You have requested a legal analysis of Senate Bill S863 (“S863”) pending in the New Jersey Legislature with respect to the following three issues: (1) whether it would constitute a change in existing law if enacted in its current form, (2) whether it would require the Folk Project to treat itinerant musicians who perform at Folk Project venues as employees for purposes of state employment laws, and (3) whether the Folk Project would have any grounds to challenge the law in court if enacted in its current form. For the reasons discussed in more detail below, our review indicates the following answers to these questions:

1. S863 would constitute a change in law if enacted in its current form because the New Jersey Supreme Court’s reasoning in *Hargrove v. Sleepys, LLC*, as further reinforced by case law decided since that ruling, indicates that the Court’s ruling does not support application of the “ABC test” for purposes of classifying itinerant musician performers hired by The Folk Project as employees pursuant to “all State employment laws,” as those laws are defined in S863.

2. If enacted in its current form, S863 would require The Folk Project to treat all musicians who perform for remuneration at Folk Project venues as employees for purposes of “all state employment laws” as defined in S863 because The Folk Project cannot satisfy prong B of the ABC test – *i.e.*, whether the “work” is conducted physically outside the hiring entity’s normal place of business.

3. If enacted in its current form, S863 would be tantamount to an unconstitutional restraint on freedom of expression and speech by imposing unnecessary financial burdens on the ability of The Folk Project and similar organizations to stage performances that consist of speech protected under the First Amendment to the U.S. Constitution.

It also bears mentioning that an agreement to amend California’s “AB5” legislation that went into effect in 2019, on which S863 is largely based, was reached with that State’s legislative leaders in April 2020 specifically to cure its disastrous impacts on performing musicians and the venues that hire them. [https://www.billboard.com/articles/business/9360514/california-ab5-gig-economy-law-amended-protect-music-professionals](https://www.billboard.com/articles/business/9360514/california-ab5-gig-economy-law-amended-protect-music-professionals).
I. SUMMARY

The questions summarized above have arisen as a result of correspondence between Senator Stephen M. Sweeney (D), sponsor of S863, and The Folk Project in response to concerns that The Folk Project has raised about its potential adverse impacts on non-profit arts organizations like The Folk Project. Those concerns were summarized in a letter from Folk Project President Paul Fisher on behalf of The Folk Project to Sen. Sweeney dated March 16, 2020. Among other things, the March 16th letter raised the concern that unless modified to exempt organizations like the Folk Project, they could be forced to treat itinerant performers as employees pursuant to a variety of New Jersey employment laws. The letter stated that such a requirement would impose an inordinate and unnecessary financial burden on all-volunteer 501(c)(3) organizations like The Folk Project, which are operated 100% by volunteers who derive no remuneration from musician performances, and which exist solely to support and assist an historic and vibrant tradition of folk music appreciation in New Jersey. To the contrary, far from being a money-making enterprise, these organizations rely on cash donations and dues from their members to stage musician performances.

To date, The Folk Project has received no response from Sen. Sweeney’s office. However, by letter dated March 26, 2020, Sen. Sweeney responded to a letter from Jay Wilensky that set forth Mr. Wilensky’s views about S863. I understand this letter has been replicated in other responses to correspondence sent by individuals and organizations expressing similar concerns. In the letter to Mr. Wilensky, Sen. Sweeney stated that S863 contains no change from existing law because it merely codifies the New Jersey Supreme Court’s ruling in Hargrove v. Sleepys, LLC. As described in Sen. Sweeney’s letter, the Court ruled in Sleepys that the “ABC test” would be used “to determine whether someone is an independent contractor or an employee in the case of a misclassification dispute.”

Sen. Sweeney’s characterization of the binding effect New Jersey Supreme Court’s ruling in Hargrove v. Sleepys, LLC on employment classification questions is incorrect in multiple respects. First, as noted in December 5, 2019 correspondence from the New Jersey State Bar

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1 Mr. Wilensky stated in the letter that his comments on S863 represented his individual views and not necessarily those of The Folk Project. However, since Mr. Wilensky also identified himself as the current Vice President of The Folk Project, it is possible that the reason Sen. Sweeney has not responded to The Folk Project’s letter is that he believed he had already done so in responding to Mr. Wilensky’s letter.

