

TESTIMONY IN SUPPORT OF PROPOSAL 3: AMENDING THE VERMONT CONSTITUTION TO PROTECT THE RIGHT TO COLLECTIVE BARGAINING

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Thank you for the opportunity to provide written testimony in support of Proposal 3, a proposed amendment to the Vermont Constitution that would enshrine the right of employees to organize and collectively bargain. As a labor lawyer with over four decades of experience advocating for workers across various sectors, I believe this amendment is both legally sound and morally necessary. I respectfully offer this testimony to respond to the concerns raised by Legislative Counsel Sophie Zdatny on April 9, 2025, and to clarify how Proposal 3 aligns with constitutional and labor law principles.

1. Scope of “Employees” and Statutory Exclusions

Ms. Zdatny raised the concern that Proposal 3 could override existing Vermont statutes that exclude certain categories of workers—such as agricultural laborers, legislative staff, or judiciary supervisors—from collective bargaining protections. She argued that, once enshrined in the Vermont Constitution, the amendment would confer collective bargaining rights on these workers in a manner that conflicts with current law.

This concern, however, is not legally supported. The proposed amendment protects the right of “employees” to organize and collectively bargain. It does not define the term “employee,” nor does it supply its own statutory framework. Accordingly, whether a worker falls under the protections of the constitutional amendment depends on whether they meet the definition of “employee” under Vermont labor law.

Currently, many workers excluded from bargaining rights under Vermont statutes are excluded by virtue of being defined out of the term “employee.” For instance, under 21 V.S.A. § 1502(6)(A)—which governs the Vermont Labor Relations Act—“employees” specifically does not include agricultural laborers. As the statute states:

“‘Employee’ means any individual employed by an employer, but shall not include...
any individual employed as an agricultural laborer...”
— 21 V.S.A. § 1502(6)(A)

Because these workers are not considered “employees” under existing state law, they would not automatically be covered by the proposed constitutional amendment. The amendment would not override statutory definitions unless those definitions are later challenged and found to be unconstitutional—a legal determination that would rest with the courts.

Similarly, public sector workers such as legislative staff and assistant attorneys general are currently excluded from organizing rights because Vermont’s labor statutes do not include them in the definition of “employee.” 3 V.S.A. § 902(5)(A). The constitutional amendment would not automatically extend bargaining rights to them, unless the legislature amends those statutes or a court finds the exclusions unconstitutional in light of the amendment.

In short, Proposal 3 does not automatically override statutory exclusions, nor does it create an immediate, universal entitlement for currently excluded categories of workers to organize. It creates a constitutional floor, not a complete legal framework, and its implementation will depend on subsequent legislative action or judicial interpretation.

Ms. Zdatny also raised the inclusion of undocumented workers in the definition of “employees” as a concern. However, federal labor law already recognizes undocumented workers as “employees” for purposes of collective bargaining rights. The U.S. Supreme Court affirmed this in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), holding that undocumented workers are covered under the National Labor Relations Act. While the later decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) limited the remedies available to undocumented workers, it did not eliminate their right to organize or engage in union activity.

Thus, Vermont would not be charting new or controversial legal ground by affirming these rights at the state constitutional level. Proposal 3 would simply align the Vermont Constitution with long-standing federal labor principles.

2. Clarifying Collective Bargaining vs. the Right to Strike

Ms. Zdatny expressed concern that the proposed amendment may be interpreted to implicitly confer a right to strike, even though the language of Proposal 3 does not reference strikes. Let’s be clear: Proposal 3 does not create a constitutional right to strike in Vermont. It affirms the right to collectively bargain—a distinct concept. Striking is a tactic used in collective bargaining but is not synonymous with the right to engage in that process.

The U.S. Supreme Court has distinguished between the right to organize and the right to strike. In *Smith v. Arkansas State Highway Employees Local 1315*, 441 U.S. 463 (1979), the Court held that states may recognize collective action rights while still lawfully restricting strikes by public employees. Similarly, courts in states like New York (see N.Y. Const. art. I, § 17) have upheld laws barring strikes by public workers while maintaining strong protections for collective bargaining.

Vermont retains the authority to regulate strikes, especially in the public sector. Nothing in Proposal 3 to the Vermont Constitution prohibits such regulation.

3. Union Security Agreements, *Janus*, and Voluntary Adoption

Ms. Zdatny noted that the second sentence of Section 2 of the proposed amendment includes language that would allow for agreements requiring union membership or dues payments, which she suggested may run afoul of the U.S. Supreme Court’s decision in *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).

It is important to emphasize several key points:

- First, Proposal 3 amends the Vermont Constitution, not the U.S. Constitution. Vermont cannot override *Janus*, which prohibits mandatory union fees for public employees under the First Amendment. Proposal 3 respects that federal limitation.
- Second, this provision applies where permissible under federal law—primarily to private-sector employers covered by the NLRA, which allows union security agreements

under 29 U.S.C. § 158(a)(3), unless prohibited by a state right-to-work law.

- Third, and crucially, a union security agreement is not automatic. Such clauses must be voluntarily negotiated and mutually agreed upon between the union and the employer as part of a collective bargaining agreement. No employer can be compelled to accept one.

Employers may choose to include union security clauses because they understand the benefits of a stable and collaborative workforce. Reasons employers agree to union security clauses include:

- Promoting labor peace by avoiding free-rider issues;
- Ensuring fairness among employees who benefit from union representation;
- Encouraging high levels of employee engagement and retention; and
- Supporting consistent communication between labor and management.

Proposal 3 protects this freedom of contract while ensuring that future Vermont legislatures cannot pass a “right-to-work” law that weakens collective bargaining.

4. Future Legislative Action Will Be Required

Finally, while Proposal 3 enshrines the right to collectively bargain in the Vermont Constitution, this is only the beginning. Constitutional recognition must be followed by legislative action to give full effect to this right.

Just as the federal NLRA is supplemented by detailed rules and procedures, Vermont will need to amend or enact statutes to:

- Create or expand appropriate labor relations acts for newly covered employees ;
- Establish clear procedures for union certification and elections; and
- Set standards for enforcement, dispute resolution, and remedies.

For example, a new statute might be required to govern labor relations for domestic workers or other currently unprotected groups.

Conclusion

Proposal 3 affirms a fundamental truth: the right to collectively bargain is essential to economic justice, democratic workplaces, and a fair Vermont. By amending the Vermont Constitution, we guarantee that these rights are not left to the shifting winds of statutory interpretation or political change.

Concerns about statutory exclusions, strikes, union shops, or undocumented workers are well addressed within our constitutional and legal framework. Courts will interpret and shape these provisions responsibly. **But the decision to extend this protection—to say clearly and**

boldly that workers deserve a voice—belongs to the people of Vermont. Therefore, I urge this Committee to advance Proposal 3. Thank you.