

TESTIMONY OF CHIEF DEPUTY ATTORNEY GENERAL
IAN S.A. CLEMENT
THIRTY-SIXTH LEGISLATURE OF THE VIRGIN ISLANDS
COMMITTEE ON RULES AND JUDICIARY
BILL NO. 36-0132
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Good afternoon, Chairman Joseph, members of the Committee on Rules and Judiciary, other members, legislative staff, and everyone joining us in person and online. My name is Ian S.A. Clement, and I serve as the Chief Deputy Attorney General of the Virgin Islands Department of Justice. I am here on behalf of Attorney General Gordon C. Rhea to present the Department's testimony regarding Bill No. 36-0132.

The Department of Justice supports Bill No. 36-0132. The Department supports its purpose, favors a statute that reaches the retirement benefits of officials and employees who use public office to commit felonies, and appreciates Senator Gittens for introducing the measure. The Committee has before it two texts: the bill as introduced and Amendment No. 36-762, the amendment in the nature of a substitute. The Department urges the Committee to proceed with the substitute. Attached to this testimony and submitted for the record are a section-by-section analysis of the substitute and a set of recommended amendments. To save the Committee's time, I will not read the appendices aloud. I request that they be entered

into the record in their entirety, and I will limit my remarks to the Department's support for the bill, why the substitute is the better vehicle, and the three changes the Department considers essential.

A public pension is deferred compensation for faithful service. An official who uses the office to steal from the people he serves has not rendered faithful service, and the people should not fund his retirement while they are still paying for his crime. The principle is not new. Federal law has forfeited federal retirement benefits upon conviction of specified offenses for decades. Congress extended that rule to its own members in 2007, and a substantial number of states have pension forfeiture statutes for crimes committed in office. The Virgin Islands has none. The Department's interest is practical. The Department prosecutes public corruption and seeks restitution in every case with a loss. Those orders are too often uncollectible because the defendant's largest remaining asset is a retirement benefit that existing law shields from every creditor, including the Government he defrauded. This bill puts that asset within reach of the victim, the court, and the Bureau of Corrections, in that order.

The Department prefers the substitute for three reasons. The bill as introduced forfeits benefits automatically upon a plea or conviction, with no hearing on the forfeiture itself; the substitute requires a final conviction and then a civil

action in the Superior Court, on notice, at which the individual may appear, be heard, and present evidence. That is the process a court will demand before the Government takes a vested property interest. The bill as introduced makes the GERS Board of Trustees the appellate body; the Board is the fiduciary of the fund, not a court, and its rulings would return to the Superior Court on writ of review in any event. The substitute places the proceeding where it belongs and assigns the Attorney General to bring it, and the Department accepts that responsibility. And the bill as introduced defines the covered offenses partly by cross-reference to a federal statute written for Members of Congress, which Congress may amend without notice to this Body; the substitute defines the offense in Virgin Islands terms, with a functional test at its core: a felony that the individual's office, authority, or access facilitated or concealed. That test is what this bill is about.

Three changes are essential. First, make the act prospective and say so. The bill must state that it applies to offenses committed on or after its effective date. Neither text does. A forfeiture imposed as a consequence of conviction for conduct that predates the statute invites an ex post facto challenge and, for members whose benefits have vested, invites the argument that the Territory has impaired its own contract. The substitute's constructive-notice provision in subsection (c) applies only going forward; no one can be deemed to have notice of a law that did not exist when

he acted. One applicability sentence removes the strongest defense argument in every case the Department will bring.

