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## **STATEMENT OF THE ISSUE**

Whether the General Assembly may authorize a municipality to cancel a local development agreement that channels casino gambling revenues to corporations that were created only to receive and spend those revenues.

## STATEMENT OF THE CASE

On April 29, 2007, the Indiana General Assembly passed the Budget Act, Section 302 of which amended Indiana Code § 4-33-6-7 to read as follows:

c) This subsection applies to an owner's license issued for the City of East Chicago. If a controlling interest in the owner's license is transferred, the fiscal body of the City of East Chicago may adopt an ordinance voiding any term of the development agreement (as defined by IC 36-1-8-9.5) between: (1) the city; and (2) the person transferring the controlling interest in the owner's license; . . . The ordinance may provide for any payments made under the redevelopment agreement, including those held in escrow, to be redirected to the City of East Chicago for use as directed by ordinance of the city fiscal body. . . .

H.E.A. 1001, 115<sup>th</sup> Gen. Assembly, 1<sup>st</sup> Reg. Sess. (Ind. 2007). Thus, Section 302 by its terms grants the City of East Chicago authority to void or modify the terms of local development agreements that exist between the City and holders of a riverboat casino license.

The Foundations of East Chicago, Inc. ("FEC") filed this lawsuit on May 3, 2007, challenging the validity of Section 302 under numerous provisions of the Indiana and United States Constitutions. Appellant's App. Vol. I at 2. The Attorney General, on behalf of the State, subsequently intervened in the action to defend the statute's validity. Appellant's App. Vol. I at 4.

The Marion Superior Court (Reid, J.) conducted a bench trial on October 18, 2007. On November 19, 2007, the trial court issued its Order Denying Permanent Injunction and Final Judgment Dismissing Plaintiff's Claims ("Judgment"). Appellant's App. Vol. I at 11-63. In this judgment, the trial court rejected all of the state and federal constitutional arguments put forth by FEC and held that Section

302 was a proper and constitutional exercise of legislative authority. Appellant's App. Vol. I at 11-63. FEC has appealed that judgment.

### STATEMENT OF FACTS

When the Indiana General Assembly first authorized riverboat gambling in Indiana in 1993, it expressly stated that the purpose behind doing so was to “benefit the people of Indiana by promoting tourism and assisting economic development.” Ind. Code § 4-33-1-2. To this end, the Indiana Gaming Commission is statutorily permitted to take economic development impact into consideration in granting riverboat licenses and “may give favorable consideration” both to “[e]conomically depressed areas of Indiana . . .” and to “[a]pplicants presenting plans that provide for significant economic development over a large geographic area.” Ind. Code § 4-33-6-7(a). The system contemplates that competing casino license applicants will offer economic development incentives through instruments known as local development agreements, or “LDAs.” *See* Ind. Code § 4-33-4-1(a)(5).

East Chicago was one of the economically depressed areas eligible for a riverboat casino. *See* Ind. Code §§ 4-33-6-1(4), -7(a). The process for obtaining the lone available license for an East Chicago casino, however, departed from the competitive bid model contemplated by Indiana Code § 4-33-4-1(a)(5). Showboat Marina Partnership—45% of which was owned by Waterfront Entertainment and Development, Inc.—was the lone final applicant for the East Chicago riverboat casino license. Appellant's App. Vol. XI at 2218. An East Chicago-area investment

group headed by two of then-Mayor Robert Pastrick's associates—Michael Pannos and Thomas Cappas—owned Waterfront.<sup>1</sup> Appellant's App. Vol. XI at 2218.

Under Mayor Pastrick's leadership, the City of East Chicago worked with Showboat to create an economic development incentive package to present to the IGC in support of Showboat's application for the East Chicago gaming license. *See* Appellant's App. Vol. XI at 2219-20. The resulting LDA, known as the Showboat Agreement, was memorialized in two letters—one dated April 8, 1994, the other dated April 18, 1995—to Mayor Pastrick from Thomas Bonner, CEO of Showboat. Appellant's App. Vol. IX at 1632-45. Showboat agreed to make economic development contributions totaling 3.75% of the proposed casino's "adjusted gross receipts" (as defined by Indiana Code § 4-33-2-2) to be distributed as follows:

- 1% to the City of East Chicago;
- 1% to the Twin City Education Foundation, a non-profit corporation;
- 1% to the East Chicago Community Development Foundation, a non-profit corporation; and
- 0.75% to East Chicago Second Century, Inc., a for-profit corporation.

Appellant's App. Vol. XI at 1634-36.

The East Chicago Common Council approved the Showboat Agreement on September 11, 1995. Appellant's App. Vol. XI at 2220. The IGC issued a Certificate of Suitability—*i.e.*, a casino license—to Showboat based on the Showboat Agreement and related public testimony, including from Pastrick. Appellant's App.

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<sup>1</sup> Pannos is the former chairman of the Indiana Democratic Party and Cappas is "an East Chicago political insider whose power is believed to have been so extensive under the Pastrick administration the media dubbed him the city's 'midnight mayor.'" Bill Dolan, *Good Fortune Might Run Out on Second Century*, Northwest Indiana Times (Apr. 12, 2006).

Vol. XI at 2220. The Showboat Agreement was and remains the only local development agreement in Indiana directing a continuing portion of casino revenue intended for economic development directly to a for-profit entity, Second Century. *See generally* Appellant's App. Vol. V-VIII at 841-1631 (local development agreements for Michigan City, Switzerland County, Harrison County, French Lick, Lawrenceburg, City of Rising Sun, Majestic Star Casino, and the City of Hammond).

On February 26, 1999, pursuant to a side agreement with Showboat that the East Chicago Common Council did *not* approve, Pastrick exercised an option directing that ownership of Second Century be transferred to Cappas and Pannos. Appellant's App. Vol. XI at 2222. That same month, the IGC approved the transfer of the riverboat casino license from Showboat to Harrah's Operating Company, Inc. ("Harrah's"). Appellant's App. Vol. XI at 2222.

In 2005, the license was again transferred, this time from Harrah's to RIH Acquisitions IN, LLC d/b/a Resorts East Chicago ("Resorts"). Appellant's App. Vol. XI at 2223. As the IGC considered the transfer, the City, in a written objection to the transfer and by witnesses at a public IGC hearing, alleged, among other things, that FEC's predecessors and Second Century had "misappropriated and misused funds, violated their respective by-laws and rules and engaged in practices which undermined their respective missions." Appellant's App. Vol. XII at 2582. Although the IGC ultimately approved the transfer of the license, it nonetheless requested an investigation by the Attorney General to determine whether the

performance of the Showboat Agreement was “consistent with the stated purposes of the Riverboat Gambling Act and maintain[ed] the integrity of the riverboat gambling industry.” Appellant’s App. Vol. XII at 2582.

The Attorney General’s investigation revealed that by June of 2006, Second Century had received approximately \$16,082,145 from the casino and the two Foundations had received a combined total of approximately \$43,561,844. Appellant’s App. Vol. XI at 2224. With respect to the \$16 million received by Second Century<sup>2</sup>, the Attorney General found that the whereabouts of much of this money could not be determined because of obfuscation on Second Century’s part. Appellant’s App. Vol. XI at 2216. The Attorney General’s report also cited evidence that much of that \$16 million can be traced to the unjust enrichment of Pannos and Cappas. *See* Appellant’s App. Vol. XI at 2216, 2225-26, 2232-33.

Because of the concerns highlighted by the Attorney General’s investigative report, on June 8, 2006, the IGC passed Resolution 2006-58, which disapproved the portion of the Showboat Agreement requiring the riverboat licensee to make payments to Second Century. Appellant’s App. Vol. XIV at 2878-79. The casino thereafter put the 0.75% in riverboat funds formerly paid to Second Century into escrow. Appellant’s App. Vol. I at 21.

