panel’s construction, every gathering at a personal residence for the purpose of congregational worship is illegal without a CUP, and subject to criminal enforcement. See LAMC § 12.08 (defining operation of nonconforming use as *per se* public nuisance and criminal act). Nothing in the code or any decisional law supports such a sweeping definition.

As the Panel posits, the question is “whether, within the framework of the City’s zoning ordinance, the Congregation could engage in the uses permitted by the Settlement Agreement without first obtaining a CUP.” Slip. Op. 10190 (emphasis added). The municipal code itself expressly states that conditional use procedures “apply only to uses in zones when not permitted by right.” LAMC §

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<sup>5</sup> Far from permitting an institutional use, the Settlement Agreement restricts the Congregation from engaging in activities, which other residents enjoy as a matter of right. ER 25 (prohibiting “any [] gathering” during specified period) (emphasis added).

12.24(A). In settling the federal litigation, the City Council determined, as it was entitled to do, that the limited religious use the Settlement Agreement allowed was an ancillary residential use permitted by right – as is any other noncommercial gathering in a private residence – and not an institutional church use within the meaning of section 12.24. In summarily dismissing the City’s interpretation of its own zoning code, the Panel has usurped the City’s legislative function and failed to accord the City the deference state law demands.<sup>6</sup> *See City of Walnut Creek v. County of Contra Costa*, 101 Cal. App. 3d 1012, 1021 (Ct. App. 1980) (“The construction placed on a piece of legislation by the enacting body is of very persuasive significance.”); *MHC Operating Ltd. P’ship v. City of San Jose*, 106 Cal. App. 4th 204, 219 (Ct. App. 2003).

More fundamentally, the Panel’s construction of section 12.24 contravenes basic principles of federal constitutional law. A categorical rule that requires a CUP for all congregational worship in an R-1 zone necessarily commands the City to enforce against all religious gatherings and practice in the residential zone – regardless of size and scope, while it retains its wide discretion not to enforce against non-religious gatherings of similar scope and magnitude. The Panel’s overbroad definition not only creates new state law where there was none, it also sweeps within its reach speech and conduct that is indisputably protected by the First Amendment, Equal Protection Clause, and other state and federal guarantees. *See Tucker v. State of Cal. Dep’t of Educ.*, 97 F.3d 1204, 1215 (9th Cir. 1996)

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<sup>6</sup> As a matter of California law, the district court was correct. *See Malibu Mountains Recreation, Inc. v. County of Los Angeles*, 67 Cal. App. 4th 359, 369 (Ct. App. 1998) (CUP is “a property right that runs with the land, not with the owner.”); *Anza Parking Corp. v. City of Burlingame*, 195 Cal. App. 3d 855, 858 (Ct. App. 1987). That interpretation is typically afforded deference by this Court. *See Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980).

(striking overbroad orders and stating “the sweeping ban on the posting of all religious information would clearly be unreasonable.”). Fundraisers, political gatherings and book clubs will be permitted, while gatherings for religious purposes will be shut down. Absent clarification of the Panel’s new rule, the City will be compelled to require a CUP for all religious gatherings in the residential zone and to litigate to liability all religious land use claims to avoid collateral challenge to its zoning decisions. On that basis alone, the Opinion cannot stand.

**C. The Panel Misapplied *Trancas* And The California Constitution.**

The Panel found the Settlement Agreement void and unenforceable under state law because it exempted the Congregation from the application of future and existing zoning laws, and “bargained away” the City’s right to enforce criminal prohibitions against nonconforming uses or any other zoning ordinances for “as long as the Congregation is in existence.” Slip Op. 10191-10192.

