

* The Clerk of Court is directed to amend the caption as set forth above.

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3 Before: RAGGI, WESLEY, and DRONEY, *Circuit Judges*.
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6 Appeal from judgment and orders of the United States District
7 Court for the Southern District of New York (Preska, C.J.) imposing
8 a 36-month sentence of imprisonment, ordering forfeiture in the
9 amount of \$22,000, and designating Defendant's contributions to the
10 New York State pension fund as a substitute asset for forfeiture. We
11 **AFFIRM**.
12

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14 RANDA D. MAHER, ESQ., Great Neck,
15 New York, *for Appellant*.
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18 States Attorney (Brian A. Jacobs,
19 Assistant United States Attorney, *on*
20 *the brief*), *for* Preet Bharara, United
21 States Attorney for the Southern
22 District of New York, New York,
23 New York, *for Appellee*.
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27 DRONEY, *Circuit Judge*:

28 Defendant Eric Stevenson, a former Member of the New York
29 State Assembly representing a district in the Bronx, was convicted

1 after a jury trial of (1) conspiracy to commit honest services wire
2 fraud, *see* 18 U.S.C. § 1349; (2) conspiracy to commit federal
3 programs bribery and to violate the Travel Act, *see id.* § 371; (3)
4 accepting bribes, *see id.* § 666(a)(1)(B); and (4) extortion under color
5 of official right, *see id.* § 1951. Stevenson raises a number of issues on
6 appeal, the majority of which we address in a summary order issued
7 simultaneously with this opinion. Here, we address only
8 Stevenson's challenges to (1) the sentence imposed, (2) the forfeiture
9 order, and (3) the designation of substitute assets for forfeiture. We
10 **AFFIRM.**

11 **BACKGROUND**

12 From 2011 until 2013, Stevenson was a Member of the New
13 York State Assembly as a representative of District 79 in the Bronx.
14 In March 2012, federal law enforcement officers began investigating
15 his interactions with a group of individuals (the "Businessmen")
16 who were seeking assistance in opening and operating adult daycare

1 centers in the Bronx. For the next year, law enforcement officers
2 worked with confidential informants to investigate Stevenson and
3 others, and conducted audio and visual surveillance. Based on that
4 investigation, Stevenson was indicted in the United States District
5 Court for the Southern District of New York and arrested in April
6 2013. At his subsequent jury trial, the Government presented
7 evidence that Stevenson accepted three bribes in 2012 and 2013 in
8 the total amount of \$22,000 in return for various actions to promote
9 the Businessmen's adult daycare centers, including proposing
10 legislation to the New York State Legislature that would have
11 imposed a moratorium on new adult daycare centers, thus favoring
12 the Businessmen. The jury found Stevenson guilty on all counts in
13 January 2014.

14 On May 21, 2014, the district court sentenced Stevenson to an
15 aggregate term of 36 months of imprisonment. The district court
16 also entered a preliminary order of forfeiture in the amount of

1 \$22,000, representing the amount of the bribes. The final judgment,
2 including an order of forfeiture, was entered on May 23, 2014.

3 In December 2014, after it was determined by the district court
4 that the forfeiture amount could not be satisfied, the district court
5 entered a preliminary substitute order of forfeiture, pursuant to 21
6 U.S.C. § 853(p) and Federal Rule of Criminal Procedure 32.2, for
7 Stevenson's "contributions, funds, benefits, rights to disbursements,
8 or other property" held by the New York State and Local Retirement
9 System. J.A. 1429. The final order of forfeiture of substitute assets
10 was entered on July 30, 2015.

11 Stevenson appeals the 36-month sentence, arguing that the
12 district court's calculation of his sentencing guidelines range was
13 improper because two of the enhancements that were selected (for
14 acting as a "public official," *see* U.S.S.G. § 2C1.1(a)(1), and as an
15 "elected public official," *see* U.S.S.G. § 2C1.1(b)(3)) were
16 impermissibly overlapping. He also argues that he was entitled to

1 have a jury decide the amount of forfeiture beyond a reasonable
2 doubt, and that designating his interest in his retirement fund as a
3 substitute asset was error as it is protected from such forfeiture by
4 Article V of the New York State Constitution. We disagree, and
5 affirm the sentence and forfeiture orders.