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<sup>2</sup> The Attorney General’s initial investigation centered only on Second Century, culminating in the “Interim Investigative Report of East Chicago Second Century, Inc. Conducted at the Request of the Indiana Gaming Commission” submitted to the IGC on June 8, 2006. *See* Appellant’s App. Vol. XI at 2216-33. The Attorney General submitted its “Investigative Report of the East Chicago Foundations Conducted at the Request of the Indiana Gaming Commission” on May 11, 2007. *See* Appellant’s App. Vol. XII at 2584-2609.

In March 2007, Resorts publicly announced it would seek to transfer the East Chicago riverboat license to Ameristar Casinos, Inc. (“Ameristar”). Appellant’s App. Vol. II at 392. On April 29, 2007, the General Assembly passed the Budget Act, Section 302 of which allowed the City to adopt an ordinance voiding any term of the Showboat Agreement upon the transfer of the East Chicago gaming license. Appellant’s App. Vol. X at 1902. On September 13, 2007, the IGC issued an order granting the application of Ameristar to acquire ownership of Resorts. Appellant’s App. Vol. I at 22. Pursuant to Section 302, upon the transfer of the license, the City passed two ordinances directing funds otherwise payable to Second Century and FEC under the Showboat Agreement to be paid to the City. Appellant’s App. Vol. X at 2053-59.

### **SUMMARY OF THE ARGUMENT**

The governmental rationale for allowing riverboat gambling is to use casino revenue to pay for local economic development projects. The Riverboat Gambling Act establishes a regulatory matrix predicated on that proposition. Local Development Agreements such as that between the City of East Chicago and the East Chicago riverboat licensee, are one very important piece of that regulatory matrix. They are vehicles for channeling casino revenues to local development projects, not vehicles by which elected local officials may arrange payoffs for their associates. They are more like administrative rules than they are like ordinary business contracts—they provide the detailed means for effectuating the General Assembly’s general directives concerning the relationship between casinos and local

development. Accordingly, LDAs are every bit as subject to legislative alteration as are other modes of state and local regulation. Section 302 is but one targeted means of effectuating good-government changes to the LDA that regulates the East Chicago riverboat casino.

Beyond that inescapable reality, no constitutional principles thwart Section 302. The state and federal Contracts Clauses pose no hurdles because riverboat casino operations are highly regulated—again, the LDA itself constitutes a part of that regulation—and Section 302 is justified by a substantial public interests in ensuring the casino revenue intended for local development is properly used and in protecting the integrity of riverboat gambling revenues and operations. It represents a well-targeted, proportionate response to questionable circumstances surrounding the creation of the LDA and administration of the funds paid under its directives. Accordingly, Section 302 does not violate the state or federal Contracts Clauses.

The State and Federal Takings Clauses also do not impede Section 302. FEC, whether described as a third-party beneficiary of the LDA or as an incidental beneficiary of a government license, has no property rights at stake that are protected by the Takings Clause. Such property rights exist only with respect to particular items or parcels of personal or real property, not in contracts. Furthermore, government action constitutes a taking only when it either directly appropriates private property or destroys through regulation the distinct investment-backed expectations of property owners. Neither has occurred here—

indeed, FEC has no cognizable property or investment-backed expectations of any kind at stake. The existence of the LDA and the benefits it yields to FEC does not remove the management of gambling revenues from the reach of the General Assembly, particularly not when the General Assembly has always intended those revenues to benefit the public rather than private corporations and their principals.

Next, while Section 302 undoubtedly constitutes special legislation for purposes of Article IV, § 23 of the Indiana Constitution, it just as undoubtedly is justified by circumstances peculiar to the East Chicago riverboat casino and LDA. To summarize, the East Chicago LDA arose under suspicious circumstances where there was only one bidder for the East Chicago riverboat license; it uniquely provides for payments to a for-profit entity owned substantially by associates of the former mayor; and it has led to an investigation by the Attorney General that was unable to confirm local development expenditures commensurate with payments made under the LDA. Based on these and many other circumstances, the General Assembly was amply justified in enacting a special law to allow East Chicago to address the problems surrounding the LDA by cancelling it entirely.

FEC's single-subject and separation-of-powers arguments are equally unavailing. Section 302 was properly included in a budget bill because it addresses local government needs, as do many other provisions of the budget bill. Indeed, it addresses government appropriations, a function indisputably relevant to the budget bill, every bit as much as other sections of the budget bill that FEC concedes are permissible. Finally, while Section 302 perhaps alters the common law of

contracts in a very narrow way (and is therefore unquestionably valid), it does not improperly overturn a prior judicial decision finding the East Chicago LDA to be an enforceable agreement. Unlike the legislation at issue in the single case that FEC cites supporting its argument, Section 302 does not purport to revive any legal instruments decreed invalid by a prior judicial decision. Section 302 merely authorized future actions by the City East Chicago. There is no final judicial decree declaring the Showboat Agreement valid, and regardless Section 302 does not declare the Showboat Agreement void *ab initio*.

## **ARGUMENT**

### **I. The Trial Court Properly Held That Section 302 is Not an Unlawful Impairment of Contracts Under Either the State or Federal Constitutions**

FEC argues that Section 302 violates both the State and Federal Contracts Clauses because it “directly and purposely authorizes the City to *eliminate* the Foundations’ contract rights and seize those rights for itself.” FEC Br. at 18. Section 302, however, does not substantially impair FEC’s contract rights because FEC had no reasonable expectation that its ability to receive riverboat gambling revenue would continue indefinitely. Moreover, even if Section 302 did impose a substantial impairment, it is still a constitutionally valid enactment because it serves legitimate and significant public purposes consistent with the State’s police power and is a reasonable and appropriate means of accomplishing those purposes.

**A. Section 302 does not violate the federal Contracts Clause**

The federal Contracts Clause generally precludes government interference with existing contracts, but it nonetheless accommodates the “inherent police power of the State to safeguard the vital interests of its people.” *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (internal quotation omitted). To this end, courts use a three-part test to analyze whether a law unlawfully impairs an existing contract. The first part asks “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” *Id.* at 411 (internal quotation omitted). If so, the next question is whether the State has a “significant and legitimate public purpose behind the regulation.” *Id.* (citation omitted). If a legitimate purpose exists, the third question is “whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.” *Id.* at 412 (internal quotation omitted). So, a law may validly impose a substantial impairment on an existing contract as long as it represents a proportionate response to a significant legislative need. *See id.* at 411-12.

Applying this analysis, the trial court properly concluded that the riverboat gambling statutory scheme does not permit “any reasonable expectation that economic development paid by the State’s licensee will be free from any future regulation” and, thus, Section 302 created “no ‘substantial’ impairment.” Appellant’s App. Vol. I at 42-43. Further, the trial court correctly held that even if

there was a substantial impairment, the law is valid because it “serves a number of important and legitimate public purposes” and “is a reasonable and appropriate means” to accomplish these purposes. Appellant’s App. Vol. I at 45, 47.

**1. There is no legally cognizable “substantial impairment” because gambling proceeds are highly regulated**

Of threshold relevance is “whether the industry the complaining party has entered has been regulated in the past.” *Energy Reserves*, 459 U.S. at 411 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)); see also *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 897 (7<sup>th</sup> Cir. 1998) (holding that a state statute permitting dealers to challenge certain decisions of car manufacturers does not work a substantial impairment because the industry was already heavily regulated). The more regulation an industry has previously endured, the less contracts in that industry may reasonably be deemed impaired by subsequent legislation. See *Energy Reserves*, 459 U.S. at 416.

Riverboat gambling and the distribution of riverboat gambling proceeds are heavily regulated in Indiana. See, e.g., Ind. Code § 4-33-1-2 (providing that riverboat gambling is subject to “strict regulation of facilities, persons, associations and gambling operations”). The Riverboat Gambling Act imposes detailed disclosure requirements on those applying for riverboat gambling licenses and operator agent contracts. Ind. Code § 4-33-5-1. The statute then dictates, among other things, the allocation and distribution of riverboat gambling revenue. Ind. Code §§ 4-33-12.5-6, -7. It provides percentages for calculating municipal disbursements according to census data and gives timelines for those payments. *Id.*

Indeed, even after riverboat gambling revenue has been distributed to municipalities, the statute limits how that money can be spent. Ind. Code § 4-33-12.5-8 (providing that such funds may only be used to improve the municipality's infrastructure, including construction and maintenance of roads, buildings, land, and sewers). As noted, the LDAs themselves constitute an important piece of this regulatory scheme. In such a highly regulated and strictly policed environment, FEC and its predecessors had no reasonable expectation that their ability to receive and spend casino gambling revenue would continue *ad infinitum* without further regulation.

