CONSTITUTIONAL LAW — FREEDOM OF SPEECH — FOURTH CIRCUIT UPHOLDS POLICE IMPERSONATION STATUTE AS PERMISSIBLE RESTRICTION OF FALSE SPEECH. — *United States v. Chappell*, 691 F.3d 388 (4th Cir. 2012).

The U.S. Code and nearly every state analogue contain laws restricting false speech. These statutes proscribe fraud, perjury, and defamation, as well as impersonating U.S. creditors, Red Cross members, and U.S. government employees.[1] Last Term, the Supreme Court revisited false speech in *United States v. Alvarez*,[2] invalidating the Stolen Valor Act of 2005[3] (SVA), a federal statute criminalizing false claims of having received a military decoration or medal. Holding that false statements do not constitute a "general category that is presumptively unprotected" by the First Amendment,[4] four Justices for the plurality and two concurring found the SVA inadequately tailored to the government's interest in protecting military honors.[5]

Recently, in *United States v. Chappell*,[6] the Fourth Circuit upheld a Virginia statute criminalizing the impersonation of police officers, distinguishing the statute from that in *Alvarez*.[7] Yet, unlike the *Alvarez* plurality and concurrence (collectively, the *Alvarez* "majority opinions" or "majority"), which carefully scrutinized the fit between the SVA's ends and means, the *Chappell* majority uncritically assumed the harm of false statements and minimized the danger to free expression of their proscription. In doing so, *Chappell* evinced a deeper commitment to the *Alvarez* dissenters' view of society and the First Amendment than to that of the Justices composing the decision's majority.

On October 6, 2009, U.S. Park Police pulled over Douglas Chappell for speeding on the George Washington Memorial Parkway,[8] a federal

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[1] *See* United States v. Alvarez, 132 S. Ct. 2537, 2545–46 (2012) (plurality opinion) (listing statutes); United States v. Chappell, 691 F.3d 388, 397–98 (4th Cir. 2012) (same).

[2] 132 S. Ct. 2537.

[3] Pub. L. No. 109-437, 120 Stat. 3266 (2006).

[4] *Alvarez*, 132 S. Ct. at 2546–47 (plurality opinion). The concurrence agreed that false speech restrictions deserved "neither near-automatic condemnation . . . nor near-automatic approval." *Id.* at 2552 (Breyer, J., concurring in the judgment). The opinions diverged primarily over the extent of First Amendment protection. *Compare id.* at 2543 (plurality opinion) (applying "exacting scrutiny"), *with id.* at 2552 (Breyer, J., concurring in the judgment) (applying "intermediate scrutiny"); *see also The Supreme Court, 2011 Term — Leading Cases*, 126 HARV. L. REV. 176, 201–03 (2012) (discussing the *Alvarez* opinions' divergent approaches to false speech).

[5] Applying "exacting scrutiny," the plurality concluded that the government had failed to make a "clear showing of the necessity of the statute." *Alvarez*, 132 S. Ct. at 2551 (plurality opinion). The concurrence similarly found, under "intermediate scrutiny," that the SVA as drafted "work[ed] disproportionate constitutional harm" to its "important protective objective." *Id.* at 2556 (Breyer, J., concurring in the judgment).

[6] 691 F.3d 388.

[7] *Id.* at 391.

[8] *Id.*

road running through northern Virginia near Washington, D.C. Although he had not been employed by the Fairfax County, Virginia, Sheriff's Office for approximately one year prior to the stop, Chappell told the Park Police Officer that he was a Fairfax County Deputy Sheriff.[9] When asked to verify his employment, Chappell made up a Sheriff's Office employee identification number and stated that he had left his law enforcement credentials at home.[10]

Chappell was charged in the U.S. District Court for the Eastern District of Virginia with impersonating a police officer in violation of Virginia Code § 18.2-174,[11] a two-part provision criminalizing "falsely assum[ing] or exercis[ing] the functions, powers, duties and privileges incident to the office of sheriff, police officer, marshal, or other peace officer" (the "exercise clause") or "falsely assum[ing] or pretend[ing] to be any such officer" (the "pretending clause").[12] Chappell initially appeared before a magistrate judge and moved to dismiss the impersonation charge, urging the judge to strike down § 18.2-174 as unconstitutionally overbroad.[13]