Under California law, however, the City had the power to determine that limited religious use of a residence is not a “conditional use” within the meaning of the municipal code, and to settle the RLUIPA claims against it. No state or local law restricts the City’s power to determine whether an ancillary use becomes a conditional use requiring a CUP, or to allow a permissible use through a settlement agreement. California courts expressly recognize that cities retain inherent power to resolve land use litigation by stipulated judgment or settlement. *See 108 Holdings, Ltd. v. City of Rohnert Park*, 136 Cal. App. 4th 186, 195 (Ct. App. 2006) (citing *Pardee Constr. Co. v. City of Camarillo*, 37 Cal. 3d 465, 468 (Ct. App. 1984)); *see also Stephens v. City of Vista*, 994 F.2d 650, 655-56 (9th Cir. 1993) (upholding private agreement settling land use litigation). The City’s decision to exercise that power is entitled to deference by this Court. *See Santa Margarita Area Residents v. San Luis Obispo County Bd. of Supervisors*, 84 Cal. App. 4th 221, 227-28 (Ct. App. 2000).

The Settlement Agreement comports with California law because it does not contract away the City's future legislative power, expressly exempt the Congregation from future or existing zoning requirements or permit an illegal use. Contracts that purport to bargain away governmental functions or the right to exercise police power in the future are invalid under California law. *See 108 Holdings*, 136 Cal. App. 4th at 194-95; *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 734 (Ct. App. 1976) (contracts that amount to "surrender" or "abnegation" of "control of a properly municipal function" are invalid) (emphasis in original).

California courts will not imply an unlawful surrender of police power. *See 108 Holdings*, 136 Cal. App. 4th at 195-96. Rather, only those agreements that expressly restrict a city's power to legislate in the future are invalid. *See id.* at 196 (stating that "[r]eservation of the police power is implicit in all government contracts and private parties take their rights subject to that reservation."); *see also Delucchi v. County of Santa Cruz*, 179 Cal. App. 3d 814, 823 (Ct. App. 1986) (it is presumed that "parties contract in contemplation of state's inherent right to unhampered [] police power."). Absent express waiver or exemption, California courts will not "'read into the contract [] an abrogation of the potential future exercise of the sovereign police power.'" *108 Holdings*, 136 Cal. App. 4th at 196 (citing *Professional Engineers v. Dep't of Transp.*, 13 Cal. App. 4th 585, 591 (Ct. App. 1993); *see also City of Glendale v. Super. Ct. of Los Angeles*, 18 Cal. App. 4th 1768, 1777-78 (Ct. App. 1993) (stating that promise to waive sovereign power "cannot be implied" and rejecting claim that contract promised not to exercise zoning power absent "express promise") (emphasis in original).

Nowhere in the Settlement Agreement does the City expressly agree to refrain from legislating in the future or from enforcing its zoning codes against the Congregation. ER 23-31. In *Trancas*, the parties expressly agreed to comply

“with development standards of the City’s zoning code, except density.” *Trancas Prop. Owners Assoc. v. City of Malibu*, 138 Cal. App. 4th 172, 178 (Ct. App. 2006) (emphasis added). In contrast, the Settlement Agreement places no express restriction on the City’s power or applicable law. The Panel’s failure to recognize this distinction contravenes California law. *See 108 Holdings*, 136 Cal. App. 4th at 196-97 & n.5 (court lacks authority to “ignore well-established California law and adopt a far more restrictive view of the reserved powers doctrine”); *see also County Mobilehome v. Positive Action Comm., Inc. v. County of San Diego*, 62 Cal. App. 4th 727, 736 (Ct. App. 1998) (noting California rule that contract must be interpreted to make it lawful and operative).

Unlike *Trancas*, where it was beyond dispute that the revised development was illegal without a variance, the Settlement Agreement does not permit a “conditional use” or exempt the Congregation from the substantive and procedural requirements governing CUPs. The Settlement Agreement simply binds the City to do precisely what its own law already allows it to do – namely, to determine that limited religious use of a residence is a permissible ancillary use. *See Santa Margarita Area Residents*, 84 Cal. App. 4th at 232-33. Because the Settlement Agreement does not permit a “conditional use” it cannot function as a CUP.<sup>7</sup> The Panel summarily dismisses Los Angeles City Charter (“City Charter”) section 273(c), which expressly grants the City Attorney broad power to represent the City and settle litigation against it. Slip Op. at 10192. In so doing, the Panel ignored longstanding California constitutional law.