FEC cites “numerous cases” that purportedly reject the view that extensive regulation of a field renders contracts in that field subject to later impairments. FEC Br. at 19 (citing *Verizon W. Va. v. W. Va. Bureau of Employment Programs*, 586 S.E.2d 170, 210 (W. Va. 2003); *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Welfare*, 742 F.2d 442, 451 (8<sup>th</sup> Cir. 1984); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 385 (8<sup>th</sup> Cir. 1994); *In re Workers' Comp. Refund*, 46 F.3d 813, 820 (8<sup>th</sup> Cir. 1995)). In each of these cases, however, the courts found Contracts Clause violations where legislation touched on narrow, unregulated portions of larger industries.

For example, “critical” to the invalidation of the Minnesota statute in question in *In re Workers' Comp. Refund* was a “determination [of] how concisely the regulated industry is defined.” *In re Workers' Comp. Refund*, 46 F.3d at 820. In that case, the court's holding was based on the finding that although insurance and

workers' compensation coverage in general was heavily-regulated in Minnesota, reinsurance premiums (the subject of the contract upended by Minnesota's law) were unregulated prior to the passage of the Act in question. *Id.* Similarly, in *Allied Steel*, the Court observed that in enacting a "pension funding charge" for companies closing offices in that state—a move that severely disrupted settled pension agreements—the Minnesota Legislature entered "a field it had never before sought to regulate." *Id.* *Allied Structural Steel*, 438 U.S. at 246.

In *Minnesota Association of Health Care Facilities*, the Eighth Circuit invalidated only the retroactive provision of a Minnesota statute limiting rates that nursing homes could charge their non-Medicaid patients. *Minn. Ass'n of Health Care Facilities*, 742 F.2d at 451. That provision created a "totally unexpected liability on nursing homes for charges that were permitted by law when collected." *Id.* The portions of the statute that applied *prospectively* were upheld, however, because "nursing homes could not reasonably expect that the terms of whatever contracts they had with their residents would exempt them from rate regulation by the state." *Id.* at 450. Likewise, in *Holiday Inn Franchising*, the Iowa Franchise Act violated the Contract Clause because franchises were not sufficiently regulated in the past to be on notice that they may be subject to impairment in the future. *Holiday Inn Franchising*, 29 F.3d at 385. While franchises in general had traditionally been regulated in Iowa, the court found it relevant that no previous regulation applied retroactively to agreements made before the enactment of the

statute, making it unreasonable to anticipate that any subsequent legislation would be applied retroactively. *Id.* at 385.

Section 302, of course, operates only *prospectively*, and unlike the activities regulated in FEC's cases, the riverboat gambling industry in Indiana has traditionally been heavily regulated in every respect. Here, no assertion can be made that any smaller portion of this larger industry has been traditionally unregulated or that this regulation has left any room for reasonable belief that economic development funds from riverboat gambling profits would be exempted from further future regulation. Indeed, local development agreements are themselves are part of the overall regulatory scheme. FEC would not even exist were it not for the General Assembly's directive that casino revenues be channeled to public development projects. FEC can now hardly claim to be blindsided by the legislature's decision to modify how its objectives are vindicated.

FEC further maintains that "while parties to contracts involving the gaming industry of course must recognize the General Assembly may someday revoke Indiana's authorization of legalized gambling, this does *not* mean the General Assembly therefore has *carte blanche* to impair rights under contracts involving gaming matters." FEC Br. at 19. Whatever the merits of that abstract proposition, the General Assembly has plenary authority over legalized gambling and surely *does* possess the power to staunch the flow of gambling revenue intended for local development—the very point of allowing casino gambling in the first place—to recipients it deems not to be serving the public interest.

Section 302 is one part of a complex regulatory matrix designed to protect the integrity of casino gambling operations in Indiana. It helps ensure that casino gambling in East Chicago is operated for the benefit of the licensee—whose qualifications have been fully vetted by the State—and for the benefit of Indiana citizens, the intended ultimate beneficiaries of the Riverboat Gambling Act. *See* Ind. Code § 4-33-1-2 (“This article is intended to benefit the people of Indiana by promoting tourism and assisting economic development.”). Thus, FEC could not have reasonably expected to be free from regulation ensuring that its funding was being used for the purposes intended by the Riverboat Gambling Act. And, of course, since FEC is at most a third-party beneficiary of the Showboat Agreement and did not exist prior to that agreement, it had no expectations at the inception of the Agreement that have now been frustrated. Accordingly, there is no substantial impairment of contractual rights obligations for purposes of the Contracts Clause.

**2. Allowing the City to redirect gambling proceeds away from associates of a suspect prior city administration serves a legitimate and significant public purpose**

Even if this Court finds that Section 302 imposes a substantial impairment on contractual obligations, the statute is still valid if there is a legitimate and significant public purpose behind the law. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

Section 302 serves a number of important and legitimate public purposes, including: (1) subjecting public funds to oversight by electorally accountable public

officials<sup>3</sup>; (2) ensuring that gambling revenues are used for local development; (3) helping to foster a sense of openness in a city that has been plagued by scandals and corruption; and (4) maintaining credibility and integrity, and decreasing opportunities for corruption, in riverboat gambling operations. These purposes are all part of the State's police power to protect the general welfare of its people. *Cf. City of El Paso v. Simmons*, 379 U.S. 497, 508, 516 (1965) (upholding legislation terminating contract rights to reinstatement of land purchase agreement as a legitimate means of eliminating confusion over land titles that had led to costly litigation for the State).

These interests are particularly acute where, as here, casino gambling revenues are implicated. *Cf. Posadas De Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 341 (1986) (observing that states have a substantial interest in regulating gambling activities). Gambling can provide vast opportunities for graft, corruption, and infiltration by organized crime. *Peachey v. Boswell*, 240 Ind. 604, 167 N.E.2d

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<sup>3</sup> FEC claims that the Attorney General's statutory oversight authority provides sufficient public accountability. *See* FEC Br. at 30. Aside from the General Assembly's prerogative to conclude otherwise, it is worth noting that the City's records on these matters will be open to the public and regularly subject to State Board of Accounts audits, even without a judicial decree. The Attorney General is quite significantly limited by the need to demonstrate one of a number of factors before obtaining a judicial dissolution or other remedy against a non-profit corporation. Specifically, the Attorney General must prove that: (1) the corporation obtained its articles of incorporation through fraud; (2) the corporation has continued to exceed or abuse the authority conferred upon it by law; (3) the corporation is a public-benefit corporation and its assets are being misapplied or wasted; or (4) the corporation is a public-benefit corporation and is no longer able to carry out its purposes. Ind. Code § 23-17-24-1. There is really no comparison between the Attorney General's limited power over non-municipal corporations and the accountability provided by the electorate and the State Board of Accounts.

48, 55 (1960); *see also Seminole Tribe of Florida v. State*, 11 F.3d 1016, 1025 (11<sup>th</sup> Cir. 1994) (noting that one of Congress' primary goals in enacting the federal Indian Gaming Regulatory Act was to shield Indian gaming from organized crime and other corrupting influences). Where, as with the East Chicago Riverboat Casino, there is already substantial evidence of problems with managing casino revenue intended for local development, these concerns are only heightened. *See, e.g.*, Appellant's App. Vol. XI at 2216-33 (Attorney General's investigative report of Second Century, finding that Second Century failed to provide economic development commensurate with the substantial sums of money it received from the casino licensee). Thus, the public purpose served by Section 302 is both substantial and important.

**3. In view of this substantial state interest, any legally cognizable impairment is reasonable and appropriate**

The third inquiry asks “whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.” *Energy Reserves*, 459 U.S. at 412 (quoting *U.S. Trust Co.*, 431 U.S. at 22).