The magistrate rejected Chappell's overbreadth claim,[14] convicting him under the pretending clause,[15] and the district court affirmed on appeal.[16] Adopting the magistrate's conclusions, the district court found the "small amount of protected conduct . . . fall[ing] within the sweep of the statute" insufficient to invalidate it when compared to the amount of conduct falling within the statute's "plainly legitimate sweep" of "deterring the impersonation of police officers."[17]

The Fourth Circuit affirmed.[18] Writing for the panel, Judge Wilkinson[19] considered both facial and overbreadth challenges to the stat-

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[9] *Id.*

[10] *Id.*

[11] VA. CODE ANN. § 18.2-174 (2009). *See also* Chappell v. United States, No. 1:10cr42 (LMB), 2010 WL 2520627, at *1 (E.D. Va. June 21, 2010). Federal law incorporates Virginia law with respect to the George Washington Memorial Parkway. *See* 18 U.S.C. § 13 (2006); *Chappell*, 2010 WL 2520627, at *1–2.

[12] VA. CODE ANN. § 18.2-174.

[13] *Chappell*, 691 F.3d at 391; *see also Chappell*, 2010 WL 2520627, at *3. Overbreadth doctrine allows a law's invalidation if "a substantial number of [the law's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)) (internal quotation marks omitted).

[14] *Chappell*, 2010 WL 2520627, at *3.

[15] *See Chappell*, 691 F.3d at 391.

[16] *Chappell*, 2010 WL 2520627, at *4. Chappell also moved to dismiss the charge for lack of jurisdiction and for insufficient evidence to support his conviction. The magistrate judge rejected these arguments, and the district court affirmed. *See id.* at *1–3.

[17] *Id.* at *3.

[18] *Chappell*, 691 F.3d at 391.

[19] Judge Wilkinson was joined by Chief Judge Traxler.

ute, rejecting each.[20] Beginning with Chappell's facial challenge and § 18.2-174's "plainly legitimate sweep," the court found that the statute serves Virginia's "critical" interests in protecting public safety and deterring individuals, like Chappell, from impersonating law enforcement officers to "evade fines, incarceration, and other state-imposed sanctions."[21] As Chappell's challenge focused solely on the pretending clause under which the government convicted him,[22] the court sought to distinguish the pretending clause's reach from that of the exercise clause, stating that the pretending clause, but possibly not the exercise clause, prohibited "pretending to be a law enforcement officer in order to board an airplane."[23] Additionally, the court continued, "just pretending to be a police officer could — without more — assist an individual in gaining entrance to a home or abducting a child."[24] By contrast, the court dismissed Chappell's list of § 18.2-174's potential unconstitutional applications as "ludicrous" and "far-fetched."[25] Having identified the statute's "many legitimate applications," Judge Wilkinson rejected Chappell's facial challenge.[26]

The court then turned to Chappell's overbreadth claim,[27] again dismissing § 18.2-174's hypothetical unconstitutional applications as unrealistic, "based on speculation, not actual fact," and insubstantial relative to the statute's legitimate applications.[28] So construed, Chappell's claim failed to demonstrate a "realistic danger" of § 18.2-174's "significantly compromis[ing] recognized First Amendment protections."[29] Furthermore, Judge Wilkinson reasoned, § 18.2-174 prohibited "a species of identity theft" with "little or no communicative value" — police impersonation — that "is more in the nature of conduct than speech."[30] Noting that the function of overbreadth adjudication "attenuates" as the relevant activity "moves from 'pure speech' toward

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[20] *Chappell*, 691 F.3d at 391–96.

[21] *Id.* at 392.

[22] *Id.* at 391.

[23] *Id.* at 392.

[24] *Id.*

[25] *Id.* at 393 (rejecting Chappell's argument that the SVA "criminalizes the behavior of adults who attend costume parties dressed as a police officer, children playing cops and robbers, and actors portraying law enforcement officials" (quoting Brief of the Appellant at 17, *Chappell*, 691 F.3d 388 (No. 10-4746)) (internal quotation marks omitted)).

[26] *Id.* at 394 ("To succeed in a typical facial attack, [a party] would have to establish that no set of circumstances exists under which [a statute] would be valid, or that the statute lacks any plainly legitimate sweep." (alterations in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1587 (2010)) (internal quotation marks omitted)).

[27] *Id.*

[28] *Id.* at 396.

[29] *Id.* at 395 (quoting Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984)).