Second, reconcile the timeline. Subsection (d)(1) permits the Attorney General to file the forfeiture action only after a final conviction, meaning one affirmed on appeal or no longer appealable. Subsection (f)(1) mandates immediate withholding upon conviction; subsection (i)(1) requires the Attorney General to initiate proceedings within ten days of conviction; and subsection (i)(2) gives the individual thirty days to challenge the withholding “within the civil forfeiture proceeding,” a proceeding that, under subsection (d)(1), cannot yet exist. In this Territory, an appeal can take years. The Government Employees Retirement System has advised the Committee that it can implement whatever a court orders, and it has identified this same ambiguity: it does not know whether it is expected to act on the Attorney General’s notice or to await the court. It should never have to make that legal judgment. The fix is to allow the Attorney General to file upon conviction; to have the Attorney General’s notice impose a short administrative hold, so that no lump-sum refund or new benefit is paid out before the court can act; to allow the court, after a hearing, to enter an interim withholding order while the appeal runs; to hold withheld funds in an interest-bearing account; and to enter the final forfeiture order only when the conviction becomes final, with release and interest if it is

reversed. At every step, GERS acts on a paper it can read, not a question it must decide. That sequence protects the fund, the victim, and the defendant.

Third, give the court a standard, and protect innocent dependents. The substitute leaves to the court whether benefits are forfeited, deferred, withheld, or otherwise applied, but supplies no factors. Since *Timbs v. Indiana* in 2019,¹ the Excessive Fines Clause of the Eighth Amendment binds the states and, through the Revised Organic Act, this Territory. A thirty-year employee who takes a bribe in her twenty-ninth year and loses the entire pension will argue disproportion. The Department wants a record built on statutory factors: the severity of the offense, the loss to the Government or the victim, the degree to which the office facilitated the crime, the length of service and the tainted portion, and the needs of any innocent spouse or dependent child. The child-support priority in subsection (g)(3) already recognizes that a family stands behind the defendant; the court should also be authorized to direct a portion of the benefit to an innocent spouse, former spouse, or dependent child. Those factors and that authority will make every forfeiture order defensible on appeal.

Two further matters, briefly. The substitute needs conforming work: it uses “public employee or public official” where the defined terms are “government

¹ 586 U.S. 146, 139 S. Ct. 682 (2019).

employee” and “government official,” leaves its section numbers blank, and addresses benefits “connected to the offense” in one paragraph and “all retirement benefits” in the next. Appendix A addresses each. On implementation, subsection (f) makes the Attorney General responsible for reporting every qualifying conviction wherever it occurs. The Department knows its own cases; it does not automatically learn of convictions in the District Court or outside the Territory. The Department will work with the United States Attorney’s Office to close that gap and recommends that every application for retirement benefits include a certification, under penalty of perjury, stating whether the applicant has been charged with or convicted of an offense involving a breach of the public trust. That certification costs nothing and makes the statute self-enforcing. GERS has also asked that any order it must carry out identify the payor, the benefit and amounts affected, the payees and their priority, and the points of contact at each agency. The Department agrees and has included that requirement in Appendix B.

The Department of Justice supports Bill No. 36-0132. It urges the Committee to adopt Amendment No. 36-762, to make the act prospective, to reconcile the timeline for withholding and forfeiture, and to give the court the standard and the authority it needs to enter orders that will survive appeal. With those changes, this

Body will give the Department a tool it does not have today and give the people of the Virgin Islands a measure of justice when the public trust is broken.

I thank the Committee for the opportunity to testify. This concludes my remarks, and I am prepared to answer any questions that this Body may have.

APPENDIX A

SECTION-BY-SECTION ANALYSIS OF AMENDMENT NO. 36-762 (AMENDMENT IN THE NATURE OF A SUBSTITUTE TO BILL NO. 36-0132)

Submitted for the record by the Virgin Islands Department of Justice

Section 1 — Enacting clause and placement. The section adds “a section 724a and 770c” to chapters 27 and 28A of title 3, but the following section heading is left blank (“§ _____”), and only one section of text is provided. The bill should state whether the identical text is to be codified twice or whether one section is to cross-reference the other, and it should provide the section numbers. If chapter 28A governs a separate class of members, the Committee should confirm that the definitions in subsection (b), which are keyed to GERS membership and to pensions “paid directly by the Government,” apply to that class.

Subsection (b)(1)–(2) — “Convicted” and “final conviction.” The definitions are sound. The Department notes that a conviction may be vacated on collateral review after it becomes final. The bill should specify what happens to forfeited or withheld benefits in that event; the Department recommends releasing withheld funds with interest and restoring prospective benefits, without recovering amounts already applied to restitution actually paid to victims.