6 DISCUSSION

7 I. Sentencing Challenges

8 a. Enhancements

9 Stevenson's pre-sentence report included a computation of his
10 total offense level as 24, based on a base offense level of 14 and the
11 inclusion of three enhancements that added 10 levels.¹ Stevenson
12 does not contest the factual bases for that computation, but argues
13 that it included impermissible double counting due to its application
14 of two separate increases in his offense level relating to his service as

¹ The base offense level for an offense involving bribery, when the defendant is a public official, is 14. U.S.S.G. § 2C1.1(a)(1). Stevenson's offense level was then increased by two because the offense involved more than one bribe, U.S.S.G. § 2C1.1(b)(1), by four because the value of the payments exceeded \$10,000, but did not exceed \$30,000, U.S.S.G. §§ 2C1.1(b)(2), 2B1.1(b)(1)(C), and by four because the offense involved an elected public official, U.S.S.G. § 2C1.1(b)(3), for a total of 24.

1 a public official. The first of those increases was based on U.S.S.G.
2 § 2C1.1(a)(1), which elevated Stevenson's base offense level from 12
3 to 14 because he was a "public official." The second was U.S.S.G.
4 § 2C1.1(b)(3), which was used to assign Stevenson a 4-level
5 enhancement due to his status as an "elected public official."
6 Stevenson's argument is that both enhancements cannot be applied
7 to a single defendant because each addresses the same harm.
8 Stevenson did not make this objection before the district court, so we
9 review this claim of procedural unreasonableness for plain error.
10 *See United States v. Wernick*, 691 F.3d 108, 113 (2d Cir. 2012). A
11 showing of plain error requires that:

12 (1) there is an error; (2) the error is clear or obvious,
13 rather than subject to reasonable dispute; (3) the error
14 affected the appellant's substantial rights, which in the
15 ordinary case means it affected the outcome of the
16 district court proceedings; and (4) the error seriously
17 affects the fairness, integrity or public reputation of
18 judicial proceedings.
19

1 *United States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation
2 marks and brackets omitted).

3 There was no error here, much less plain error.
4 “Impermissible double counting occurs when one part of the
5 guidelines is applied to increase a defendant's sentence to reflect the
6 kind of harm that has already been fully accounted for by another
7 part of the guidelines.” *United States v. Volpe*, 224 F.3d 72, 76 (2d Cir.
8 2000) (internal quotation marks omitted). Nonetheless, “multiple
9 adjustments may properly be imposed when they aim at different
10 harms emanating from the same conduct.” *Id.* The relevant
11 question, then, is whether the two enhancements “serve identical
12 purposes”—in which case applying both would be double counting
13 and would demonstrate procedural irregularity—or whether they
14 “address separate sentencing considerations.” *Id.*

15 We conclude that the two enhancements do not serve identical
16 purposes or address the same harm. While a betrayal of public trust

1 is a serious matter in any criminal case, it may be considered a
2 greater harm when committed by one who has been elected to office
3 and not simply appointed to a public position. As the Eleventh
4 Circuit has noted,

5 [b]ecause of the critical importance of representative
6 self-government, a guideline that applies to any public
7 official who betrays the public trust does not fully
8 account for the harm that is inflicted when the trust that
9 the official betrays was conferred on him in an election.
10 Being a bribe-taking 'elected public official' is different
11 from being a run-of-the-mill, bribe-taking, non-elected
12 'public official.'"

13
14 *United States v. White*, 663 F.3d 1207, 1217 (11th Cir. 2011) (some
15 internal quotation marks and brackets omitted); *see also United States*
16 *v. Barraza*, 655 F.3d 375, 384 (5th Cir. 2011) (rejecting claim that
17 simultaneous application of U.S.S.G. § 2C1.1(a)(1) and § 2C1.1(b)(3)
18 constitutes double counting); *United States v. Gilmore*, No. CR 10-200-
19 02, 2012 WL 1377625, at *6 (W.D. La. Apr. 18, 2012) (noting that the
20 term "public official is construed broadly to cover persons who are
21 not even employees of a local or state government," and finding no

1 double counting when both U.S.S.G. § 2C1.1(a)(1) and § 2C1.1(b)(3)
2 are applied). Thus, we conclude that the application of sentencing
3 enhancements under both U.S.S.G. §§ 2C1.1(a)(1) and 2C1.1(b)(3) did
4 not here constitute double counting.