2 The “ABC” test, as set forth pursuant to N.J.S.A. 43:21-19(i)(6), is as follows:

(6) Services performed by an individual for remuneration shall be deemed to be employment . . . unless and until it is shown . . . that:

(A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.
Kelley Drye & Warren LLP

Association (“NJSBA”) concerning S863’s predecessor bill (S4204) that was introduced in the previous Legislative session, the bill goes well beyond the holding of Sleepys by, among other things, replacing the phrase “trade, occupation, profession or business” in the C prong of the ABC test approved in Sleepys with the narrower phrase “enterprise or business,” effectively precluding an individual from being classified as an independent contractor in any case unless they have incorporated as an LLC or other formal business association. The NJSBA requested that if the bill goes forward, “we urge you to reflect the actual existing language of the case law that has been well tested over the past 50 years.”

Likewise, in a memorandum dated February 7, 2020, the New Jersey Civil Justice Institute concluded that S863 also narrows the B prong of the ABC as approved in Sleepys by including an additional exclusion for services performed outside the place of business of the entity for whom an individual is providing such services. The Department of Labor’s advancement of a similar theory was specifically rejected in a previous New Jersey Supreme Court ruling in the case of Carpet Remnant Warehouse, Inc. v. N.J. Dept. of Labor, 125 N.J. 567, 581 (1991), which the Supreme Court positively referenced in its ruling in Sleepys.

Sen. Sweeney’s contention that S863 merely codifies the rule in Sleepys is also incorrect in that the ruling, unlike S863, in fact did not purport to apply to all instances of misclassification disputes, but rather was narrowly focused on classification issues arising solely under the New Jersey Wage and Payment Law, N.J.S.A. 34:11-4.1 et seq. (“WPL”) and the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a et seq. (“WHL”). By contrast, the express language of S863 applies more broadly than to the WPL and WHL, including, among other statutes, the Workers Compensation Law, N.J.S.A. 34:15-1 et seq. (“WCL”). (As noted below, the New Jersey Supreme Court and the Appellate Division have applied the broader “nature of relationship” test, not the ABC test, in WCL cases subsequent to Sleepys, making it clear that S863 is not confined to the parameters of the Court’s holding in Sleepys.)

More importantly, contrary to the impression conveyed in Sen. Sweeney’s letter, the Supreme Court’s ruling in Sleepys does not represent a final statement of the law in the case of itinerant musician performers and does not justify application of the ABC test to itinerant musicians or to organizations like The Folk Project that sponsor their performances. Unlike the broad, indiscriminate adverse impacts that S863 would have on organizations like The Folk Project, the Court retains the ability to modify its ruling to recognize an exception for these organizations if called upon to do so. Indeed, considering the substantial equities involved and distinguishing characteristics of The Folk Project’s circumstances (e.g., an all-volunteer, non-profit organization financially supported through membership and cash donations that sponsors itinerant musician performers vs. a profit-making mattress sales and distribution enterprise that hires laborers for delivery of its product), it is difficult to conceive that the New Jersey Supreme Court would recognize no exception whatsoever to its ruling in the case of The Folk Project and art organizations like it. In view of other Supreme Court and Appellate Division rulings both before and after Sleepys, it is likely that the Supreme Court in a proper case would recognize the manifest disutility of applying S863 to itinerant musician performers, who are quintessentially independent contractors just as any plumber or electrician. However, S863 would effectively render the phrase “independent contractor” effectively meaningless as applied to itinerant musician
performers due to the arbitrary fiat, nowhere found in *Sleepys*, that they do not establish their own LLC and do not perform outside of The Folk Project’s normal place of business.

Finally, S863 would impose an unconstitutional restraint on freedom of expression and speech protected under First Amendment of the U.S. Constitution. Because S863’s overly broad application in such areas, where its stated goals of preventing misclassification of true employees as independent contractors cannot possibly be achieved by requiring sponsoring arts organizations to treat touring musicians as employees, the bill does not satisfy the well-established requirement of being “narrowly tailored” to achieve its purpose so as to avoid an unconstitutional restraint on speech protected under the First Amendment. See, e.g., *Frisby et al. v. Schultz et al.*, 487 U.S. 474 (1988).