1. There are two levels of scrutiny that may apply at this level of analysis, depending on whether the State is a party to the contract. “[U]nless the State is itself a contracting party, courts should ‘properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.’” *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 505 (1987) (quoting

*Energy Reserves*, 459 U.S. at 413); see also *Alliance Auto. Manufacturers v. Gwadosky*, 430 F.3d 30, 43 (1<sup>st</sup> Cir. 2005) (“When . . . the State is not a party to a contract, courts ordinarily defer, within broad limits, to the legislature’s judgment about the reasonableness and necessity of a particular measure”); *Chicago Bd. of Realtors v. City of Chicago*, 819 F.2d 732, 737 (7<sup>th</sup> Cir. 1987) (holding that the statute was reasonable and appropriate and reasoning that high deference should be given to the judgment of the state legislature because the State was not a party to the contract); *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1270 (7<sup>th</sup> Cir. 1983) (“*Energy Reserves Group* very clearly indicates that the [Supreme] Court continues to view the contract clause as requiring two different levels of analysis depending upon whether a State is one of the contracting parties”).

Here the State itself is not a party to the affected contract, and the rationale for holding states to a higher standard when cancelling their own contracts does not apply just because a political subdivision is a party. Neither *Wencke v. City of Indianapolis*, 429 N.E.2d 295 (Ind. Ct. App. 1981), nor *Chicago Board of Realtors* stands for the proposition that a city can be considered “the state” for purposes of applying heightened Contracts Clause scrutiny. See FEC Br. at 21 n.14. *Wencke* made no mention of any “stricter standard” that applies when evaluating a law impairing a contract to which a city is a party. The Court found “no evidence that the legislature intended [the statute] to exercise the state’s police power,” yet *still* declared valid the statute impairing *Wencke*’s contract rights to the favor of the city. *Wencke*, 429 N.E.2d at 298. And in *Chicago Board of Realtors*, the contracts in

question were between landlords and tenants, and the opinion nowhere suggested that a state law disrupting a city's contract would be subject to heightened scrutiny. *Chicago Bd. of Realtors*, 819 F.2d at 735.

The reasons for heightened scrutiny simply do not apply here. As the Supreme Court explained in *Energy Reserves*, “[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a government unit to its contractual obligations when it enters financial or other markets.” 459 U.S. at 413 n.14. Here, however, neither the State nor the City has entered “financial or other markets,” and neither is attempting to walk away from financial obligations.

Again, the Showboat Agreement is not much like an ordinary commercial contract at all. It is really just an agreement to carry out regulation of a casino licensee in a particular way. Unfortunately, this particular mode of implementing the casino's statutory duty to contribute to local development has led to the specter of corruption and self-dealing at the hands of the Pastrick Administration and its associates. The General Assembly quite legitimately looked at this situation and decided that local development in East Chicago—the ultimate beneficiary of these funds—would be better served if the funds flowed through the City or some other conduit besides FEC and Second Century. Heightened scrutiny therefore does not apply.

2. Section 302 is without question a reasonable and appropriate means of accomplishing a legitimate public purpose. As described in the Statement of Facts,

the Showboat Agreement has been tainted since the time of its negotiation. *See* Appellant's App. Vol. XI at 2229-34. The Pastrick Administration was not forthcoming about who would actually control of the the stream of local development revenue coming from the casino, and it channeled the funds away from the intended beneficiaries—the citizens of East Chicago—and into the hands of Pastrick's friends and associates, Pannos and Cappas, without the knowledge of the East Chicago Common Council. *See* Appellant's App. Vol. XI at 2221-22, 2229.

Furthermore, the Showboat Agreement has not even come close to adequately fulfilling its stated goal of providing economic development within the City of East Chicago. *See* Appellant's App. Vol. IX at 1633. The entities established pursuant to the Showboat Agreement—Second Century and the Foundations (now FEC)—have been the subject of considerable public concern and suspicion regarding their use of the gambling revenues flowing to them through the Showboat Agreement. *See* Dolan, *supra*, note 1; John Grant Emeigh, *Casino Money Stirs Inquiries*, Post-Tribune, Mar. 16, 2005, at A1.

Under these circumstances, the General Assembly reasonably concluded that something must be done, lest public confidence in the legitimacy of casino gambling operations and its capacity to provide a public benefit be eroded. The legislature enacted Section 302 to provide the City with a means to redirect the funds to transparent, legitimate ends. This was a reasonable and appropriate means to accomplish very important public objectives.

FEC argues that Section 302 is not reasonable because by its terms it authorizes not only the current East Chicago administration to cancel the Showboat Agreement, but also authorizes future administrations of that city to cancel future agreements. FEC Br. at 22 n.15. It is hard to see the potential for future applications of Section 302 as a weakness. FEC's argument seems to be that, because the premise of Section 302 is that a prior city administration tainted this LDA, the General Assembly is irrational in relying on future administrations to police future LDAs. The corruption that plagued one city administration, however, does not destroy the usefulness of electoral accountability to keep future administrations in line. It was permissible for the General Assembly to conclude that the best way keep the same problems from happening again in the future is to make it clear that the mayor of East Chicago bears direct responsibility for enforcing—or cancelling—casino-related LDAs. This is a rational and proportionate response to the problems with the Showboat Agreement.

**B. Section 302 does not violate the Indiana Contracts Clause**

Under the Contracts Clause of the Indiana Constitution, a statute impairing contracts is valid if it is both an exercise of police power and “necessary for the general public and reasonable under the circumstances.” *Clem v. Christole, Inc.*, 582 N.E.2d 780, 784 (Ind. 1991). In *Clem*, the Court invalidated legislation overriding neighborhood covenants against group homes based on several factors: (1) the societal benefits of allowing group homes in residential neighborhoods were “indirect”; (2) the statute “d[id] not address a broad problem general to society”; (3)

the siting of group homes was “not traditionally subject to legislation”; (4) by expressly making agreements unenforceable, the statute effected a “considerable impairment” of contracts; and (5) restrictive covenants were “consistent with values identified in our Indiana Constitution.” *Id.* at 784.

Later, in *SCI Indiana Funeral Services v. D.O. McComb & Sons, Inc.*, 820 N.E.2d 700 (Ind. Ct. App. 2005), *trans. denied*, 831 N.E.2d 748 (Ind. 2005), the court treated *Clem* as imposing a rational-basis type test. The trial court had held that provisions of the Exclusive Rights Act, which gave cemetery owners the exclusive right to open and close grave sites and thus impaired an existing contract between the plaintiff mortuary and defendant cemetery owner, violated the Indiana Contracts Clause. The Court of Appeals reversed, holding that under *Clem* the Exclusive Rights Act was “reasonably necessary” for public health, safety, and welfare by preventing damage to grave sites by inexperienced mortuaries. *Id.* at 710. The court also pointed to an array of state statutes regulating human burial, establishing Health Department jurisdiction over the same, and imposing criminal penalties for noncompliance. *Id.* at 710-11. The existence of this extensive regulatory scheme lent “further support to the conclusion that the Exclusive Rights Act protects the general public.” *Id.* at 711.

Section 302 is distinguishable from the statute invalidated in *Clem* and comparable to the statute upheld in *SCI*. The statute in *Clem* operated in a field *not* traditionally subject to legislative regulation, while that in *SCI* further regulated an already highly regulated sector of the economy. Section 302, as

discussed in Part I.A.1, *supra*, operates in an area already subject to strict statutory regulation—and, in fact, affects an agreement that is itself part of that regulatory scheme. The Indiana Supreme Court has stated that “where an industry is highly regulated . . . some impairment [of contracts] is treated as within the party’s expectations.” *Indiana Dep’t of Env’tl. Mgmt. v. Chemical Waste Mgmt., Inc.*, 643 N.E.2d 331, 339 (Ind. 1994) (summarily rejecting as unripe an as-applied contracts clause challenge to regulation of hazardous waste disposal).