[30] *Id.*

conduct,"[31] Judge Wilkinson found Chappell's challenge "a particularly inappropriate case" for overbreadth invalidation.[32]

Concluding, the court addressed *United States v. Alvarez*, handed down only two months prior to *Chappell*. Seeking to distinguish § 18.2-174 from the SVA, Judge Wilkinson seized on *Alvarez*'s approving citation of a series of statutes proscribing false speech, including a federal statute "bearing striking similarities" to § 18.2-174 that criminalized impersonating federal government officers.[33] While the SVA "merely restrict[ed] false speech," *Alvarez* reasoned, the constitutionally permissible restrictions protected interests such as the "integrity of Government processes" and the "general good repute and dignity of government service itself."[34] Analogizing § 18.2-174 to the permissible impersonation statutes, Judge Wilkinson determined that *Alvarez* did not compel § 18.2-174's invalidation.[35] Rather, the decision's approving references to impersonation statutes "confirm[ed] that § 18.2-174 speaks to the very real problem of law enforcement impersonations and the misfortunes that can flow from them."[36]

Judge Wynn dissented,[37] arguing that a "straightforward application of *Alvarez*'s analysis and holding" required the court to strike down § 18.2-174.[38] Unlike the majority, Judge Wynn interpreted § 18.2-174's pretending clause as "merely restrict[ing] false speech" and thus running afoul of the constitutional boundary *Alvarez* delineated between permissible and impermissible false speech restrictions.[39] Framed as a prohibition of pure speech, the pretending clause swept as broadly as the SVA, criminalizing mere false statements "in family, social, or other private contexts"[40] that did not implicate public safety. Furthermore, more finely tailored alternatives that "place[d] less of a burden upon protected speech"[41] — such as a revised pretending clause requiring an act in addition to pretending alone or requiring pursuit of a material benefit — could achieve the statute's compelling,

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[31] *Id.* at 395–96 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)).

[32] *Id.* at 396.

[33] *See id.* at 397 & n.3.

[34] *Id.* at 397 (quoting United States v. Alvarez, 132 S. Ct. 2537, 2546 (2012) (plurality opinion)) (internal quotation marks omitted).

[35] *Id.*

[36] *Id.* Judge Wilkinson further concluded that, while the SVA criminalized pure speech spoken "without the intent to 'secure employment or financial benefits,'" *id.* at 398 (quoting *Alvarez*, 132 S. Ct. at 2542 (plurality opinion)), § 18.2-174 prohibited impersonation, as in Chappell's case, "for the material purpose of avoiding a speeding ticket[,] . . . [which] bears a closer kinship to the kind of identity theft that a state can surely proscribe consistent with the First Amendment." *Id.*

[37] *Id.* at 400 (Wynn, J., dissenting).

[38] *Id.*

[39] *Id.* at 401.

[40] *Id.* at 402 (quoting *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment)).

[41] *Id.* at 403.

protective objective.[42] Rejecting the majority's recourse to overbreadth doctrine as inconsistent with the *Alvarez* majority opinions, neither of which conducted an overbreadth analysis, Judge Wynn concluded that the pretending clause, like the SVA, lacked a sufficiently close fit between its means and ends.[43] Finally, based on his conclusions that the clause criminalized pure speech[44] and posed a greater risk to protected expression than the *Chappell* majority recognized,[45] Judge Wynn determined that § 18.2-174 "would still not survive" the majority's overbreadth analysis, even if, "for the sake of argument, [that analysis] were appropriate."[46]

Judge Wynn properly faulted the majority for failing to consider fully the pretending clause's breadth and independent function. While *Alvarez* carefully scrutinized the SVA, Judge Wilkinson avoided applying similar scrutiny by eliding the differences between § 18.2-174's two parts. Section 18.2-174's pretending clause defies Judge Wilkinson's analysis and analogy to *Alvarez*, less clearly proscribing harmful speech than the exercise clause and less clearly falling within *Alvarez*'s category of permissible proscriptions. Further, *Chappell* minimized § 18.2-174's danger to free expression, further diverging from the *Alvarez* majority opinions' distrust of broad statutory language.