II. FACTUAL BACKGROUND

Touring folk musician performers have long been viewed as quintessentially independent contractors according to New Jersey Law, owing in large measure to a tradition deeply embedded in American culture. The tradition of sponsoring touring musicianship in New Jersey stretches back hundreds of years to the days when European “troubadours” traveled from village to village. The troubadour tradition found its expression in the rise of “folk” music that can be traced back to the earliest days of Colonial life in New Jersey. By the early 1900s, recordings at Camden’s Victor studios, led by British folklorist and author Cecil Sharp, launched a revival of America’s folk music tradition. Camden was the site of the first commercial recordings of legendary folk music artists such as Paul Robeson, the Carter Family, along with Jimmie Rodgers, the “Father of Country Music.” In May of 1940 the iconic folk music “balladeer” Woody Guthrie arrived in Camden to record his first commercial album, “Dust Bowl Ballads.” This rich tradition has been carried forward to the present day through the efforts of all-volunteer groups like The Folk Project.

In The Folk Project’s 46-year history, of the thousands of musician performers who have appeared in its venues, none has ever asked to be classified as an employee, and some have specifically insisted on being classified as an independent contractor. Likewise, this has been the long-standing practice of other non-profit organizations that similarly provide performance venues for musician artists. In its present form, however, S863 would fundamentally change this widely accepted classification of itinerant musicians as independent contractors, due to the effect of Prong B of the “ABC test” that S863 would write into New Jersey employment laws. Because no exception is provided in S863 for itinerant musician performers or all-volunteer, non-profit organizations like the Folk Project who, primarily through their own funds, sponsor musician performers on their stages, and will significantly burden through increase costs of treating such

3 *See Estate of Kotsovskas, ex rel. Kotsovskas v. Liebman*, 221 N.J. 568, 594-95 (N.J. 2015) (holding that for purposes of classifying an individual as an employee or independent contractor under the New Jersey Workers Compensation Law, a “hybrid test” combining control test and the “economic realities” as of the nature-of-the-work test applies). The Folk Project’s musician performers meet each and every one of the “totality of circumstances” factors under the hybrid test for classification as independent contractors because they: control the dates of their performance; control the manner of their “work”; furnish and make significant investment in their instruments; are generally engaged by an individual venue once or twice per year; are financially independent from the venues; and have the right to offer their services to others.
performers as employees, S863 runs afoul of the First Amendment’s “narrowly tailored” requirement because it cannot achieve its stated purpose in relation to itinerant musician performers.

If forced to classify its musician performers as employees as a consequence of Prong B, The Folk Project’s payroll would go from zero to more than 250 employees per year. Moreover, because The Folk Project engages individual musicians for no more than one-time performances annually, it effectively would be hiring 250 new employees every year. Consequently, as currently drafted, S863 could impose entirely new financial and clerical burdens that will make it difficult or impossible for the FP and similar organizations to function or even exist. Needless to say, the ensuing administrative burden of increased paperwork, reporting, taxes, etc. will impose a profound burden on The Folk Project’s donors and dedicated volunteers. At a minimum, The Folk Project would be forced to divert a significant portion of its resources away from programming. And since the quality of its programming is the key factor contributing to the sustainability of its enterprise, The Folk Project ultimately could be forced to close its doors permanently.

As applied to itinerant musician performers and non-profit, all-volunteer organizations that sponsor their performances, S863 would profoundly diminish the ability of these organizations to provide economically sustaining platforms for folk musician artists/performers. At a time when these artists and their sponsoring organizations like The Folk Project are facing unprecedented economic challenges due to COVID-19 shelter-in-place restrictions, adding the oppressive financial burden of classifying performers as employees for purposes of laws like the WHL, WPL and WCL will exact a heavy toll on this art form in New Jersey, as well as the many economic benefits that flow into the State as a result of the public service they provide.