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<sup>7</sup> Further, *Trancas* does not purport to ban settlement agreements reached after full notice and process is provided and the City decides to permit a lesser or different permissible use. Nothing in the zoning code requires the City to officially declare that it is allowing a permissible use.

Under California law, the charter of a municipality is its constitution and represents privileges granted by the Constitution “of complete autonomous rule with respect to municipal affairs.” *Cawdrey v. City of Redondo Beach*, 15 Cal. App. 4th 1212, 1221-22 (Ct. App. 1993). City charter power to regulate municipal affairs is broad, and can be limited only by express restrictions in the charter itself. *See id.* (only limitations “which have been specified in the charter” can limit charter power); Cal. Const., art. 11, § 5(a) (only the provisions in a city’s own charter can impose limits on a city’s general power to regulate municipal affairs) (emphasis added). More significantly, as the California Supreme Court has expressly recognized, if the powers and duties expressly conferred by a city charter are in conflict with general state law, the charter, not the general law, controls. *See Dobb v. County of San Diego*, 8 Cal. 4th 1200, 1216 (1994) (stating that “powers and duties legitimately conferred by charter on county officers supersede general law”) (emphasis in original); *see also City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95, 102 (Ct. App. 1988) (city charter provisions “respecting purely municipal affairs prevail over related state laws”). Thus, no ordinance can limit or restrict expressly conferred charter power. *See Patterson*, 202 Cal. App. 3d at 102 (“an ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution.”) (citations omitted).

Here, the City Charter expressly confers power to settle litigation, and establishes separate and distinct procedures governing settlement – all of which were followed here. By its terms, the City’s powers are broad and encompass all powers possible for a charter city to have under the constitution and laws of California, subject only to express limitations in the City Charter itself. *See Los Angeles, Cal., Charter § 101* (2007). Nothing in the City Charter purports to restrict the City’s power to settle litigation, to contractually consent to a

permissible use or to accomplish through settlement what the City under its codes is empowered to permit. Absent express limitations in the City Charter itself, the Panel was without authority to imply them or to conclude in the first instance that, as a matter of state law, section 12.24 supersedes section 273. *See Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) (“Charter provisions are construed in favor of the exercise of the power over municipal affairs and ‘against the existence of any limitation or restriction thereon which is not expressly stated in the charter.’”).

The Panel’s failure to consider the authoritative effect of section 273, and its conclusion that *Trancas* establishes superseding general law (*see* Slip Op. 10192), contravenes California law. Section 273 establishes independent authority to settle litigation, which, absent express limitations, supersedes conflicting state and local law.<sup>8</sup> The Panel’s construction effectively nullifies section 273, renders its supremacy meaningless and precludes the City’s ability to compromise its position and settle land use litigation. This Court is bound to harmonize and apply, not ignore, existing state law. *See Lynch*, 307 F.3d at 812.

**D. The Opinion Contravenes RLUIPA’s Express Preemption Provision.**

Before this litigation began, the Congregation had been allowed to pray at a nearby residence for nearly 25 years, and was never required to have a CUP. SER 65; ER 414. The Settlement Agreement settled the Congregation’s claims that the City’s demand for and denial of a CUP when other non-religious uses of the same scope and magnitude were not required to do so violated RLUIPA. SER 162-90.

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<sup>8</sup> *Trancas* is distinguishable. It involved (1) superseding state law requirements governing variances, which do not apply to CUPs (*see* Cal. Govt. Code § 65906 (2007)), (2) a project that was illegal absent a variance, and (3) no independent superseding City Charter power to settle.