Subsection (b)(3)–(4) — “Government employee” and “government official.” “Government employee” is defined without reference to GERS membership, whereas “government official” is limited to officers who are GERS members, plus any official who may draw a pension from the Government. The

Department reads the two definitions together to capture every person who has a retirement benefit administered by GERS or paid by the Government, which is the correct scope. The bill should state this directly, so that a defendant who was an employee of a semi-autonomous agency with its own plan cannot argue that he is outside both definitions.

Subsection (b)(5) — “Offense involving a breach of public trust.” This is the operative definition, and the Department supports its structure: a functional test (misuse of the authority, duties, or responsibilities of public office for gain, or conduct facilitated or concealed by the position) supported by an illustrative list of title 14 chapters and a parallel clause for federal felonies. Three corrections. The definition uses “public employee or public official,” which the substitute does not define; it should use the defined terms. The chapter list contains a typographical error (“11” for “11”). The Committee should confirm that each listed chapter of title 14 is one it intends to reach, since some of the enumerated chapters contain offenses that would rarely involve the use of public office; the functional test will do the work in any event, and the Department reads the list as illustrative, not as an independent basis for forfeiture. The bill should provide that a conviction under a listed chapter is subject to forfeiture only if the functional test in the first sentence is also satisfied, so the statute is not read to forfeit the pension of an employee whose felony had nothing to do with the job.

Subsection (b)(6)–(7) — “Retirement benefits” and “forfeiture or deferment.” The definitions are broad enough to encompass employee contributions, employer contributions, and statutory pensions. The Department supports this breadth, subject to the proportionality factors recommended in Appendix B,

and notes that a number of jurisdictions forfeit the pension but return the employee's own contributions without interest. The Committee should deliberate on that question and state its answer. If employee contributions are to be reached, the court's discretion under subsection (d)(3) and the factors recommended in Appendix B will sustain the statute against an excessive-fines challenge.

Subsection (b)(8)–(9) — “Cost of imprisonment” and “restitution.” The definitions are adequate. The Department recommends that the Bureau of Corrections be directed to publish an annual per-diem cost of incarceration, so that the amount applied under subsection (g)(4) is set by a published figure rather than litigated in each case.

Subsection (c) — Notice. The Department supports the constructive-notice provision. It applies only to conduct occurring after the act takes effect and should be paired with an express applicability clause stating that the act applies to offenses committed on or after the effective date. The Department also recommends that GERS provide written notice of the act to every member and every new hire.

Subsection (d) — Forfeiture action in the Superior Court. The Department supports assigning the action to the Superior Court and the Attorney General and supports the notice-and-hearing requirement in (d)(2). The action should be designated a civil proceeding, the burden of proof (preponderance) should be stated, and the court should be directed to enter written findings. The subsection should be reconciled with subsections (f) and (i) as described in subsection (i) below. The court should be authorized to join GERS and the

Department of Finance as parties so that its order binds the entities responsible for carrying it out.

Subsection (e) — Scope of forfeiture. Paragraph (1) reaches benefits “accrued because of government service connected to the offense”; paragraph (2) reaches “all retirement benefits and accumulated contributions attributable to the individual’s government service.” The two are not the same. The Department recommends that the statute authorize the court to reach the whole benefit and order a lesser forfeiture where the factors warrant, rather than leaving the scope to be argued from inconsistent language. Paragraph (3)(B) requires that the offense “directly relates to, arises from, or involves” the misuse of official duties; this should be aligned with the functional test in subsection (b)(5) so that there is one standard, not two.

Subsection (f) — Notice of conviction and immediate withholding. The Department accepts the notification duty. It recommends that the trigger be a conviction in any court, as drafted, and that the Attorney General be authorized, rather than directed, to request withholding, so the Department retains discretion in cases where withholding would serve no purpose (for example, where the individual has no accrued benefit). GERS has advised that it cannot tell from the substitute whether withholding is to occur upon the Attorney General’s notice or upon the court’s order. The Department recommends that the Attorney General’s notice impose a defined administrative hold, during which GERS makes no lump-sum refund of contributions, commences no new benefit, and escrows any periodic payment then in pay status, and that the hold lapse unless the court enters an interim withholding order within sixty days. The Department also recommends the

retirement-application certification described in the testimony, so that GERS is not dependent on the Department for notice of out-of-territory convictions.