5 **b. Disparity**

6 Stevenson also argues that his sentence was procedurally
7 unreasonable because it reflected an impermissible disparity under
8 18 U.S.C. § 3553(a)(6) between the sentence received by Stevenson
9 and those of his co-defendants (the Businessmen: Igor Belyansky,
10 Slava Belyansky, Igor Tsimmerman, and David Binman).

11 We also reject this argument. 18 U.S.C. § 3553(a)(6) requires
12 that a sentencing court consider “the need to avoid unwarranted
13 sentence disparities among defendants with similar records who
14 have been found guilty of similar conduct,” not that it consider the
15 disparities between co-defendants. *See United States v. Frias*, 521 F.3d
16 229, 236 (2d Cir. 2008) (“We have held that section 3553(a)(6)
17 requires a district court to consider nationwide sentence disparities,

1 but does not require a district court to consider disparities between
2 co-defendants.”).

3 Even so, the district court here did in fact consider the
4 sentences of the co-defendants when explaining Stevenson’s
5 sentence: the other defendants had lower guideline ranges, pled
6 guilty, and accepted responsibility for their conduct. As the district
7 court also noted, there were additional considerations in sentencing
8 Stevenson as an elected official who was bribed that did not apply to
9 the other defendants, the bribing parties who had no governmental
10 positions: “to compare the sentences of the bribing parties to the
11 sentence of the public official who was bribed is [to compare] apples
12 and oranges.” J.A. 1356. The district court did not commit
13 procedural error in its computation and application of the
14 sentencing guidelines.

15

1 **II. Forfeiture**

2 **a. *Libretti v. United States***

3 At Stevenson’s sentencing, the district court issued an order of
 4 forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) ² and 28 U.S.C.
 5 § 2461(c) in the amount of \$22,000 based on its conclusion regarding
 6 “the amount of proceeds traceable to the commission of the offenses
 7 charged in . . . the Indictment.” J.A. 1345–48. On appeal, Stevenson
 8 argues that this was improper because, under the Sixth Amendment,
 9 the facts relevant to the determination of the amount of a criminal
 10 forfeiture must be found by a jury beyond a reasonable doubt.³

11 In 1995, the Supreme Court addressed this issue directly,
 12 holding that there is no Sixth Amendment right to a jury

² “While § 981(a)(1)(C) is a civil forfeiture provision, it has been integrated into criminal proceedings via 28 U.S.C. § 2461(c).” *United States v. Contorinis*, 692 F.3d 136, 145 n.2 (2d Cir. 2012). 28 U.S.C. § 2461(c) provides that the procedures of 21 U.S.C. § 853 apply to such proceedings.

³ Stevenson also argues on appeal that the evidence failed to establish beyond a reasonable doubt that the proceeds traceable to him for the offenses he was convicted of amounted to \$22,000. However, the amount of a forfeiture order must be supported “only by a preponderance of the evidence,” and “the district court’s factual findings [are reviewed] for clear error.” *United States v. Gaskin*, 364 F.3d 438, 461–62 (2d Cir. 2004). Stevenson has pointed us to no such clear error here.

1 determination in a criminal forfeiture proceeding. *See Libretti v.*
2 *United States*, 516 U.S. 29, 48–49 (1995). Stevenson acknowledges
3 *Libretti*, but argues that more recent Supreme Court decisions have
4 served to effectively overrule it. Specifically, in *Apprendi v. New*
5 *Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that “any
6 fact that increases the penalty for a crime beyond the prescribed
7 statutory maximum must be submitted to a jury, and proved beyond
8 a reasonable doubt.” Twelve years later, the Supreme Court applied
9 this principle to the calculation of a maximum criminal fine as part
10 of a sentence, holding that the amount of a fine, “like the maximum
11 term of imprisonment or eligibility for the death penalty, is often
12 calculated by reference to particular facts. . . . In all such cases,
13 requiring juries to find beyond a reasonable doubt facts that
14 determine the fine’s maximum amount is necessary to implement
15 *Apprendi*’s ‘animating principle’” *S. Union Co. v. United States*,
16 132 S. Ct. 2344, 2350, 51 (2012) (quoting *Oregon v. Ice*, 555 U.S. 160,

1 168 (2009)). And one year after that, the Supreme Court extended
2 the principle further to facts affecting a mandatory minimum
3 sentence of incarceration. *Alleyne v. United States*, 133 S. Ct. 2151,
4 2158 (2013).