The Opinion undermines the purpose of RLUIPA, which is to remedy religious discrimination arising from the arbitrary application of case-by-case determinations under local zoning laws. *See* 146 Cong. Rec. S 7774 (daily ed. July 27, 2000). That purpose is defeated if every religious use no matter its intensity is deemed a conditional use and forced to go through the CUP process. Further, in declaring all congregational worship in an R-1 zone illegal absent a CUP, the Opinion has the effect of totally excluding church uses in Hancock Park. *Cf.* 42 U.S.C. § 2000cc(b)(3)(A) (prohibiting application of land use regulation that “totally excludes religious assemblies from a jurisdiction.”). RLUIPA was enacted precisely because local zoning administrators were arbitrarily requiring and then denying CUPs for otherwise permitted uses and on impermissible grounds. SER 120-24 (requiring CUP after 25 years of permitted use then denying it on basis that there have been no church uses in Hancock Park for 75 years, and City did not want to set a bad “precedent”).<sup>9</sup>

Most fundamentally, the Opinion eviscerates RLUIPA’s preemption provision, which expressly confers upon local government wide discretion in alleviating burdens on religion and preempts substantially burdensome practices and policies. *See* 42 U.S.C. § 2000cc-3(e) (providing that local government may avoid the preemptive effect of RLUIPA by changing the policy or practice that substantially burdens religious exercise, exempting the exercise from the application of existing policies and practices, “or by any other means that eliminates the substantial burden.”). In declaring that congregational worship is a “conditional use” that cannot be permitted by settlement, the Panel has effectively stripped the City of its power to interpret and apply its own zoning code and

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<sup>9</sup> The Board of Zoning Appeals refused to consider evidence of substantial burden or apply federal constitutional or statutory standards. SER 124, 132.

practices in order to avoid the preemptive force of RLUIPA. City officials must be permitted to reconsider their positions in light of RLUIPA and to change their practices to bring them into conformity with federal law through settlement.

The Settlement Agreement is not void under state law precisely because it was authorized under preemptive federal law. At the very least, it cannot be ignored.

**E. The Panel’s “Actual Violation” Rule Expands Existing Ninth Circuit Law, Creates An Inter-Circuit Split And Contravenes Supreme Court Precedent.**

The Panel found the Settlement Agreement “authorized the City to disregard its own zoning ordinances” in the name of RLUIPA, and absent a finding that “there has been or will be an actual violation of federal law” the Settlement Agreement was void. Slip Op. 10193. Settlement agreements that allow states and municipalities to disregard, modify or circumvent the challenged state law are void under federal law. *Id.* Charter cities are thus powerless to change their policies and practices through settlement, or to refrain from enforcing unlawful ordinances – despite their sovereign power over municipal affairs. Instead, they must litigate to liability the merits of every federal claim.

This Court has never before required an “actual violation” in such cases. In *Keith v. Volpe*, this Court reversed an injunction prohibiting Caltrans from issuing a permit to a third party, which a state court had previously determined was mandated under state law. *Keith*, 118 F.3d at 1393-94. The district court based its injunction on a consent decree, which it interpreted to constitute an adequate source of authority for overriding valid state law and the state court’s issuance of the permit. It also relied “vaguely on the ‘policy concerns’ . . . of the National Environmental Policy Act,” which imposed “only procedural requirements” and did not “dictate a substantive environmental result.” *Id.* at 1393.

This Court held that while the district court properly interpreted the consent decree as purportedly banning the permit, absent conflicting federal law dictating a substantive result, the court “improperly concluded that the decree prevailed over state law.” *Id.* Because the contractual consent decree could not be used as a “substantive declaration of Caltrans’s obligations under California law,” the district court had no power to defeat third-party state law rights, if any, “as finally interpreted by the California courts.” *Id.* at 1394 (“[S]tate law, as finally interpreted by the California courts,” governs whether permit should issue.) (emphasis added).

The *Keith* Court did not invalidate the consent decree – despite finding that it effectively prohibited the issuance of permits as mandated by state law. *Keith* did not require an actual violation of federal law, or purport to determine what findings, if any, would be necessary to justify the consent decree or the injunction. It simply held that absent a conflicting federal law that would justify overriding third-party state law rights, the district court was powerless to issue the injunction based on the consent decree alone. The Panel’s extension of *Keith* to void the Settlement Agreement in this case was unwarranted.