Furthermore, like the Exclusive Rights Act upheld in *SCI*, Section 302 is “reasonably necessary” to protect the public health, safety, and welfare of the citizens of East Chicago. Again, Section 302 provides a means for the City to address corruption that has beleaguered it for so long and to ensure that the City and its people receive the benefit of the gambling revenues generated by the riverboat licensee, as originally intended by the legislature. *See* Ind. Code § 4-33-1-2. Thus, unlike the statute invalidated in *Clem*, Section 302 has direct societal benefits and addresses a broad problem of great magnitude. It is an entirely proportionate response to at least one problem plaguing East Chicago.

## **II. The Trial Court Properly Held that Section 302 Does Not Create an Unconstitutional Taking Under Either the State or Federal Takings Clauses**

FEC claims it has a private property interest in the riverboat gambling funds reserved to it under the Showboat Agreement and that Section 302 “authorizes a direct taking by the City of the Foundations’ contract rights to funds distributed under the Agreement[.]” FEC Br. at 26. This theory fails on a number of grounds,

the most fundamental of which is that FEC has no property rights at stake that are cognizable under either the state or federal Takings Clauses.<sup>4</sup>

1. In order to make a claim under the Takings Clause, the claimant must prove that his “property,” in the sense of “the group of rights inhering in the citizen’s relation to [a] physical thing,” has been “taken.” *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *Peick*, 724 F.2d at 1275. Property consists of “the group of rights which the so-called owner exercises in his dominion of the physical thing,” such as the “right to possess, use and dispose of it.” *Gen. Motors*, 323 U.S. at 378, 380.

FEC claims that as a third-party beneficiary to the Showboat Agreement, it has a “vested personal property interest in receipt of funds under the Agreement[], upon which [it has] the right to rely.” FEC Br. at 24. However, regardless of FEC’s third-party beneficiary status, it does not have the authority to possess, use, or dispose of the funds in any way it sees fit, but is instead required to allocate the funds in a very specific way. *See* Appellant’s App. Vol. IX at 1634-35 (portion of Showboat Agreement stating that FEC’s predecessors were to focus on, among other things, funding training programs for workers, funding a scholarship program for post-secondary education for residents of East Chicago, and funding various economic development projects within the City). In reality, FEC merely directs the

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<sup>4</sup> The Indiana Supreme Court treats the federal and state Takings Clauses as interchangeable. *See Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003) (“Insofar as the Takings Clauses are concerned, the federal and state constitutions are textually indistinguishable.”). Thus, if Section 302 does not violate the federal Takings Clause, it likewise does not violate the state Takings Clause.

funds it receives to their ultimate beneficiaries—the public. *See, e.g.*, Ind. Code § 4-33-12.5-8. Indeed, FEC was created to receive and distribute these funds only as part of the overall regulatory scheme designed to channel revenues from the riverboat casinos to various beneficial public uses.

Indeed, for purposes of the Takings Clause, property rights arise only in particular items or parcels of personal or real property, not in contracts. *See United States v. Sec. Indus. Bank*, 459 U.S. 70, 80 (1982). In *Security Industrial Bank*, the Court recognized the difference between a creditor’s right as a lien-holder to specific property, which is protected by the Takings Clause, and the creditor’s contractual right to be repaid, which is not. *Id.* at 75-76; *see also Eastern Enter. v. Apfel*, 524 U.S. 498, 544 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (“[T]he Government’s imposition of an obligation between private parties, or destruction of an existing obligation, must relate to a specific property interest to implicate the Takings Clause”). Here, FEC at most identifies a claim to a contractual debt, not a claim to specific property. Indeed, FEC itself describes its right as an “interest in the receipt of funds . . . upon which [it has] the right to rely.” FEC Br. at 24. Therefore, it has no compensable property interest at stake.

FEC cites *Deckard v. GMC*, 307 F.3d 556 (7<sup>th</sup> Cir. 2001), and *Standard Land Corp. v. Bogardus*, 1545 Ind. App. 283, 289 N.E.2d 803 (1972), in support of their alleged property interest. Those cases, however, merely rejected, as a matter of the common law of contracts and common-law third-party beneficiary rights, the reformation of private agreements by private contracting parties. They did not say

that third-party beneficiary rights constitute property rights protected from subsequent legislative enactments by the Takings Clause. Moreover, such rights do not follow from common-law third-party beneficiary rights. Property rights protected by the Takings Clause are not created from a contract to receive future funds, period. *See Security Industrial Bank*, 459 U.S. at 80. There is no basis for extending greater Takings Clause rights to third-party beneficiaries than the parties to the contract themselves enjoy.

Nor does *Illinois Clean Energy Community Foundation v. Filan*, 392 F.3d 934 (7<sup>th</sup> Cir. 2004), which held that the Illinois legislature could not force a charitable foundation to disgorge over \$125 million to the state, apply here. There is no doubt that funds already owned by a corporation constitute property protected by the Takings Clause. *Id.* But that says nothing about contract rights relating to future income streams. Section 302 does not require FEC to disgorge anything it already owns. It merely authorizes East Chicago to halt future payments to FEC by canceling the Showboat Agreement.

More to the point, incidental beneficiaries of a government license cannot assert a property right to the license. *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775 (1980). In *O'Bannon*, the Court ruled that nursing home residents could not assert property rights to the home's license when it was revoked by the state. The residents asserted their claim under the Due Process Clause rather than the Takings Clause, but that only makes property rights in this case even more remote. *See id.* at 789-90; *see also Pro-Eco, Inc. v. Bd. of Comm'rs of Jay County*, 57

F.3d 505, 513 (7<sup>th</sup> Cir. 1995) (holding that property rights under the Takings Clause are narrower than under the Due Process Clause).

To be sure, FEC does not expressly claim a property interest in the riverboat casino license itself. It does, however, claim a compensable property right to a percentage of the revenue that flows incidentally from that license, and that claim is fundamentally the same as claiming a property right in the license itself. Incidental beneficiaries of government licensing schemes have no greater property rights at stake than the licensees themselves. *O'Bannon*, 447 U.S. at 789.

Another way to conceptualize the issue is to understand that when a legislative body has the power to regulate, it also has the power to destroy or disregard contract rights in the field it is regulating, and “[p]arties cannot remove their transactions from the reach of dominant constitutional power simply by making contracts about them.” *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986); *see also Ohio Student Loan Comm’n v. Cavazos*, 900 F.2d 894, 900-01 (6<sup>th</sup> Cir. 1990) (the “‘contract’ in the instant case . . . does not constitute property under the takings clause” and “the federal government has the power to change the terms of the relationship without taking the ‘property’ of the state in violation of the Fifth Amendment”); *Pro-Eco*, 57 F.3d at 511 (rejecting a takings claim based in part on *Connolly*, stating that “we will not allow Pro-Eco to contract away the Board’s right to develop a zoning plan”).

*Connolly* applies here because Section 302 is an exercise of sovereign police power. It regulates how casino gambling revenue intended to benefit local economic

development in East Chicago is managed. The revenue may benefit the public (as it is intended) by way of city government coffers just as well as—if not better than—by way of FEC. Thus, Section 302 enables the City to ensure that associates of the Pastrick Administration do not continue to benefit at the expense of the public of East Chicago as the cash flows from the casino.

2. Furthermore, under the balancing test for asserted regulatory takings—factors that examine the financial impact of the regulation, the investment-backed expectations of the property owner, and the character of the regulation, *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)—FEC’s case is particularly weak.

**First**, as for the financial impact of Section 302, although it deprives FEC of gambling revenue, it deprives the ultimate beneficiaries of the money—the people of East Chicago—of nothing. Again, FEC exists only as a means of distributing casino gambling revenues to projects that will help East Chicago with economic development. If the City cancels the Showboat Agreement, the gambling proceeds will benefit the people of East Chicago, but through a different vehicle. Indiana law requires that riverboat casino revenues be used to improve the development of the localities where the casinos reside. *See* Ind. Code §§ 4-33-1-2 (stating that riverboat gambling is intended to benefit the people of Indiana by providing economic development), 4-33-6-7 (instructing the IGC that it may take economic development impact into consideration in granting riverboat licenses). Whether that

development occurs with the assistance of FEC or some other organization (or through the City itself) is insignificant for present purposes.