5 After *Apprendi*, but before *Southern Union* or *Alleyne*, we
6 confirmed that *Libretti* remained good law. *United States v. Fruchter*,
7 411 F.3d 377, 380–82 (2d Cir. 2005). The Supreme Court has
8 explained that “[i]f a precedent of this Court has direct application
9 in a case, yet appears to rest on reasons rejected in some other line of
10 decisions, the Court of Appeals should follow the case which
11 directly controls, leaving to this Court the prerogative of overruling
12 its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*,
13 490 U.S. 477, 484 (1989). Consequently, faced in *Fruchter* with an
14 argument that “*Apprendi* and its progeny have so undercut *Libretti* as
15 to have overruled it sub silentio,” we held that “*Libretti* remains the
16 law until the Supreme Court expressly overturns it.” *Fruchter*, 411

1 F.3d at 381. In finding that neither *Apprendi* nor the other Supreme
2 Court cases urged upon us as having overturned *Libretti*⁴ had done
3 so, we pointed to “the distinction between criminal forfeiture
4 proceedings and determinate sentencing regimes,” explaining that
5 *Apprendi* and the later cases applying it “prohibit a judicial increase
6 in punishment beyond a previously specified range; in criminal
7 forfeiture, there is no such previously specified range.” *Id.* at 382,
8 383. Calling criminal forfeiture “a different animal from determinate
9 sentencing,” we concluded that “*Libretti* remains the determinative
10 decision.” *Id.* at 383.

11 Stevenson argues that the Supreme Court has since expressly
12 overruled *Libretti* in *Southern Union* and *Alleyne*. We disagree.

13 The argument that *Southern Union* expressly overruled *Libretti*
14 fails because—just like the decisions that we considered in
15 *Fruchter*—*Southern Union* also involved a determinate sentencing

⁴ *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

1 scheme. There, the statute through which the defendant corporation
2 was convicted of environmental violations provided a maximum
3 fine of \$50,000 for each day of violation. *Southern Union*, 132 S. Ct. at
4 2349. The jury was instructed only to find a violation, but not the
5 number of days the violation occurred. *Id.* However, the district
6 court imposed a fine of \$38.1 million, based on its calculation that
7 the violations occurred over a period of 762 days. *Id.* The Supreme
8 Court concluded that such a fine was not permitted based on the
9 jury's verdict, as the only violation that the jury necessarily found
10 was for one day. *Id.*

11 In so extending the *Apprendi* holding to criminal fines, the
12 Supreme Court noted that *Apprendi* required submission to a jury of
13 "any fact that increases the penalty for a crime *beyond the prescribed*
14 *statutory maximum*," *id.* at 2350 (emphasis added) (quoting *Apprendi*,
15 530 U.S., at 490), concluding therefore that there could be no
16 "*Apprendi* violation where no maximum is prescribed," *id.* at 2353.

1 For all of the reasons we explained in *Fruchter* concerning the
2 differences between determinate sentencing and criminal forfeiture,
3 it cannot therefore be said that *Southern Union* overruled *Libretti*.

4 Nor did the Supreme Court in *Alleyne* expressly overrule
5 *Libretti*. There, it concluded that 18 U.S.C. § 924(c)—which provides
6 increased mandatory minimum periods of incarceration based on
7 whether a firearm involved in a crime of violence or drug trafficking
8 crime was carried, brandished, or discharged—required a jury
9 finding for the increased punishments. It held that “any fact that
10 increases the mandatory minimum is an ‘element’ that must be
11 submitted to the jury.” *Alleyne*, 133 S. Ct. at 2155. It did not address
12 forfeiture and its different characteristics.

13 Whether it is mandatory minimums or statutory maximums,
14 those aspects of fixing the penalties for determinate sentencing
15 schemes are meaningfully different than those establishing the
16 amount of forfeiture in applying the Sixth Amendment right to a

1 jury trial. The calculation of the amount of forfeiture is not subject to
2 any statutory thresholds that increase penalties—whether they be
3 “floor[s]” or “ceiling[s],” *see id.* at 2160—and remains within the
4 province of the sentencing court. *Libretti* and *Fruchter* remain
5 controlling precedent, and we therefore decline to reverse the
6 district court’s forfeiture order.