No state court has determined as a matter of state law that the City is prohibited from consenting to a permissible use, invoking its superseding charter power to settle litigation or modifying through settlement its practices and interpretation of its own codes to avoid a violation of federal law. Unlike *Keith*, the district court did not construe the Settlement Agreement as a source of authority sufficient to override state law as interpreted by state courts, nor did it authorize the City in the name of RLUIPA to disregard its own ordinances or abrogate substantive third party rights. Its holding was not based on vague “policy” concerns, but rather on the valid exercise of the City’s discretion to compromise its position, and on the existence of material issues of fact whether the

City could lawfully apply its zoning code to demand and then deny a CUP under RLUIPA – a statute, unlike NEPA, which dictates substantive results and expressly preempts contrary local laws and practices.

The Panel’s invocation of *Perkins v. City of Chicago Heights* is equally misplaced. Unlike *Perkins*, nothing in the Settlement Agreement allows the City to usurp power that resides in another branch of government. In *Perkins*, a municipality consented to change the city’s form of government, which as a matter of superseding state constitutional law could only be accomplished by referendum. *Perkins v. City of Chicago Heights*, 47 F.3d 212, 216 (7th Cir. 1995). The Seventh Circuit struck the consent decree because the city lacked the power to change the form of government without permission from the voters. *Id.* at 217. Here, the zoning power belongs solely to the City and falls squarely within its sovereign power over municipal affairs, and its charter power to settle litigation supersedes all conflicting state and local law. The Settlement Agreement does not judicially alter the structure of government or abrogate statutory limits on public officials’ authority. *Cf. Perkins*, 47 F.3d at 216.

This distinction is significant. *Compare Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1010-15 (7th Cir. 1980) (upholding consent decree annexing and rezoning land as approved legislative act by home rule municipality, where zoning authority belonged exclusively to municipality and consent decree did not “displace the rights and powers accorded suburban governmental entities” but rather provided “site-specific” relief through judicial process) (citations omitted) *with Cleveland County Ass’n for Gov’t By The People v. Cleveland County Bd. of Comm’rs*, 142 F.3d 468, 476-78 & nn.15, 20 (D.C. Cir. 1998) (concluding that Board in non-home rule county was without authority to unilaterally change election plan without voter approval where superseding state law expressly reserved such power to the state, or to the voters of the county, and

the county, as “a legislative unit subordinate to the state” had “only the authority that the General Assembly grant[ed] it.”).

Neither *Keith* nor *Perkins* renders charter municipalities in a home rule state powerless to change their practices through settlement to avoid the preemptive force of federal law. By its terms, *Perkins* allows settling parties to “agree to that which they have the power to do outside of litigation” – here, the independent sovereign power to consent to permissible uses and to refrain from interpreting and applying ordinances in an unlawful way. *Perkins*, 47 F.3d at 216.

Extending *Keith* and *Perkins* to this case creates a conflict with the Seventh and Third Circuits and existing Supreme Court precedent, which has never required an actual violation of federal law to justify a settlement agreement that circumvents or modifies the challenged state law procedure. The Panel’s “actual violation” rule conflicts with the Seventh Circuit’s decision in *Metropolitan Housing*, 616 F.2d at 1013-15, which upheld in an analogous context a consent decree settling Fair Housing Act claims and allowing annexation and site-specific rezoning based on a home-rule county’s exclusive power over zoning and on the fundamental policy favoring settlement. The Seventh Circuit expressly rejected any requirement that the merits of the federal claim be litigated to liability. *See id.* at 1014 (holding that in approving settlement, district court “need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy”) (emphasis added). Rather, the court need only “determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.” *Id.*

The Opinion also conflicts with *Mesalic v. Slayton*, 689 F. Supp. 416 (D.N.J. 1988), *aff’d*, 865 F.2d 46 (3d Cir. 1988), in which the Third Circuit affirmed the district court’s approval of an agreement that settled federal claims based on the unconstitutional application of zoning laws to block plaintiff’s development, and

which required the township to circumvent subsequently-enacted zoning ordinances. *Mesalic*, 865 F.2d at 48-49. The court upheld an agreement that was based on “colorable allegations of federal constitutional violations, [which] overrides any state law to the contrary” and where the “relief was fairly designed to cure the constitutional violations.” *Id.* at 48 (emphasis added).<sup>10</sup>