The devastating effect that S863 would have on The Folk Project and other non-profit arts organizations like it would also exact a heavy toll on a key component of the state’s economic backbone. A 2017 study by Americans in the Arts found that in 2015, entertainment events produced by non-profits arts and cultural organizations generated $530 million in total direct and indirect spending in New Jersey, $41 million of which went into state and local government tax coffers and $340 million of which went into direct household income for New Jersey residents. Moreover, approximately half of the total spending ($224 million) was generated by audience members, and nearly half that amount ($100 million) came from audience members attending from out of state, providing an important source of income and associated tax revenue into the state that otherwise would not exist.

Direct evidence of the devastating impact that S863 in its current form would have is available from the experience of musicians and venues that hire them in California under that state’s “AB 5” bill that was enacted in 2019, which S863 is largely based on and derived from. Responding to the outcry from independent musicians and associated performance venues impacted by AB 5’s unwarranted intrusion into a profession traditionally viewed by courts as falling squarely into the independent contractor sphere, the California Legislature found itself awash in petitions signed by 180,000 musicians and venues, culminating in an amendment adopted in April 2020 that restored the traditional common law test under which independent
musicians, including itinerant musicians, have long been deemed independent contractors. See https://www.billboard.com/articles/business/9360514/california-ab5-gig-economy-law-amended-protect-music-professionals.

III. SUMMARY OF HARGROVE V. SLEEPYS, LLC

The NJ Supreme Court on January 14, 2015, in Hargrove v. Sleepys, LLC, 220 N.J. 289 (2015), affirmed the New Jersey Department of Labor’s (“NJDOL”) regulations, which have been in effect since 1995, applying the ABC test to the WPL and WHL. Ruling on a question of law certified by the U.S. District Court for the District of New Jersey in a case brought by workers hired to deliver mattresses for Sleepys, LLC, the Court held that while neither law contained a definition of “employee” to which the laws apply, it would defer in this instance to the NJDOL’s expertise in determining how the laws should be applied. Id. at 301. In support of this determination, the Court cited the following considerations:

1. NJDOL’s regulations have been in effect “without challenge” since 1995 and the Court was “not persuaded that this long-standing approach to resolving employment-status issues needs any alteration.” Id. at 316.
2. The defendant, a for-profit mattress retailer, cited “no good reason” as to why the ABC test should not be applied for purposes of determining whether workers should be considered employees under the WPL and WHL. Id. at 312.
3. The ABC test would serve to provide a clearer rule “permitting an employee to know when, how, and how much he will be paid” as compared with a totality-of-the-circumstances analysis employed under the nature-of-the-relationship test that “is by its nature case specific.” Id. at 316.
4. As applied in the context of delivery workers, application of the ABC test is consistent with rulings by courts in other states holding that such workers are to be considered employees. Id. at 299.

IV. ANALYSIS

A. S863 is Broader Than Sleepys

As noted above, S863 goes beyond the New Jersey Supreme Court’s ruling in Sleepys in the following important respects:

1. S863 replaces the phrase “trade, occupation, profession or business” in the C prong of the ABC test approved in Sleepys with the narrower phrase “enterprise or business,” effectively precluding an individual from being classified as an independent contractor in any case unless they have incorporated as an LLC or other formal business association.

2. S863 also narrows the B prong of the ABC as approved in Sleepys by including an additional requirement for independent contractor status that the worker’s services are
physically performed outside the place of business of the entity for whom the worker is providing such services.

3. The New Jersey Supreme Court’s ruling in *Sleepys* was limited to whether the ABC test as set forth in NJDOL’s regulations should apply in classification questions under the WPL and WHL. By contrast, S863 expressly applies not only to the WPL and WHL, but also to other unidentified “supplementing” State employment laws. S863 at Section 1. Moreover, while it provides enumerated exclusions for other laws codified under Title 34 (specifically, the New Jersey Prevailing Wage Act,” N.J.S.A. 34:11-56.25 et seq., the Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 et seq., and the Construction Industry Independent Contractor Act, N.J.S.A. 34:20-1 et seq.), it provides no exclusions for other statutes codified under Chapter 34, such as the WCL. This construction creates by inverse implication an inference that statutes like the WCL are to be included within the scope of S863.