7 **b. Pension Plan**

8 The district court issued an order following sentencing for the
9 forfeiture of \$22,000 in proceeds obtained from Stevenson’s offenses,
10 *see* 18 U.S.C. § 981(a)(1)(C); 28 U.S.C. § 2461(c); *see also* 21 U.S.C.
11 § 853(a), and later identified as a substitute asset for forfeiture “[a]ny
12 and all contributions, funds, benefits, rights to disbursements, or
13 other property held on behalf of, or distributed to, ERIC
14 STEVENSON, by the New York State and Local Retirement
15 System, . . . and all property traceable thereto,” J.A. 1429. These
16 contributions were made by Stevenson while he was a Member of
17 the Assembly. Stevenson did not serve in the State Assembly long

1 enough to become a vested member of the pension plan entitled to
2 pension distributions, but he is entitled to a refund of the
3 contributions that he made. See N.Y. Retire. & Soc. Sec. Law §§ 516,
4 517. In response to an inquiry made by this Court at the conclusion
5 of oral argument, the Government made a submission explaining
6 that it “intend[ed] to serve the Order on the New York State and
7 Local Retirement System (“NYSLRS”) and request that the NYSLRS
8 pay over the pension contributions” of Stevenson. Dkt. No. 93.

9 Stevenson argues that identifying his pension plan
10 contributions as a substitute asset and permitting seizure by the
11 Government was error as those contributions are protected by
12 Article V, Section 7 of the New York State Constitution, which states
13 that such a plan’s benefits “shall not be diminished or impaired.”
14 We disagree.

15 The Supremacy Clause of the U.S. Constitution provides that
16 “the Laws of the United States . . . shall be the supreme Law of the

1 Land; . . . any Thing in the Constitution or Laws of any State to the
2 Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. Articles of the
3 New York Constitution, as state law, are therefore preempted if they
4 are inconsistent with federal law. *See Silkwood v. Kerr-McGee Corp.*,
5 464 U.S. 238, 248 (1984) (“[S]tate law is . . . preempted to the extent it
6 actually conflicts with federal law, that is, when it is impossible to
7 comply with both state and federal law.”).

8 Here, there is a conflict between New York law, providing
9 that the pension fund is not to be “diminished or impaired,” and
10 federal law, which authorizes forfeiture “irrespective of any
11 provision of State law,” of any property derived from the crime of
12 conviction, 21 U.S.C. § 853(a), and, where such property cannot be
13 located or has been transferred, of “any other property of the
14 defendant” in the same amount, *id.* at § 853(p)(1)-(2). Therefore,
15 Article V, Section 7 of the New York State Constitution is preempted
16 to the extent that it would prevent forfeiture of Stevenson’s

1 contributions to or benefits from a state pension or retirement
2 system up to \$22,000, the amount ordered forfeited.

3 This conclusion is consistent with that of a number of our
4 sister circuits that have similarly held that various provisions of state
5 law are preempted by federal forfeiture law. *See United States v.*
6 *Fleet*, 498 F.3d 1225, 1232 (11th Cir. 2007) (“[W]e hold that where the
7 forfeiture of substitute property is concerned, 21 U.S.C. § 853(p)
8 preempts Florida’s homestead exemption and tenancy by the
9 entireties laws.”); *United States v. Wagoner Cty. Real Estate*, 278 F.3d
10 1091, 1097 (10th Cir. 2002) (“[W]e hold that federal preemption of
11 the Oklahoma homestead exemptions is necessary to carry out the
12 Congressional intent underlying § 881(a)(7) and to maintain
13 uniformity in federal forfeiture law.”); *United States v. Bollin*, 264
14 F.3d 391, 399 (4th Cir. 2001) (“[P]ursuant to the Supremacy Clause,
15 federal forfeiture law supersedes the garnishment protections that
16 Georgia state law provides for funds in an individual retirement

1 account.”); *United States v. Curtis*, 965 F.2d 610, 616 (8th Cir. 1992)
2 (“[T]he federal forfeiture statute, § 853(a), clearly superseded the
3 homestead exemption set forth in Iowa Code § 561.16.”).

4 * *

5 For the foregoing reasons, we **AFFIRM** the judgment,
6 including the sentence imposed, the forfeiture order, and the order
7 identifying substitute assets by the district court.