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THE FOLK PROJECT'S STATEMENT OF POSITION REGARDING S863

BACKGROUND ON THE FOLK PROJECT

- The Folk Project is a 501(3)(c) all-volunteer educational arts organization duly incorporated under New Jersey law as a non-profit corporation, with 450 dues-paying members and thousands of followers throughout North and Central New Jersey.
- As stated in its Charter, its core mission is to “provide non-profit cultural activities and educational services in the fields of music and folk arts to the general public and to the members of the organization.” The Folk Project advances this mission by promoting entertainment, education, and self-expression through the lens of traditional and acoustic music.
- Operating strictly as an all-volunteer organization with no employees, The Folk Project has been presenting events for over 46 years. Today, it presents more than 100 concerts, dances, workshops and retreats annually. Among other things, the organization exists to provide a platform for musician artists to perform before paying audiences.
- No Folk Project personnel are paid. As required by The Folk Project’s Charter, no director, officer, member or other private individual may receive any part of the net earnings of the corporation. Moreover, none of its directors, officers, members or others receive a salary or any other form of compensation for the purely voluntary services they provide to the organization. Not only does The Folk Project and the success of its mission depend on its all-volunteer makeup, its financial viability is derived primarily through cash donations from its members and modest membership fees. Notwithstanding the generosity of its donor members, The Folk Project has always operated on thin financial margins close to the break-even point and it is not uncommon for some of its programs to finish the year in the red from time to time. Far from profiting from the labor of the musician performers it engages, The Folk Project uses its relatively small share of gate receipts, which go primarily to the performers, solely to help defray expenses (rent, equipment, etc.) in staging their performances. In short, it exists to provide a platform for self-employed musician artists to perform in public. And it is able to do so only because of the generosity of its donor and subscribing members.
- In addition to the public benefits to New Jersey residents derived from a thriving musician artist community, it is also important to recognize that The Folk Project and other non-profit arts organizations like it make up 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.

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- Folk music and related artistic expression is a tradition that goes back to earliest days of Colonial life in New Jersey, when people sang in their parlors and front porches, in their houses of worship, and in villages and taverns throughout the Pine Barrens. In the early years of the 1900s, recordings in Camden’s Victor studios, led by British folklorist and author Cecil Sharp, launched America’s folk music revival. Camden—a technology hub during the first half of the 20th century—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 tradition has been carried forward to the present day through the efforts of all-volunteer groups like The Folk Project. This 300-year-old New Jersey tradition, and all that it represents as a grand cultural tapestry, wouldn’t be possible if not for the passionate, dedicated work of local volunteers and the independent musician performers they sponsor in their venues.

HOW S863 WILL IMPACT THE FOLK PROJECT

- Itinerant musician performers are quintessentially independent contractors according to New Jersey Law.¹ 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 all New Jersey worker-related laws. Prong B provides that a person who otherwise meets the statutory definition of an independent contractor must nonetheless be classified as an employee if the service they provide is not “outside the usual course of business for which the service is performed.” No exception is provided for all-volunteer, non-profit organizations like the Folk Project who, primarily through their own funds, sponsor musician performers on their stages.
- 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

¹ See *Estate of Kotsovska, ex rel. Kotsovska 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.

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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.

- Likewise, hundreds of similar programs throughout New Jersey, the millions of citizens who attend their functions annually, and the resulting benefits to New Jersey's economy generated by those programs, will be adversely impacted by S863. These economic benefits and their attendant state and local revenue streams (\$41 million in 2015) will be put at risk if S863 is adopted in its current form.

A SIMPLE AND EQUITABLE REMEDY

- In general, The Folk Project understands and supports the laudable goals of S863, as it carries forward the findings and recommendations of Gov. Murphy's Task Force on the Gig Economy ("Task Force") – *i.e.*, to address the increasingly frequent practice of employers who avoid worker protection laws by recasting workers traditionally viewed as employees as independent contractors. However, The Folk Project believes that S863's omnibus application of the "ABC test" to supplant existing law unnecessarily injures organizations that, like The Folk Project, are not part of the "gig economy" problem described in the Task Force's findings.
- Fortunately, the policy goals underlying S863 can be served without undermining non-profit arts organizations like The Folk Project and the public benefits they provide by simply extending the entertainer exemption provided for in Section 3(i)(7)(M) of the bill, which continues in effect the existing exemption to the Unemployment Insurance Law,² to Section 1 of the bill. By including this exemption in the bill, S863 clearly contemplates the absence of a long-term and frequent, even daily, relationship between musicians and the venues which engage them, and thus the disutility of the venue as a provider of unemployment insurance. Likewise, other critical factors that distinguish itinerant musicians from *de facto* employees exist that likewise can reasonably be ascribed to the Legislature's original design of the entertainer exemption. Most importantly, just as any self-employed plumber or electrician does, touring itinerant musician performers operate their own businesses. They make their own hours, control their own work (their music), make significant investments in their own equipment (musical instruments), and are not dependent on any single venue because they tour among many venues of their own choosing – all of the hallmarks of an independent contractor that New Jersey courts have

² Section 3(i)(7)(M) of the bill provides an exemption from Section 3 (unemployment insurance requirements) for "Service performed for or in behalf of the owner or operator of any theater, ballroom, amusement hall or other place of entertainment, not in excess of 10 weeks in any calendar year for the same owner or operator, by any leader or musician of a band or orchestra, commonly called a 'name band,' entertainer, vaudeville artist, actor, actress, singer or other entertainer."

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applied in numerous classification cases. Because these distinctions apply with equal force in the context of the laws addressed in Section 1 of the bill, they can be accounted for, without significant disruption to S863's design, by simply extending the entertainer exemption to Section 1 of the bill. Since the Legislature saw fit to provide such an exemption for purposes of The Unemployment Insurance Law, which historically has applied the more narrow ABC test in lieu of the broader "economic realities" test, it makes sense to apply the same exemption to Section 1 of the bill in the same omnibus fashion that those Sections would extend the ABC test to all other New Jersey worker-related laws.

In short, application of the entertainment exemption in Section 3(i)(7)(M) to Section 1 of S863 will have the following salutary effects:

- It will protect non-profit arts organizations that serve millions New Jersey residents and bring income and tax revenues into the State.
- It will not undermine S863's intended policy goals of addressing the gig economy problem as described by the Governor's Task Force, as the ABC test will continue to be applied broadly in all other respects.
- It will maintain the work of all-volunteer groups like The Folk Project and the musician performers they sponsor who "carry the torch" and perpetuate the living history of New Jersey's 300-year-old tradition of folk music—a valuable cultural heritage for future generations fo New Jersey residents.

The Folk Project urges the General Assembly and the Labor Committee to preserve the positive public benefit that non-profit arts organizations like The Folk Project provide for the citizens and economy of New Jersey by applying the entertainment exemption in Section 3(i)(7)(M) of the bill to Section 1.