Subsection (g) — Order of priority. The Department supports the order: restitution to victims and to the Government first, court-ordered financial obligations second, child and family support third, costs of imprisonment fourth, other lawful obligations fifth. The Department recommends that the court be authorized to alter the order for cause and that the subsection state that amounts applied to restitution are credited against the restitution ordered in the criminal judgment.

Subsection (h) — Disposition of the remainder. The subsection begins “if retirement contributions remain” and then directs “the monthly or bi-weekly pension payments” to the Correctional Facilities Repair and Renovation Fund; the terms should be aligned. More substantively, paragraph (1) directs the remainder to the Fund or to the GERS unfunded liability, which is a forfeiture, while paragraph (2) provides that the individual may not receive benefits “unless all obligations under this section have been fully” satisfied, implying that benefits resume once the obligations are paid, which is a deferment. The two cannot both be true. The Department recommends that the disposition of the remainder follow the court’s order under subsection (d)(3): where the court orders forfeiture, the remainder is applied as paragraph (1) provides; where the court orders deferment or withholding, benefits resume when the obligations are satisfied. The Department also recommends that any amount the court directs to an innocent spouse, former spouse, or dependent child be paid before the remainder is applied under paragraph (1).

Subsection (i) — Timing; challenge; interim withholding. Paragraph (1) requires notice within ten days of conviction and directs the Attorney General to “initiate any proceedings,” while subsection (d)(1) permits the forfeiture action only after final conviction. Paragraph (2) requires the challenge to be brought “within the civil forfeiture proceeding” within thirty days of notification, which is impossible if that proceeding cannot yet be filed. The Department recommends that the Attorney General be authorized to file the action upon conviction; that the court be authorized, after notice and hearing, to enter an interim withholding order pending appeal; that withheld funds be held in an interest-bearing account; that the final forfeiture order be entered only upon final conviction; and that funds be released with interest if the conviction is reversed or forfeiture is denied. Paragraph (3) should be retained.

Subsection (j) — Annual report. The Department supports the report and recommends that it be transmitted to the Governor, the Attorney General, and the President of the Legislature, and that it aggregate or omit individually identifying information.

Subsection (k) — Inspector General audit. The Department supports the biennial audit and recommends including a clause that preserves the Attorney General’s criminal jurisdiction over any matter the audit discloses.

Omitted matters. The substitute contains no applicability clause, no severability clause, no effective date, and no provision for the interaction of a forfeiture order with a domestic relations order that has already assigned a share of the benefit to a former spouse. Each should be supplied. The Department also recommends that the act state that nothing in it limits the Attorney General’s authority to seek restitution, fines, or forfeiture under any other law.

APPENDIX B

RECOMMENDED AMENDMENTS TO AMENDMENT NO. 36-762

Submitted for the record by the Virgin Islands Department of Justice

Amendments 1 through 3 are the changes the Department considers essential. The remaining amendments conform the drafting and strengthen implementation.

- 1. Add an applicability clause.** Provide that the act applies to offenses involving a breach of the public trust committed on or after the act's effective date, and that the constructive notice in subsection (c) attaches on that date. This removes the ex post facto and impairment-of-contract defenses from every forfeiture action the Department will bring.
- 2. Reconcile the timeline for withholding and forfeiture.** Authorize the Attorney General to file the forfeiture action upon conviction, whether or not an appeal is pending. Provide that the Attorney General's notice under subsection (f) imposes an administrative hold under which GERS makes no lump-sum refund or distribution, commences no new benefit, and escrows any periodic payment in pay status, and that the hold lapses unless the court enters an interim withholding order within sixty days. Authorize the court, after notice and hearing, to enter an interim order withholding benefits during any appeal. Require that withheld funds be held by GERS or the Department of Finance in an interest-bearing account. Provide that the final order of forfeiture, deferment, or application is entered only upon final conviction. Provide that if the conviction is reversed or vacated, or forfeiture is denied, withheld funds are released to the individual with accrued interest. Conform subsections (d)(1), (f), and (i) accordingly.