B. The Rule Announced in *Sleepys* is Distinguishable From The Folk Project’s Circumstances and Remains Subject to Modification

As is evident from the Court’s rationale as set forth *Sleepys*, the case was decided on and influenced by narrow facts that are highly distinguishable from The Folk Project’s circumstances. Examples include:

1. The Court’s rationale as to the need for a clearer test as that afforded by the ABC test does not make sense as it relates to itinerant musician performers. Unlike mattress delivery workers, application of the nature-of-relationship test and/or hybrid test to itinerant musician performers leaves no room for ambiguity that they are anything other than independent contractors. These tests have been reaffirmed by the Court and Appellate Division in cases decided after *Sleepys* for other workers laws adopted under Chapter 34, such as the Workers Compensation Law. *See, e.g.*, *Estate of Kotsovskva, ex rel. Kotsovskva v. Liebman*, 221 N.J. 568, 594-95 (N.J. 2015); *Pendola v. Melenia Express, Inc.*, 2018 N.J. Super. Unpub. LEXIS 2374 at *10-11 (App. Div. Oct. 26 2018). Although the Court’s application of the nature-of-the-relationship/hybrid test in such cases employed a “totality of circumstances” balancing, no such balancing is required for application of these tests to itinerant musician performers because they meet each and every criterion of those tests, as follows:

- **Control over hours**: Because the performers are not employed on an ongoing, day-to-day basis but for individual performances that last no more than a few hours, there is no work schedule for venues like The Folk Project to require them to adhere to. To the contrary, the performers’ availability for an engagement in comparison with their other numerous engagements is a constraint that The Folk Project must work within.

- **Control over manner of work**: The performers have 100% control over the content and means of the performance.
- **Who furnishes the tools needed for the services:** The performers make substantial investments in the “tools of their trade” — e.g., musical instruments and related equipment. While The Folk Project furnishes a stage and sound platform, these could no more be considered “tools” of the services than would be the water pipes in a building that a plumber (another clear example of an independent contractor) works on.

- **Continual or routine nature of the work:** The performers are rarely engaged for more than one performance out of the year (or even two to three years). In some cases, performers are engaged by a different Folk Project venue in the same year.

- **Financial dependence:** The performers are in no way financially dependent on The Folk Project because their business model necessarily depends on their retention by literally hundreds of different venues. They are, in effect, “joint venturers” — essentially the same for all intents and purposes as the band musicians in *Koza, supra*, whose band leader arranged gigs for himself and the band members. As the Appellate Division explained in *Koza*, treating the band member as an employee of the band leader would be akin to treating Arthur Garfunkel as an employee of Paul Simon, or vice versa, when they perform. 304 N.J. Super. at 442.

- **At will employment:** Although the The Folk Project typically enters into written contracts with performers, these are primarily intended for the performer’s protection and are essentially adhesion contracts that The Folk Project has little or no bargaining leverage to negotiate. However, in all such contracts, The Folk Project retains the right to cancel any performance as circumstances warrant, rendering the engagement effectively “at will.”

- **Right to offer services to others:** The performers enjoy the complete freedom to offer their services to others, as that is the very essence of their business model as touring musicians. Indeed, The Folk Project must actively compete with other venues to book them.

2. The *Sleepys* Court also cited rulings in other states in which delivery workers have been held to be employees. By contrast, a diligent search produced no cases in which itinerant performers have been held to be employees. Rather, in numerous cases, courts have recognized that they are independent contractors, employing a variety of tests. *See, e.g., Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486 (8th Cir. 2003) and cases cited therein; *Koza v. NJDOL*, 304 N.J. Super. 439 (App. Div. 1998).

3. The reason NJDOL’s 1995 regulations have never been challenged by an organization like The Folk Project is that they have never been applied in such a context. Moreover, it is not surprising that organizations as small as The Folk Project did not participate as *amici* in the briefing of the *Sleepys* case, as they lack the resources to do so. If they had, the Court would have had the benefit of a record containing circumstances that undoubtedly would merit at least some consideration by the Court. If so, the Court’s blanket conclusion that it “saw no reason” for departing from the NJDOL’s broad application of the ABC test to the WPL and WHL
would, at a minimum, have merited moderation not unlikely to include a recognition, however limited, that an exception from the scope of its broad ruling may be warranted in some cases.