The Panel’s “actual violation” rule directly conflicts with established Supreme Court precedent in *Lawyer v. Dep’t of Justice*, 521 U.S. 567 (1997), which was decided after *Perkins* and expressly distinguished by *Cleveland County*, 142 F.3d at 476 n.15. Indeed, the Supreme Court has never held that an actual violation is required to settle colorable federal claims that contravene the offending state law. In *Lawyer*, the Court upheld a remedial redistricting plan achieved through court-approved settlement of federal constitutional claims, without formally holding Florida’s pre-existing legislative redistricting plan unconstitutional and expressly rejected a requirement of formal adjudication of unconstitutionality before approving settlement. *Lawyer*, 521 U.S. at 579. In finding that Florida’s constitutional provision for legislative redistricting did not preclude judicially-sanctioned settlement, the Court noted the primacy of state redistricting responsibility, the deference federal courts owe state redistricting decisions and the attorney general’s “broad discretion” in representing the State in litigation. *Id.* at 577-78 (emphasis added). According to the Court, the State properly elected, through its attorney general, to exercise its redistricting power “by entering into the settlement agreement, which . . . it had every right to do.” *Id.* at 577.

The Court noted that the “proponents of the plan included counsel authorized to represent the State itself, and there is no reason to suppose that the

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<sup>10</sup> See also *Doe v. Pataki*, 481 F.3d 69, 78 (2d Cir. 2007) (noting “federal courts have authority to abrogate state laws on the grounds of claimed unconstitutionality or preemption pursuant to paramount federal legislation”).

State's attorney general lacked authority to propose a plan as an incident of his authority to represent the State in this litigation." *Id.* (emphasis added). In rejecting the dissent's contention that the Florida constitution provides the exclusive means by which redistricting can take place, the Court held that "absent a state court determination that state law limits the attorney general's broad settling authority it would not second-guess the scope of that power. *Id.* at 577 & n.4. Because the settlement plan represented a valid exercise of the attorney general's power to represent the State and settle litigation, the Court refused to require a formal adjudication of unconstitutionality and upheld the agreement upon a showing of a "substantial 'evidentiary and legal' basis." *Id.* at 574, 579.

**F. The Panel Decided An Issue Of First Impression That Was Not Presented To Or Decided By The District Court And Reversed On Grounds Not Briefed.**

The Congregation submits that rehearing is warranted for another independent reason. The only question presented on appeal was whether the Settlement Agreement abrogated state law requirements for a CUP. ER 413-21, 776-94, 916-33. The question of whether the Settlement Agreement allowed an illegal use in violation of federal law, or what showing is necessary to validate a consent decree that circumvents state law was never presented to or decided by the district court; nor was it properly raised on appeal in this Court.<sup>11</sup> *See id.*; *see also* Appellants' Opening Brief ("LRNA's Brief") at 7-10. Reaching out to decide an

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<sup>11</sup> The record shows that RLUIPA was effective and applicable to the Congregation's claims at the time settlement was approved, that the Congregation had colorable federal claims (SER 280-83; ER 416-18), and settlement was reached "only after [the] Court concluded that genuine issues of material fact existed as to whether the City's enforcement of LAMC § 12.08 violated RLUIPA." ER 784-85; SER 283. The only uncertainty at the time of settlement was RLUIPA's constitutionality, not its applicability. ER 418.

issue of exceptional importance, which expands existing Circuit law and creates a conflict with Supreme Court precedent, and which no party has an opportunity to litigate, brief or appeal, is fundamentally unfair and contrary to law.<sup>12</sup> See *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Galvan v. Alaska Dep't of Corr.*, 397 F.3d 1198, 1204 (9th Cir. 2005); *United States v. Broadus*, 7 F.3d 460, 463 (6th Cir. 1993); *Page v. Schweiker*, 786 F.2d 150, 153 (3d Cir. 1986).