3. Supply factors for the court’s decision and protect innocent dependents.

Direct the court, when deciding whether benefits are to be forfeited in whole or in part, deferred, withheld, or otherwise applied, to consider: the nature and severity of the offense; the monetary loss to the Government or any victim; the extent to which the individual’s office, authority, or access facilitated the offense; the length of the individual’s service and the portion of that service during which the offense occurred; the individual’s cooperation and any restitution already paid; and the financial needs of any innocent spouse, former spouse, or dependent child. Authorize the court to direct that a portion of the benefit be paid to an innocent spouse, former spouse, or dependent child, and provide that a domestic relations order entered before the conviction remains enforceable to the extent the court directs.

4. Use the defined terms. Replace “public employee or public official” in subsection (b)(5) with “government employee or government official.” Align subsection (e)(3)(B) with the functional test in subsection (b)(5). Correct “chapters 11” to “chapter 11.” Provide that a conviction under an enumerated chapter of title 14 constitutes an offense involving a breach of the public trust only if the functional test is also met.

5. Fix the codification. Provide the section numbers. State whether the text is to be codified in both chapter 27 and chapter 28A or codified once with a cross-reference, and confirm that the definitions are consistent with the membership governed by chapter 28A.

6. Reconcile the scope of forfeiture. Amend subsection (e) to provide that the court may order forfeiture of all retirement benefits and accumulated contributions

attributable to the individual's government service, or of a lesser portion as the court determines under the factors in Amendment 3, and delete the inconsistent "connected to the offense" limitation in paragraph (1).

7. Reconcile subsection (h). Conform "contributions" and "pension payments."

Provide that, where the court orders forfeiture, any remainder after the priorities in subsection (g) and any amount directed to a spouse or dependent are applied to the Correctional Facilities Repair and Renovation Fund if the individual is incarcerated, and otherwise to the unfunded liability of GERS; and that, where the court orders deferment or withholding, payment of benefits resumes when the obligations in subsection (g) are satisfied.

8. Make the forfeiture action a civil proceeding with a stated standard.

Designate the action as a civil proceeding governed by the Virgin Islands Rules of Civil Procedure, place the burden on the Government by a preponderance of the evidence, require written findings, and authorize joinder of GERS and the Department of Finance so that the order binds the entities administering the benefit.

9. Prescribe the contents of every withholding and forfeiture order. Require

every interim or final order under this section to identify the payor (GERS, the Department of Finance, or both); the benefit, contribution account, or pension affected and the amount or portion subject to the order; each payee and the priority and amount of each payment under subsection (g); the disposition of any remainder; and the points of contact at GERS, the Department of Finance, the Bureau of Corrections, and the Department of Justice responsible for carrying out the order. Provide that GERS and the

Department of Finance act on the face of the order and incur no liability for payments made in conformity with it.

- 10. Add a retirement-application certification.** Require every application for retirement benefits administered by GERS or paid by the Government to include a certification, under penalty of perjury, stating whether the applicant has been charged with or convicted of an offense involving a breach of the public trust in any court. Require GERS to notify the Attorney General of any affirmative certification.
- 11. Address vacated convictions and prior domestic relations orders.** Provide that if a final conviction is vacated on collateral review, prospective benefits are restored and withheld funds are released with interest, without any recovery of amounts already paid to victims as restitution. Provide that a domestic relations order assigning a share of the benefit to a former spouse before the conviction remains enforceable to the extent the court directs.
- 12. Direct notice to members and publish the cost of incarceration.** Direct GERS to provide written notice of the act to each member and each new hire. Direct the Bureau of Corrections to publish annually the per-diem cost of incarceration for use under subsection (g)(4).
- 13. Add severability, effective date, and savings provisions.** Add a severability clause, an effective date, a clause preserving the Attorney General's authority to seek restitution, fines, and forfeiture under any other law, and a clause preserving the Attorney General's criminal jurisdiction over matters disclosed in the Inspector General's audit.