4. Unlike the case of mattress delivery workers in Sleepys, whose employers, according to the Court, cited “no good reason” as to why the ABC test should not be applied in lieu of the nature-of-the-relationship and/or hybrid test, for purposes of determining how service providers should be classified under the WPL and WHL, there are good reasons why the ABC should not be applied to itinerant musician performers. These reasons stem from the same reasons why such performers so clearly satisfy all of the criteria, as noted above, for classification as independent contractors under the nature-of-the-relationship and/or hybrid test. In short, they are just as economically independent as any plumber, accountant, attorney or other similar professional who traditionally has been treated in the law and universally recognized in practice as independent contractors. The ABC test, by contrast, is wholly inappropriate to determine how they should be classified for purposes of the WPL, WHL or any other New Jersey worker law adopted under Chapter 34 because Prong B of the ABC test does not bear any meaningful relationship to the defining characteristics that set them apart from workers like mattress delivery workers. Unlike the economically dependent relationship that mattress delivery workers bear to a sales and distribution enterprise like Sleepys, LLC, itinerant musician performers comprise an economic enterprise wholly independent from the venues that sponsor their performances. The mere fact that they are in the same line of business as the venues that provide a stage and audience (i.e., musical entertainment) in which to perform is therefore simply not relevant to any consideration giving rise to their classification as employees or independent contractors. A rule that indiscriminately lumps them in with other classes like mattress delivery is both illogical and unnecessary.

In view of the significant distinguishing characteristics of The Folk Project’s engagement of itinerant professional musician performers as noted above, in the event that a case were brought to Court seeking in good faith a reversal or modification to its ruling in Sleepys, it remains within the New Jersey Supreme Court’s power to recognize an exception for circumstances like The Folk Project’s engagement of itinerant performers. Absent subsequent legislative enactment prescribing its ability to do so, the New Jersey Supreme Court retains the power to so modify the scope of its prior ruling in light of being made aware of such distinguishing circumstances and has done so on occasion. By contrast, if S863 is enacted in its current form, the Supreme Court will be compelled to yield to the Legislature’s formulation of the test, however in line with or askance it may be from the Court’s ruling in Sleepys.

C. S863 Would Effect a Change in Law As Compared With Sleepys And Other Court Rulings

If S863 is enacted in its current form, except in the case of areas of uncertainty in application and a Constitutional challenge, such enactment would, as matter of law, potentially deprive the New Jersey courts of the ability to recognize an exception outside of the narrow
record that was before the Court in Sleepys. Where the Legislature has clearly and unambiguously legislated on a particular matter and no room is left for interpretation, courts are bound to follow its lead. E.g., Sebelius v. Cloer, 569 U.S. 369 (2013). The only exception would be where the law at issue leaves questions as to its applicability or raises a question of Constitutional import. In view of this principle, while certain aspects of S863’s reach remain uncertain as currently written, it constitutes a change from existing law to the extent that it affects parties whose unique situations were not presented to the Supreme Court in Sleepys. Otherwise, there would be no need for its enactment. By the same token, the Legislature may take into consideration the unique distinguishing characteristics of touring musicians and the venues that sponsor them and provide an appropriate exception in their case.

D. The Applicability of the Entertainment Exception

Not only is the Legislature able to recognize an exception overlooked by the Sleepys Court on issues of applicability not before the Court in that case, it is incumbent on the Legislature to do so. By contrast to the Constitutional role of the courts to decide narrow questions of fact and law as presented in specific circumstances, it is the province of the Legislature to decide issues of broad and general applicability. In so doing, it is the Legislature that is aptly suited to give thoughtful and deliberate consideration to the manifold circumstances in which the a rule of broad applicability should be devised and to provide for necessary exceptions as circumstances warrant, so as to avoid unwarranted intrusions into long-accepted industry practices and unique circumstances of groups like The Folk Project.

In the case of the broad rule contemplated in S863, it happens that the Legislature has been over the same ground previously in its enactment of an exception for entertainers in Section 3(i)(7)(M) of the Unemployment Insurance Law — an exception for which S863 expressly incorporates into a savings provision in Section 3 of the bill, but only as to the Unemployment Insurance Law. Since S863 would expressly incorporate a modified form of the ABC test used in the Unemployment Law into the WPL, WHL and other “supplemental acts,” the Legislature’s previous inclusion of an exception for entertainers should be carried forth in S863’s adoption of the ABC test into those laws.