In distinguishing the SVA from permissible restrictions on false speech,[47] the *Alvarez* majority opinions made centrally relevant the proximity of speech to harm. Justice Kennedy's survey of the permissible restrictions presumed the separability of their speech and nonspeech objectives, justifying the statutes as in fact targeting not speech but harm. Thus, Justice Kennedy reasoned, the restrictions targeted "some other legally cognizable harm associated with a false statement,"[48] erosion of the integrity of legal judgments and government processes,[49] or ill-gotten receipt of "a material advantage."[50] To Justice Kennedy, the statutes served functions "quite apart from merely restricting false speech."[51] While Justice Breyer did not so fully separate speech from its material accompaniments, he too justified the

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[42] *See id.*

[43] *See id.* at 402, 404.

[44] *Id.* at 407–08 (noting § 18.2-174 criminalized Chappell's "simply stating a false fact about his employment," *id.* at 407).

[45] *See id.* at 402, 408.

[46] *Id.* at 405.

[47] *Alvarez* cited approvingly, among others, statutes proscribing fraud, defamation, false statements to government officials, perjury, and impersonation of government officials. *See* United States v. Alvarez, 132 S. Ct. 2537, 2545–46 (2012) (plurality opinion); *id.* at 2553–55 (Breyer, J., concurring in the judgment).

[48] *Id.* at 2545 (plurality opinion).

[49] *Id.* at 2546.

[50] *Id.* at 2548.

[51] *Id.* at 2546.

false speech restrictions as, for various reasons, targeting "a subset of lies where specific harm is more likely to occur."[52]

Both opinions found that the SVA lacked an adequate nexus to harm. Under the light of the plurality's "exacting scrutiny" and the concurrence's "intermediate scrutiny," the majority Justices agreed that the SVA failed constitutional muster not for want of a sufficient interest[53] but for lack of a close fit between that interest — protecting the integrity of military honors — and the SVA's means to achieve it — prohibiting, without limitation, pure false speech. The opinions determined any injury to military honors was too attenuated from the Act's function to justify its validation, particularly with more finely tailored alternatives available to serve the Act's protective objective.[54]

Judge Wilkinson, however, circumvented *Alvarez*'s dispositive tailoring inquiry, instead assuming without any evidentiary showing or scrutiny that § 18.2-174 in fact targeted and prevented harm. Like the dissenters in *Alvarez*, who believed false statements inflict immediate, albeit "less tangible" harm, apparently by their very utterance,[55] Judge Wilkinson concluded that § 18.2-174 "prohibits lies 'that are particularly likely to produce harm.'"[56]

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[52] *Id.* at 2555 (Breyer, J., concurring in the judgment) (stating that the permissible restrictions contained "limitations of context, requirements of proof of injury, and the like" that narrowed the statutes to particularly harmful speech).

[53] *See id.* at 2549 (plurality opinion) (positing as "beyond question" the government's interest "in protecting the integrity of the Medal of Honor"); *id.* at 2555 (Breyer, J., concurring in the judgment) (referring to the government's interest as "substantial").

[54] *See id.* at 2549–51 (plurality opinion) (noting the "lack of a causal link" between the SVA and "the Government's stated interest," *id.* at 2549); *id.* at 2555–56 (Breyer, J., concurring in the judgment) (faulting the government for failing to provide a "convincing explanation as to why a more finely tailored statute would not work," *id.* at 2556).

[55] *Id.* at 2559 (Alito, J., dissenting) (arguing that false statements "debase the distinctive honor of military awards" and "blur[] the signal given out by the actual awards"); *see also id.* at 2560 ("[M]uch damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward."). The *Alvarez* plurality, by contrast, specifically rejected the government's argument that Alvarez's lie had the "tendency to dilute the value and meaning of military awards" absent specific evidence demonstrating the connection. *Id.* at 2549 (plurality opinion) (quoting Brief for the United States at 54, *Alvarez*, 132 S. Ct. 2537 (No. 11-210)) (internal quotation mark omitted).

[56] *Chappell*, 691 F.3d at 399 (quoting *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring in the judgment)); *see also id.* at 397 (crediting without evidence or substantial discussion "the very real problem of law enforcement impersonations and the misfortunes that can flow from them"). Justice Alito's and Judge Wilkinson's assumptions of falsity's harm draw strength from the view that lies inflict harm "not on a targeted individual" but on "social context" and "the fabric of a culture." *See* Stanley Fish, *Hate Speech and Stolen Valor*, N.Y. TIMES (July 2, 2012, 9:15 PM), http://opinionator.blogs.nytimes.com/2012/07/02/hate-speech-and-stolen-valor/; *cf.* IMMANUEL KANT, *On a Supposed Right to Lie Because of Philanthropic Concerns*, *in* GROUNDING FOR THE METAPHYSICS OF MORALS 63, 64 (James W. Ellington trans., 3d ed. 1993) (arguing that lies do not exist in isolation but rather "wrong . . . mankind in general"). Harm to social context seems less quantifiable and more vulnerable to unsupported assertion than harm to specific individuals.