**Second**, there is no significant interference with reasonable investment-backed expectations because FEC has no investment interest in East Chicago casino gambling revenue. FEC benefits entirely because its predecessors found favor with a prior city administration, not because it risked capital. Furthermore, the highly regulated nature of casino gambling revenues prevents FEC from having *reasonable* expectations of any kind at stake here. *See Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1226 (Ind. 2000) (expectations contrary to laws regulating property are not reasonable).

**Third**, the character of the government action is entirely legitimate because it has nothing to do with appropriating private property for the government or regulating a stand-alone business out of existence. It has to do instead with heading off a deal that siphoned revenue intended to benefit the public into the coffers of Mayor Pastrick's associates.

In this regard, the *Penn Central* balancing approach asks whether a private party is "forced to bear a burden 'which, in all fairness and justice, should be borne by the public as a whole.'" *Concrete Pipe & Prod. v. Constr. Laborers' Pension Trust*, 508 U.S. 602, 647 (1993). There is no rationale for concluding that it is unfair to burden FEC in this circumstance. FEC exists solely because of the gambling revenue, and the only interests injured by Section 302 are FEC's employees and grantees. But those employees and grantees have no better claim to

gambling funds intended for local development than the employees and grantees of any other entity that might receive the funds. FEC is not like a company that, independent of the alleged taking, has shareholders or owners or produces goods or services that will suffer from the financial loss.

3. FEC also argues that the interest-follows-principal doctrine of *Webb's*, *Phillips*, and *Brown*—where government agencies appropriated interest paid on private funds to itself or another private entity—applies here. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980), *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998), *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 217-35 (2003). In those cases, there was no dispute that a private citizen owned the principal, and the debate was over what use the government could make of the time value of privately owned capital. Here there is no analogous private owner of capital. The gambling money is paid by the casino to benefit the citizens of East Chicago, not to benefit FEC. FEC exists only to do the City's bidding, so it is farcical to suggest it owns the gambling revenues in the way that, for example, a client owns funds entrusted to a lawyer, see *Brown*, 538 U.S. at 235-36, or even in the way a gambler owns his winnings.

Regardless, what *Brown* teaches is that, where extensive government regulation, not private investment, has created cash flow, government can manipulate where, exactly, the cash flows without paying compensation to anyone. *Brown*, 538 U.S. at 235-36. That is because there is no real deprivation of property to the asserted private interests—there is no “just compensation” to pay. *Id.* Here,

FEC would not receive gambling revenue without extensive government regulation that both enables the gambling to occur *and* directs that a percentage of the gambling revenue benefit the public. Accordingly, FEC loses nothing compensable when the government directs that income stream elsewhere.

### **III. Section 302 Does Not Violate the Indiana Constitution’s Single Subject Clause; it Properly Relates to the Overall Purpose of the State Budget Bill**

Article IV, section 19 of the Indiana Constitution reads in its entirety: “An act, except an act for the codification, revision or rearrangement of laws, shall be confined to one subject *and matters properly connected therewith*” (emphasis added). Section 19 aims to prevent legislative logrolling, but is designed to do so “without much judicial intervention.” *Bayh v. Indiana State Building and Construction Trades Council*, 674 N.E.2d 176, 179 (Ind. 1996). Enforcing Section 19 strictly forces courts to scrutinize and interfere with the legislative process, endangering separation of powers principles. *See Roeschlein v. Thomas*, 258 Ind. 16, 280 N.E.2d 581, 590 (1972); *State ex rel Masariu v. Marion Superior Court*, 621 N.E.2d 1097, 1098 (Ind. 1993) (“courts should not intermeddle with the internal functions of either the Executive or Legislative branches of Government”).

Accordingly, Indiana courts are highly deferential to the legislature when it comes to single-subject objections. Recent cases hold that courts should reject Section 19 challenges unless the grouping of matters in a bill is “clearly unreasonable.” *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 215 (Ind. 1981) (holding that relationship of a product liability statute to the remainder of an act

addressing the operation and jurisdiction of Indiana courts was not “clearly unreasonable”). In *Dague*, the Court stated that “in considering the validity of an Act under this constitutional provision, a very liberal interpretation is to be applied, with all doubts resolved in favor of the legislation’s validity.” *Id.* at 214. This Court followed *Dague*’s flexible approach in *Hoovler v. State*, 689 N.E.2d 738, 741 (Ind. Ct. App. 1997), *trans. denied*, 698 N.E.2d 1186 (1998), where it upheld a bill that contained provisions regarding both taxation and local government.

Applying this deferential standard, the trial court here correctly held that Section 302 was sufficiently connected to the State budget’s overall focus on “regulating and apportioning government revenues” to satisfy the constitutional requirements of Section 19. According to the Court, “[b]y making more revenue available to local government, Section 302 addresses the overall concern of providing and regulating funding for State and local government, a prime focus of the State budget.” Appellant’s App. Vol. I at 41.

Budget bills *routinely* address a variety of issues of public importance. *See* Appellant’s App. Vol. II at 271 (chart from State’s trial brief listing non-appropriation items contained in past Indiana budget acts, such as changes to kindergarten enrollment dates, the creation of judicial offices for a number of counties, and the requirements that the Department of Child Services have sufficient qualified and trained staff). In *Indiana State Teachers’ Association v. Board of School Commissioners of City of Indianapolis*, 679 N.E.2d 933, 935-36 (Ind. Ct. App. 1997), this Court upheld a budget bill that included provisions restricting

the collective bargaining rights of Indianapolis teachers—provisions that did not directly raise or spend revenue. The Court noted the Supreme Court’s “laissez-faire” approach to enforcing Section 19 and was satisfied that “the legislature has traditionally linked together matters of state and local administration.” *Id.* at 935. Accordingly, an adequate connection existed between the collective-bargaining provisions, which fell under the category of “local administration,” and other provisions of the budget bill that fell under the category of “state administration.”

A similarly adequate connection exists between Section 302 and the rest of the budget bill. Section 302 addresses issues of local governmental administration—corruption in East Chicago and the proper application of economic development funds from riverboat revenues—and other sections address state administration. *See* Appellant’s App. Vol. IX at 1771 (giving the state budget director power to transfer money to the general fund from other sources in the event that the executive branch becomes unable to function due to lack of money in the general fund); Vol. X at 1894 (prohibiting unilateral DNR sale of Charlestown well water).

Finally, Section 302 is “properly connected” with the State budget’s overall objectives of “regulating and apportioning government revenues” at least as much as the sections of the bill cited by FEC. FEC Br. at 28 n.17. FEC says that sections of the budget bill authorizing automatic pension plan deductions, creating judgeships and a commission, and limiting a state department’s ability to sell property, all “involve or affect ‘appropriat[ing] funds.’” If that is so, it is only

because *everything* the legislature does incidentally affects cash flow in some way. No less can be said of Section 302, which FEC repeatedly describes as a law that provides money to the City of East Chicago. FEC Br. at 2, 5, 27.

#### **IV. Section 302 is Permissible Special Legislation Because It Addresses a Specific Problem Unique to the East Chicago Casino Gambling License**

In *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683, 692 (Ind. 2003), the court established that the basic test for the permissibility of special legislation is whether there are “inherent characteristics of the affected locale that justify local legislation.” If so, a “general law” cannot be “made applicable” and legislation applying only to that locale is permitted. *Id.*; see also *State ex rel. Attorney General v. Lake Superior Court*, 820 N.E.2d 1240, 1249 (2005) (“If the affected county reflects unique circumstances that rationally justify the legislation, then a general law is not ‘applicable’ elsewhere and Section 23 is not violated”) (citation omitted).