If the Panel refuses to rehear the appeal, the Congregation respectfully submits that the Panel should modify the Opinion so as not to void the Settlement Agreement under federal law in the first instance, but, instead, should remand to the district court to afford the parties an opportunity to demonstrate that there has been or will be an actual RLUIPA violation. At minimum, the Panel should clarify the standard for showing when there “will be” an actual violation of federal law.

### **III. REASONS FOR GRANTING REHEARING *EN BANC***

Rehearing *en banc* is warranted because the Panel’s new “actual violation” rule contravenes established Supreme Court precedent and congressional intent underlying RLUIPA, creates an inter-circuit split on an issue of exceptional importance, and fundamentally undermines the ability of cities and states to settle land use litigation. The Panel has expanded California law without regard to charter cities’ power over municipal affairs, and has effectively usurped the City’s power to determine what is and what is not a conditional use within the meaning of its own code, and to exercise its broad charter power to settle litigation. In rendering illegal all congregational worship in a residential zone, the Opinion implicates serious First Amendment and Equal Protection concerns.

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<sup>12</sup> Even after *Lawyer*, there is no uniform approach. See David W. Swift, *A State’s Power to Enter into a Consent Decree that Violates State Law Provisions: What “Findings” of a Federal Violation Are Sufficient to Justify a Consent Decree That Trumps State Law?*, 10 Tex. J. on C.L. & C.R. 37 (2004).

In requiring litigation to liability before settlement – which, absent clarification, means a full-blown trial on the merits – the Opinion effectively (1) precludes future settlement of all civil rights, 42 U.S.C. § 1983 and federal preemption claims – as every case must be litigated to liability before settlement and no municipality will settle and knowingly invite an attorneys’ fees award; (2) renders existing settlements open to third-party collateral attack years after the litigation has settled; and (3) prevents city and state officials from avoiding implementation of patently unconstitutional laws and practices through court-approved settlement. Local and state officials should have the power to change unlawful practices through settlement and should not have to litigate to liability before doing so. The Opinion, if its stands, seriously undermines the efficacy of remedial civil rights legislation and all settlements based on unlawful state practices. So long as municipalities rely on state or local law to justify their actions, settlement is effectively precluded. Such an onerous rule undermines public policy in favor of settlement and stands the Supremacy Clause on its head.

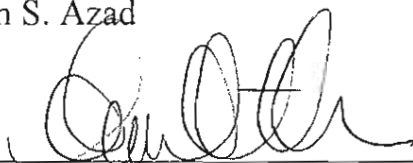
#### IV. CONCLUSION

For the reasons above, the Petition should be granted.

Dated: October 18, 2007

Respectfully submitted,  
LATHAM & WATKINS LLP

Susan S. Azad

By:  for  
Susan S. Azad  
*Counsel for Defendant-Appellee  
Congregation Etz Chaim*

**CERTIFICATE OF COMPLIANCE PURSUANT TO**  
**CIRCUIT RULES 35-4 AND 40-1**

I certify that pursuant to Ninth Circuit Rules 35-4 and 40-1, the attached petition for panel rehearing/petition for rehearing *en banc* is proportionately spaced, has a typeface of 14 points or more, and contains 6176 words.

Dated: October 18, 2007

LATHAM & WATKINS LLP

Susan S. Azad

By:  for

Susan S. Azad

*Counsel for Defendant-Appellee  
Congregation Etz Chaim*

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 633 West Fifth Street, Suite 4000, Los Angeles, CA 90071-2007.

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PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING *EN BANC***

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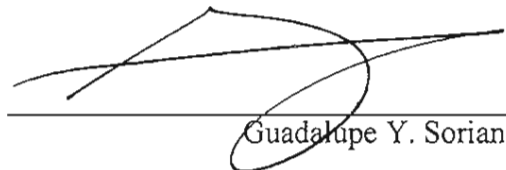
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I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **October 18, 2007**, at Los Angeles, California.

  
\_\_\_\_\_  
Guadalupe Y. Soriano