Admittedly, § 18.2-174 targets activity — impersonating a police officer — that seems intuitively more dangerous than Alvarez's false claim that he won a Medal of Honor. But it is § 18.2-174's exercise clause, not its pretending clause, that more clearly serves this safety interest. Although Judge Wilkinson offered purported examples of speech prohibited by the pretending clause but not the exercise clause,[57] a straightforward reading of the exercise clause reveals that it already subsumes Judge Wilkinson's examples. Posing as a law enforcement officer to board an airplane, gain entrance to a home, or abduct a child plausibly involves the exercise of "functions, powers, duties and privileges incident to" a law enforcement office.[58]

Even if one resists construing "functions, powers, duties and privileges" broadly, Judge Wilkinson's examples do not in fact exemplify the core behavior that he acknowledged the pretending clause targets: "pretending . . . without more."[59] Indeed, posing as a police officer to board a plane, gain entrance to a home, or abduct a child involves both speech *and* an independent, accompanying action by the speaker. Judge Wilkinson's examples elide the difference between § 18.2-174's two parts, failing to identify clear, pretending clause–specific behavior that endangers the public safety. Thus, *Chappell* did not identify the "plainly legitimate sweep" of the *pretending clause*, referring only to the *statute's* legitimate applications without disentangling the pretending clause's relationship to harm.[60]

Judge Wilkinson's analysis further obscured the tailoring inquiry by characterizing the false statements § 18.2-174 prohibits as "more in the nature of conduct than speech"[61] — a determination that has elsewhere influenced the Supreme Court's assessment of the danger and restrictability of free expression.[62] Where speech seems itself an injury

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[57] *Chappell*, 691 F.3d at 392.

[58] *See id.* at 404 n.5 (Wynn, J., dissenting) (quoting VA. CODE ANN. § 18.2-174 (2009)) (arguing such "duties and privileges" include "obtaining the authority to board an airplane or enter a home").

[59] *Id.* at 392 (majority opinion); *see also id.* at 407 (Wynn, J., dissenting) ("To interpret the [pretending] clause as requiring the same thing [as the exercise clause] would render it superfluous . . . . [T]he [pretending] clause is best read as applying to situations where individuals claim or even pretend to be police officers, even if they do nothing associated with the 'functions, powers, duties and privileges' of being an officer . . . ." (citation omitted)).

[60] Indeed, Judge Wilkinson did not refer to the pretending clause again after his initial distinction of it, referring only to § 18.2-174 as a whole. The conclusion of Judge Wilkinson's analogy to the statutes approved in *Alvarez* — "that *§ 18.2-174* speaks to the very real problem of law enforcement impersonations and the misfortunes that can flow from them," *id.* at 397 (majority opinion) (emphasis added) — thus largely obscures the difficult question of the pretending clause's function.

[61] *Id.* at 395.

[62] For example, in *United States v. Stevens*, 130 S. Ct. 1577 (2010), Chief Justice Roberts distinguished the impermissible prohibition of portraying animal cruelty from the permissible prohibition of selling child pornography on the basis that the "market for child pornography was 'in-

or more intimately tied to harm, a court's scrutiny of the immediacy of injury accompanying false statements and the need for statutes to protect against it appear less urgent. The facts of *Chappell* lent support to Judge Wilkinson's analogy insofar as Chappell followed his lie with action when the Park Police Officer continued to question him. But Judge Wilkinson's overinclusive conclusion that "the behavior prohibited by § 18.2-174 is closer to conduct than speech"[63] again neglected the most challenging behavior that is prohibited by the pretending clause — "pretending . . . without more"[64] — and that is plausibly the clause's sole, or at least most natural, target.