E. S863 Is Unconstitutional Because It Will Adversely Affect Protected Speech and Is Not Narrowly Tailored to Its Stated Goals

According to a November 14, 2019, press release by Sen. Sweeney’s office, the purpose of S863 is to address the problem of employee misclassification:

A misclassification is the improper designation of workers as “independent contractors” rather than “employees” in order to allow employers to evade basic workers’ rights. Employers are required to contribute to unemployment and temporary disability insurance, abide by labor protections such as the minimum wage and overtime, allow employees to take maternity, paternity, and family leave, and withhold New Jersey income taxes – but they are not required to do the same for independent contractors.
As applied to itinerant musician performers and the venues that hire them, this stated goal of S863 cannot be achieved under the bill because there is nothing any more improper about designating itinerant performers as independent contractors than it is to designate plumbers or electricians as independent contractors. Application of the bill’s B prong, however, may serve to knock itinerant musician performers out of the running for classification as independent contractors on the mere basis of whether the venue for which they perform is in the same line of business.

While such a distinction may serve a useful purpose as applied to taxi drivers or real estate agents, it does not serve as a meaningful test to assess whether musician performers, who traditionally have been classified as independent contractors, should be classified instead as employees. By contrast, Section 3(i)(7)(M) of the Unemployment Insurance Law provides that itinerant performers are already exempt from the requirement to contribute to unemployment insurance, which as the Legislature previously concluded would be nonsensical as applied to itinerant musicians. The same nonsensical affliction applies equally to S863’s application of the ABC test to itinerant musician performers. S863’s incorporation of the ABC test for the WPL, WHL and other “supplemental acts” therefore should be tailored in the same manner to avoid the unduly harsh impacts that can be expected from application of such an overbroad rule – impacts that, as discussed below, will work an unconstitutional burden on free speech.

Another important distinction that must be drawn when measuring S863 against the minimum requirements of legislation under the U.S. Constitution is that unlike folk musician performers, the work of taxi drivers and mattress delivery workers is not widely recognized as a form of speech protected under that document’s First Amendment. Like the freedom of the press and the right to peaceful assembly, American folk music holds a well-recognized and undeniable position in the pantheon of critical avenues of political and social commentary in American culture. See generally Ron Everyman and Scott Barretta, “From the 30s to the 60s: The Folk Music Revival in the United States,” Theory and Society, Volume 25, Issue 4 (August 1996), at 501-543. (Available online at: https://web.archive.org/web/20130404121659/http://web.uni-frankfurt.de/fb09/kunstpaed/indexweb/jukult/folk.pdf.) American folk music as an art form and form of political expression is not only worthy of First Amendment protection to the same extent as the freedom of the press and of assembly, it is essentially indistinguishable from them. See generally Samuel Fifer, “Musical Expressions and First Amendment Considerations,” 24 DePaul Law Review, Issue 1 (Fall 1974), Article 6. (https://via.library.depaul.edu/law-review/vol24/iss1/6.)