The Supreme Court has generally upheld statutes applying to only one locality if the locality has distinguishing features. In *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296 (Ind. 1994), for example, the Supreme Court upheld the statute authorizing riverboat casinos in selected counties, reasoning that special legislation was permissible because the counties in which it applied shared the distinguishing characteristic of being home to suitable bodies of water. *Id.* at 301. Similarly, in *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), the Court upheld a statute that permitted only Tippecanoe County to raise income taxes for the purpose of funding hazardous substance removal because only Tippecanoe County,

among Indiana counties, was exposed to federal Superfund liability and thus needed extra tax revenue to offset the cleanup costs. *Id.* at 1235. In *Williams v. State*, 724 N.E.2d 1070, 1085 (Ind. 2000), the Supreme Court affirmed the trial court's holding that a statute was permissible special legislation that "provide[d] for the appointment of magistrates only in Lake County courts" because Lake County was burdened by a large population and a heavy caseload, a problem not amenable to a general law of statewide application. *Id.* at 1086.

*Moseley*, *Hoovler*, and *Williams* thus set forth a test for the permissibility of special legislation that functions as a rational-basis test. *Kimsey* itself is consistent with this understanding. There the Court stated that the "challenging party must negate every conceivable basis which might have supported the [legislative] classification." 781 N.E.2d at 694 (citation and internal quotes omitted).

The trial court correctly held that Section 302 is permissible special legislation because it is justified by (1) East Chicago's long history of corruption leading up to the creation of the LDA; (2) legitimate local concerns about potential misuse and lack of oversight for riverboat development funds; (3) a unique LDA directing economic development funds to a for-profit corporation; and (4) the non-profit foundations' decision to merge and thereby eliminate local government representation on their board. Appellant's App. Vol. I at 33-34. Notably, the Showboat Agreement is the *only* local development agreement in Indiana directing a portion of casino profits intended for local development to a for-profit entity—

Second Century. Appellant's App. Vol. XI at 2220. This fact alone constitutes a distinguishing feature sufficient to justify local special legislation.

FEC argues that it is "neither reasonable nor fair" to rely on unspecified "conduct, input, agreement and/or approval of the City and/or the Attorney General" as the source of justifications of Section 302 as special legislation. FEC essentially says courts should not listen to rationales provided by those "benefiting from and/or defending special legislation," and that the City and the Attorney General should not be able to "create' *via* their own conduct the circumstances that supposedly justify" section 302. First, neither the current City administration nor the Attorney General "created" the justifications for Section 302. Those justifications arose long ago through the schemes of the Pastrick Administration. Second, to the extent that the Attorney General (and the City) have brought those schemes to light, and have thereby prompted legislators to act in response to their findings, such conduct in no way undermines the legitimacy of the resulting legislation. It simply evidences the need for legislative action. Third, defending the constitutionality of legislation is what the Attorney General does routinely. Surely the Attorney General is not disqualified from advising state agencies or legislators of information that may prompt legislation that he may later need to defend.

Likewise, FEC's attempt to impose a requirement that special legislation "remedy (the) harm," FEC Br. at 30, is not supported by Section 23 doctrine. Courts may only determine the uniqueness of the class and whether "those unique circumstances . . . rationally justify the legislation." *Alpha PSI Chapter v. Auditor*

of *Monroe County*, 849 N.E.2d 1131,1138 (Ind. 2006). The cases laying out the test for special legislation do not demand proof of efficacy, *see id.*, *Kimsey*, 781 N.E.2d at 692, *State ex rel. Atty. Gen. v. Lake County Superior Court*, 820 N.E.2d. 1240,1249 (Ind. 2006), and special legislation has been upheld without any mention of its “effectiveness.” *See Moseley*, 643 N.E. 2d at 301; *Indiana State Teacher’s Ass’n v. Board of School Comm’rs of City of Indianapolis*, 679 N.E.2d 933 (Ind. App. 1997).

Regardless, Section 302 is self-evidently effective. The problem is a local development agreement reached under non-competitive circumstances that benefits the associates of a prior corrupt city administration that has not yielded verifiable contributions to local development commensurate with the gambling revenues it has generated. The solution provided by Section 302 is to permit the City to cancel that agreement and try some other means of channeling gambling revenue intended for local development to the community. The relationship between the solution and the problem could not be clearer.

The Supreme Court has also said that special legislation is permissible if it does not stand by itself but rather functions as an integrated component of a statutory scheme. In *Williams*, the Supreme Court reasoned that the statute adding magistrates to Lake County was permissible in part because it functioned in tandem with a general statute defining the authority and compensation of magistrates. 724 N.E.2d at 1086. The scheme, considered as a whole, was an “appropriate balancing of general laws and special laws.” *Id.*

Here, the General Assembly enacted Section 302 as an amendment to the Indiana Riverboat Gambling Act, and the Supreme Court has already upheld provisions of that statute that do not treat all riverboat gambling localities alike. *Moseley*, 643 N.E.2d at 303 (upholding law providing that only in Lake County would referenda on riverboat gambling be held at the city level rather than county-wide). Section 302 coheres with the overall scheme of the Riverboat Gambling Act, many provisions of which apply only to riverboat gambling licenses or activities in particular cities or counties. *See, e.g.*, Ind. Code § 4-33-6-18(b) (applies only to Ohio River county whose largest city is adjacent to Ohio River); Ind. Code § 4-33-12-6(d) (applies only to Lake County); Ind. Code §§ 4-33-12.5-2, -6 (same); Ind. Code § 4-33-6-7(b) (applies only to largest city in Lake Michigan counties).

FEC argues that the local characteristics of East Chicago cited by the trial court in its holding that special legislation was appropriate are invalid because they are not subject to judicial notice. FEC Br. at 31-34. It simply is not the case, however, that Rule of Evidence 201 is the only gateway for justifying special legislation. What is important for purposes of special legislation is that some legitimate rationale exist to justify the special treatment. The existence of that rationale may be established any number of ways, including through self-evident justifications, *see Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 597 (Ind. 1980), *overruled on other grounds by In re Stephens*, 867 N.E.2d 148 (Ind. 2007); historical facts proven with testimony and exhibits, *see State ex rel. Attorney General v. Lake Superior Court*, 820 N.E.2d 1240, 1249 (Ind. 2005); incontestable facts established

by judicial notice, *see Indiana Gaming Comm'n v. Moseley*, 643 N.E.2d 296, 301 n.10 (Ind. 1994); and legislative facts established with testimony or exhibits proving the existence of a conceivable basis for special treatment, *see State v. Hoovler*, 668 N.E.2d 1229, 1235 (Ind. 1996).

FEC also disputes the legitimacy of proving legislative facts by way of newspaper articles and other hearsay. *See* FEC Br. at 31-32. But courts have long upheld legislation based on such proof—and other forms of hearsay. *See, e.g., Crawford v. Marion County Election Bd.*, 458 F.Supp.2d 775, 793-94 (S.D. Ind. 2006), *aff'd*, 472 F.3d 949 (7<sup>th</sup> Cir. 2007); 128 S.Ct. 1610 (2008) (upholding Indiana Voter ID Law based in part on, among other things, newspaper reports, books, public opinion polls, the findings of a private commission, and task force findings documenting instances of voter fraud and public concern for the fairness of elections).