In effect, the steps of Judge Wilkinson's analysis — assuming the harm of false statements, obscuring the pretending clause's independent content, and characterizing the regulated speech as conduct — "automatically incorporate[d] the factors that provide[d] the state's possible justifications for its regulation into the initial definition of" the regulated speech.[65] By uncritically assuming these factors, *Chappell* implicitly framed the statute's "plainly legitimate sweep" as targeting speech with an immediately harmful effect, *not* as targeting speech considered as an analytically separate concept from its effects. The latter framing demands some scrutiny in order to assess what harm, if any, false speech creates and what, if anything, a statute accomplishes in its prevention. Judge Wilkinson's framing did not.[66]

Although *Alvarez* did approve of a federal impersonation statute similar to § 18.2-174,[67] Judge Wilkinson's comparison of the statutes

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trinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials,[']" unlike the portrayal of animal cruelty, which could be more easily separated into a speech act apart from the targeted harm. *Id.* at 1586 (quoting New York v. Ferber, 458 U.S. 747, 759, 761 (1982)). Similarly, to the once-ascendant movement to enact antipornography ordinances, "pornography [was] not an idea; pornography [was] the injury." Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (famously striking down one such ordinance and rejecting the equation of speech to harm).

63 *Chappell*, 691 F.3d at 396.

64 *Id.* at 392.

65 Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1096 (1990); *cf. id.* (applying this observation to the process of defining the scope of fundamental liberties).

66 Undoubtedly, all "speech has effects," and "the expression of a view will often cause people to act on it." Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 879 (1993); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 925 (2d ed. 1988) ("It is an inadequate response to argue . . . that [anti-pornography] ordinances . . . take aim at harms, not at expression. *All* viewpoint-based regulations are targeted at some supposed harm . . . ." (footnote omitted)). Still, the proximity of speech to harmful conduct or effects centrally motivated the reasoning in cases like *Stevens*; *New York v. Ferber*, 458 U.S. 747 (1982); *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985); and *Alvarez*.

67 *See* United States v. Alvarez, 132 S. Ct. 2537, 2546 (2012) (plurality opinion); *id.* at 2554 (Breyer, J., concurring in the judgment). The statute criminalizes "falsely assum[ing] or pretend[ing] to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and act[ing] as such." 18 U.S.C. § 912 (2006).

failed to account for the relevant differences between them. Judge Wilkinson relied on the comparison for "confirm[ation] that § 18.2-174 has a plainly legitimate sweep,"[68] but the federal statute, unlike § 18.2-174, requires that individuals both speak falsely and "act" in the false role.[69] Judge Wilkinson rightly noted that the *Alvarez* majority opinions did not explicitly make action requirements the "*sine qua non* of officer impersonation statutes,"[70] but the rigorousness of the opinions' scrutiny, their search for "limiting features,"[71] and their distrust of broadly ranging statutory text suggest that omission of an action requirement should at least advise further inquiry.

Even if § 18.2-174's validity does not turn on the presence or absence of an action requirement, *Chappell*'s reasoning does not provide a way to distinguish either § 18.2-174 or the SVA from the permissible restrictions cited in *Alvarez*. Rather, the SVA resembles *Alvarez*'s permissible restrictions in every relevant way that the pretending clause resembles them, except one: both the SVA and pretending clause prohibit impersonation "without more" and without textual limit, differing only in the nature of the harm they target. Inquiring into harm, however, is the very function that scrutiny serves and that textual comparisons do not address. In short, not all restrictions of false impersonation are equal. Judge Wilkinson's analogy to the federal statute does not explain why the pretending clause, but not the SVA, escapes constitutional infirmity, apart from the analogy's teleological conclusion that *Alvarez* permitted statutes targeting something other than speech and that § 18.2-174 targeted something other than speech.[72]

Finally, Judge Wilkinson diverged from the *Alvarez* majority opinions in his assessment of § 18.2-174's danger to free expression. In *Alvarez*, the majority opinions referred only to the "sweeping, quite unprecedented reach"[73] of the SVA's text, not the factual likelihood of its unconstitutional application, in concluding that the Act risked "proba-

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[68] *Chappell*, 691 F.3d at 397 n.3.

[69] 18 U.S.C. § 912; *see also Chappell*, 691 F.3d at 400–01 & 401 n.2 (Wynn, J., dissenting).

[70] *Chappell*, 691 F.3d at 397 n.3 (majority opinion).

[71] *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment).