In numerous cases applying the free speech clause of the First Amendment, courts have routinely struck down governmental laws and regulations deemed to be insufficiently narrowly tailored to prevent unwarranted intrusions on protected speech, whether directly though regulations aimed directly at limiting speech or indirectly through regulation aimed at another purpose. Court rulings applying such principles have focused, for example, on regulations affecting or burdening speech in places that “by long tradition or by government fiat have been devoted to assembly and debate.” Prigmore v. City of Redding, 211 Cal. App. 4th 1322 (3d Dist. 2012). Consequently, state government regulations in various cases have been held to violate the First Amendment (via application of the Bill of Rights through the Fourteenth Amendment)
where they imposed requirements that unnecessarily limited or burdened the freedom of expression through speech, art or music. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (state claims for defamation by public officials violated the First Amendment’s guarantee of free speech); Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123 (1992) (county ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining the public order violated the First Amendment due to the absence of narrowly drawn, reasonable, and definite standards to guide the fee determination); Loper v. New York City Police Dept., 999 F.2d 699 (2d Cir. 1993) (statute prohibiting loitering in a public place for the purpose of begging violated the First Amendment where no compelling state interest was served by excluding those who beg in a peaceful manner from communicating with their fellow citizens); Metropolitan Council, Inc. v. Safir, 99 F. Supp. 2d 438 (S.D. N.Y. 2000) (city's application of its sidewalk sleeping policy to a vigil during which protesters would lie and sleep on a city sidewalk near the mayor's residence violated the First Amendment since the sleeping ban was not narrowly tailored to the asserted city interests); New Jersey Citizen Action v. Edison Twp., 797 F.2d 1250 (3d Cir. 1986) (municipal ordinance proscribing noncommercial door-to-door canvassing and solicitation during evening hours violated the political action groups' free speech rights under the First Amendment); Knowles v. City of Waco, Tex., 462 F.3d 457 (6th Cir. 2005) (city ordinance prohibiting structures in a public right-of-way violated First Amendment because it was not narrowly tailored to serve the city's interests in keeping the public right-of-way clear, as applied to the use of a balloon by labor union protesters in a demonstration against unfair labor practices); Weinberg v. City of Chicago, 310 F.3d 1029, 31 Media L. Rep. (BNA) 2068 (7th Cir. 2002) (ordinance, restricting the sale of merchandise within 1,000 feet of a sports stadium violated the First Amendment because it was not narrowly tailored to achieve the city's legitimate interest in protecting its citizens); and Harmon v. City of Kansas City, Mo., 197 F.3d 321 (8th Cir. 1999) (city ordinance regulating the sale and advertisement of certain products on city streets and sidewalks unconstitutionally stifled speech and artistic expression as applied to individuals who distributed pamphlets, jewelry, and wood products in exchange for donations).

In cases recognizing the constitutionally protected free speech rights of musician performers in particular, courts have likewise stricken state laws and local regulations that did not meet First Amendment standard for being narrowly tailored to minimize impacts on musician’s freedom of speech and expression. For example, Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009), the U.S. Court of Appeals for the Ninth Circuit held that a city ordinance violated the First Amendment by limiting the speech of a street musician by requiring performers to obtain permits before performing, as it was not sufficiently narrowly tailored to limit its impacts on the performer’s free speech rights. The court observed that the government bears the burden of justifying the regulation of expressive activity in a public forum and that the protections afforded by the First Amendment are “nowhere stronger” than in streets and parks, both categorized for First Amendment purposes as traditional public forums. The court ruled that the ordinance rule did not promote city's asserted interests in protecting safety of park-goers by reducing territorial disputes because permitting requirements did not assign particular performers
to specific times or locations, so that the city's interests could have been achieved by less intrusive measures than requiring individual speakers to preregister with government.

Similarly, in Lionhart v. Foster, 100 F. Supp. 2d 383 (E.D. La. 1999), the court found that a statute imposing criminal penalties for the production of sound in excess of 55 decibels on street musicians was unconstitutionally overbroad and vague in violation of the First Amendment. And in Leydon v. Town of Greenwich, 257 Conn. 318 (2001), a town ordinance limiting the access to a town park with a beachfront to residents of the town and their guests was held to violate the First Amendment by infringing on the rights of other beachgoers to engage in protected expressive and associational activities.

As discussed above, venues like The Folk Project sponsor music and related artistic expression imbued with political and social commentary have a long historic tradition in New Jersey. There can be little question that such a tradition firmly embedded in the social culture of New Jersey’s residents would be recognized by the courts as worthy of First Amendment protection to at least the same degree as other traditional public forums like city street and parks.

If enacted in its current form, S863 will have an adverse impact on speech, artistic expression and political commentary communicated through traditional American folk music because it will serve to limit or deprive the creators and performers of such music of opportunities to perform. Organizations like the Folk Project, which derive no remuneration from the performers they stage, will be unable to hire as many performers and could even be unable to continue financing such performances if they are required to absorb the additional cost of classifying performers as employees. Consequently, if enacted in its currently S863 arguably would not meet the minimum requirement set out by the courts for First Amendment scrutiny that a law be as “narrowly tailored” as possible to its stated goals so as to avoid or minimize any adverse effect on protected speech.