When, as here, a court's only job is to determine the existence of a conceivable rational basis for anti-corruption legislation, newspaper articles documenting allegations of corruption are surely relevant for purposes of demonstrating the legitimacy of that interest.<sup>5</sup> The State is not required to *prove* the corruption—

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<sup>5</sup> Curiously, FEC also asserts that “A court may not speculate on what may have motivated the Legislature to pass a statute. *Eg., Rosado v. Wyman*, 397 U.S. 397, 419 (1970) (error for lower to speculate that ‘New York was attempting to constrict its welfare payments’)”. FEC Br. at 33. When applying rational-basis type tests, however, courts routinely uphold legislation based entirely on the *conceivable* objectives of a legislature, which is all the trial court did here. *See Frame v. South Bend Community Sch. Corp.*, 480 N.E.2d 261, 265 (Ind. Ct. App. 1985) (determining that legislative purpose can be considered when the court finds the rational basis behind the legislation is unclear). Nor is *Rosado* to the contrary, for there the Court

indeed, it is not even required to prove the basis for concluding that corruption exists—to uphold the legislation. Newspaper articles, however, are a valid way of demonstrating the legitimacy of conceivable legislative concerns. Besides, the history of the State is a matter subject to judicial notice. *See Beard v. State*, 227 Ind. 717, 88 N.E.2d 769, 724, 771 (1949). The history and pattern of corruption in East Chicago leading up to the formation of the LDA was well known to the public, as demonstrated by the City’s evidence. *See Appellant’s App. Vol. X-XII at 2234-2611.*

Finally, FEC argues that special legislation affecting its interests cannot be justified because it has never been accused of wrongdoing. FEC Br. at 30. Whether FEC itself has ever been charged with corruption is irrelevant. The existence of corruption in Mayor Pastrick’s administration—the administration that approved the LDA even as that agreement directly benefited Pastrick’s associates—serves as a distinguishing feature making special legislation permissible, as do the many other factors cited above. Further, FEC is not entirely untainted. Mayor Pastrick’s former chief-of-staff, Robert Hoggs, sat on the Board of FEC’s predecessor, the East Chicago Community Development Foundation, while Hoggs’ daughter Kimberly Julkes—a Pastrick-era city planner—sat on the board of FEC’s other predecessor, the Twin City Community Foundation. *See John Grant Emeigh, City: No More Casino Cash for Felon*, Post-Tribune, Mar. 13, 2005, at A3, *available at* 2005 WLNR 4226519. Furthermore, the North Harbor project—one of the few development

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was merely commenting—unremarkably—that it would be inappropriate to

projects undertaken by the FEC and its predecessor foundations that the Attorney General has been able to track—has strong ties to Pastrick’s associates, Pannos and Cappas. *See* Appellant’s App. Vol. XII at 2602-04. Specifically, North Harbor LLC, one of the organizations that is part of the complex North Harbor business structure, is a subsidiary of Second Century and its board is comprised of Pannos, Cappas, and Second Century. Appellant’s App. Vol. XII at 2602-04.

From these circumstances and allegations, the General Assembly could reasonably infer that the Showboat Agreement has both provided opportunities for graft and has failed to yield the kind of economic development contemplated by the legislature when it authorized riverboat gambling in 1993. *See* Appellant’s App. Vol. XI at 2216 (Attorney General’s report finding that the Showboat Agreement “may violate the integrity of the riverboat gambling industry” by directing casino monies to a private, for-profit corporation and away from the citizens of East Chicago and by failing to provide economic development commensurate with the sums of money flowing from the casino to Second Century).

By enacting Section 302, the legislature has provided the City with a permissible and reasonable means to redirect the gambling revenues to their intended beneficiaries—the citizens of East Chicago. The General Assembly did not have any reason to extend this legislation to any other casino local development agreement in the state.

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*invalidate* legislative action by attributing to the legislature an improper motive.

**V. Separation of Powers Principles Require that Section 302 be Upheld, Not Invalidated**

FEC argues that *Thorpe v. King*, 248 Ind. 283, 227 N.E.2d 169 (1967), where the Court declared invalid a legislative attempt to override a judicial declaration in a prior case, requires invalidation of Section 302 based on separation-of-powers principles. Unlike the legislation at issue in *Thorpe*, however, Section 302 did not resuscitate a prior act of local government declared invalid by a court's final judicial decree; rather, it granted a local government authority for future action that a trial court had held—in an interlocutory ruling—contrary to common law. Therefore, Section 302 poses no separation-of-powers concerns.

In fact, because the General Assembly indisputably has the power to alter the common law of the state, *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 977 (Ind. 2000), a decision here limiting the exercise of that power would constitute an infringement by the judiciary on the functions of the legislature contrary to Art. 3, Section 1 of the Indiana Constitution.

1. Unlike the judgment upended in *Thorpe*, the prior ruling that FEC cites as being contravened by Section 302 is not even a final decree or judgment. It was only an interlocutory order rejecting the City of East Chicago's motion for summary judgment and counterclaims putting forth reasons why the LDA was *invalid*. See Appellant's App. Vol. IX at 1647-52. There has been no final entry of judgment in favor of Second Century, however, affirmatively declaring the LDA *valid*. Furthermore, when the legislature enacted Section 302, not even the interlocutory ruling rejecting the City's theories had yet been upheld on appeal.

Indeed, it remains the subject of a pending Petition to Transfer to the Supreme Court. See *City of East Chicago v. East Chicago Second Century, Inc.*, No. 49A02-0608-CV-631 (Petition to Transfer filed Apr. 18, 2008).

Thus, Section 302 can in no way be understood to disrupt a final judicial decree. Cf. *Star Wealth Mgmt. Co. v. Brown*, 801 N.E.2d 768, 774 (Ind. Ct. App. 2004) (a “trial court's [summary judgment] order . . . is not a final one” and can be vacated or modified at any time prior to final judgment); *Merrillville Conservancy Dist. v. Atlas Excavating, Inc Dist.*, 764 N.E.2d 718, 725 (Ind. Ct. App. 2002) (“until a judgment is entered, a trial court can amend, modify, or change an earlier decision”); *Stephens v. Irvin*, 734 N.E.2d 1133, 1135 (Ind. Ct. App. 2000) (“a trial court has the inherent power to reconsider any of its previous rulings”), *trans. denied*; *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 (Ind. Ct. App. 1998) (“a trial court has inherent power to reconsider, vacate or modify any previous order so long as the case has not proceeded to final judgment; that is to say the case is still in fieri”).

2. Nor is this case similar to *Thorpe* in terms of the relationship between the legislation at issue and the prior judicial decree it supposedly overturns. In *Thorpe*, the Lake Superior Court had held that an ordinance incorporating the Town of Cedar Lake was invalid because the statutory notice requirements for incorporation had not been met. The General Assembly responded by passing a bill to legalize that particular incorporation, stating that:

All steps taken and all acts done in and about the incorporation of the Town of Cedar Lake in Lake County, Indiana, are deemed sufficient to incorporate

the town, and the act of the Board of Commissioners of Lake County in incorporating the Town of Cedar Lake, be and the same are hereby legalized and declared to be legal and valid.

*Thorpe*, 248 Ind. at 285, 227 N.E.2d at 170.

In turn, residents of Cedar Lake sought an injunction prohibiting the officials of the newly incorporated Cedar Lake from taking any action as town officials. The Supreme Court ultimately held that such an injunction was appropriate because the incorporation bill directly attempted to nullify a final decree of a court and thereby violated separation of powers principles. That is, the invalid legislation in *Thorpe* did not attempt to *change* the law of municipal incorporation going forward, but instead provided that the court's application of the current legal standard should be ignored in order to incorporate the town without meeting extant requirements.

Section 302, in contrast, merely modifies common law to enable a municipality to reform an existing agreement. It does not directly nullify a prior judicial decree, revive a particular legal instrument that a court had already declared dead, or reverse a court's application of the relevant legal standard, and that makes all the difference. In *Schneck v. City of Jeffersonville*, 152 Ind. 204, 52 N.E. 212 (1898), the City of Jeffersonville issued bonds in excess of its power to do so. In response to a finding that the bonds were invalid, the General Assembly passed a law granting the city the authority that it previously lacked, thus changing the applicable legal standard to one under which the bonds were legal. 52 N.E. at

212-214. The Court upheld the legislation against a claim that it improperly overturned a prior judicial decree.

Here, too, the applicable legal standard, rather than a judicial holding, is being altered by the legislature. Section 302 is merely changing the legal standard applicable to determining whether or not the Agreements can be amended. There is no attempt to undo any judicial decree declaring the Agreement valid. Indeed, the entire premise of Section 302 is that the Agreement is valid and must be cancelled by the City if its baleful effects are to be ameliorated.

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the decision of the trial court.

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**CERTIFICATE OF WORD COUNT**

Pursuant to Indiana Appellate Rule 44(E), I verify that the foregoing Brief of Appellee contains no more than 14,000 words.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following counsel of record by First-Class United States mail, postage prepaid, on May 21, 2008.

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