[72] Professor John Hart Ely criticized the teleological quality of the Court's holding in *United States v. O'Brien*, 391 U.S. 367 (1968), which approved a certain class of statutes that, among other features, "further[] an important or substantial governmental *interest [that] is unrelated to the suppression of free expression*." John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975) (second alteration in original) (quoting *O'Brien*, 391 U.S. at 377) (internal quotation mark omitted). Since the government will always claim an interest unrelated to expression, Ely concluded that the *O'Brien* test should be interpreted as referring not to the state's "ultimate interest," "but rather to the causal connection the state asserts." *Id.* at 1497. Merely stating a statute's unrelated interest does little work if not accompanied by interrogation of whether the statutory language actually serves that interest.

[73] *Alvarez*, 132 S. Ct. at 2547 (plurality opinion).

ble"[74] and "significant"[75] First Amendment harm. The plain text of § 18.2-174's pretending clause "ranges [as] broadly"[76] as the SVA, applying to "pretend[ing]" without any limitation in "family, social, or other private contexts"[77] and to pure speech or "bar stool braggadocio."[78] Yet, like the *Alvarez* dissenters,[79] Judge Wilkinson discounted § 18.2-174's danger to protected expression, determining the statute's First Amendment risk not by its text but by the "actual fact" of its past and future enforcement.[80] Further, Judge Wilkinson placed faith in government not to abuse its power to proscribe false speech, again reflecting less *Alvarez*'s plurality[81] than the decision's dissent.[82]

Chappell thus circumvented *Alvarez*'s central inquiry into the harm of false speech and the SVA's tailoring to its prevention. Instead of meaningfully scrutinizing § 18.2-174, Judge Wilkinson superficially analogized the statute to the restrictions *Alvarez* approved, incorporating into his definition of the regulated speech the very proximate nexus to harm that *Alvarez* required. By assuming this immediacy of harm and by minimizing § 18.2-174's risk to free expression, *Chappell* conformed in substance to a vision of false speech restrictions shared not by the *Alvarez* majority opinions but by the decision's dissent. *Chappell*'s analogy to the statutes in *Alvarez* thus provides a blueprint to future courts seeking to avoid the scrutiny that *Alvarez* applied.

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[74] *Id.*; *see also id.* at 2548 (stating that the government's exercise of power under the SVA "casts a chill . . . the First Amendment cannot permit").

[75] *Id.* at 2555 (Breyer, J., concurring in the judgment).

[76] *Id.*

[77] *Chappell*, 691 F.3d at 402 (Wynn, J., dissenting) (quoting *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment)).

[78] *Id.* at 403 (quoting *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring in the judgment)) (internal quotation marks omitted).

[79] Justice Alito determined that the SVA "present[ed] no risk at all that valuable speech will be suppressed." *Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting). Instead, he placed his faith in legislatures, which would safeguard against constitutional harm. *See id.* at 2565.

[80] *See Chappell*, 691 F.3d at 396; *see also id.* at 393.

[81] The plurality invoked *Nineteen Eighty-Four* in a dystopian picture of the government's "broad censorial power" to declare truth were the Court to allow the SVA to stand. *See Alvarez*, 132 S. Ct. at 2547–48 (plurality opinion) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Centennial ed. 2003)). Judge Wynn criticized Judge Wilkinson for justifying "an otherwise overbroad statute . . . based on its history of past enforcement," *Chappell*, 691 F.3d at 408 (Wynn, J., dissenting), "leav[ing] us at the mercy of *noblesse oblige* . . . [and] the Government['s] promise[] to use it responsibly," *id.* at 409 (quoting United States v. Stevens, 130 S. Ct. 1577, 1591 (2010)) (internal quotation mark omitted).

[82] *See, e.g.*, *Alvarez*, 132 S. Ct. at 2565 (Alito, J., dissenting) ("The safeguard against [hypothetical, overreaching] laws is democracy, not the First Amendment. Not every foolish law is unconstitutional."). Notably, this same dispute played out in *Stevens*, but to opposite effect. *Compare Stevens*, 130 S. Ct. at 1588 (majority opinion) ("We read [the challenged statute] to create a criminal prohibition of alarming breadth."), *with id.* at 1594–97 (Alito, J., dissenting) (rejecting the majority's alarm over the statute's overbreadth by focusing on the "statute's application to real-world conduct, not fanciful hypotheticals," *id.* at 1594).