NOTE

COMPELLED IDENTITY: EEOC POLICY TO RECLASSIFY ETHNICITY AS A FREE SPEECH VIOLATION

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The Equal Employment Opportunity Commission (EEOC) requires employers to affirmatively classify employees who decline to self-identify with a particular ethnic group into one of seven broadly recognized ethnic categories as part of the Employer Information Report EEO-1 regulatory process. To comply with this reporting requirement, the EEOC offers guidance recommending that employers use visual observation to determine the ethnicity of employees who decline to self-identify. This Note will argue that this process constitutes a form of compelled speech in violation of the First Amendment. Specifically, this Note will demonstrate that self-identification is a form of speech cognizable under the First Amendment, and the EEOC's requirement that employers reclassify the ethnic status of employees who decline to self-identify constitutes a form of compelled speech in violation of the First Amendment.

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INTRODUCTION

How would you feel if your employer asked you to identify the race of one of your coworkers based on visual observations alone, despite knowing that your coworker is uncomfortable disclosing this information for any one of a myriad of reasons? You might be surprised to find that your employer is likely making an honest attempt to comply with the Equal Employment Opportunity Commission's (EEOC) reporting requirement that employers provide data to the EEOC on the ethnic composition of their workforce.[1] Under this regulatory mechanism, employers of more than 100 employees must submit an "Employer Information Report EEO-1" containing data on the ethnic identity of all employees.[2] To adhere to this

1. *See* 29 C.F.R. § 1602.7 (2019); *EEO-1 Frequently Asked Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-frequently-asked-questions-and-answers [https://perma.cc/YZ8M-FJKT] ("The EEO-1 Report is a compliance survey mandated by federal statute and regulations.").

2. *See* § 1602.7 (mandating that covered employers fill out EEO-1 "in conformity with the directions set forth in the form and accompanying instructions"). See *infra*

requirement, EEOC guidance indicates that employers may use visual observation to classify employees who decline to self-identify as a member of a particular ethnic group.[3]

This regulatory practice has been the subject of much debate. Some commentators have criticized it as being an ineffective anti-discrimination policy.[4] Others believe that this procedure can have an adverse effect on non-binary employees.[5] Litigants have sought redress in court on the basis that use of the Employer Information Report EEO-1 violates their freedom of association[6] or that reclassification of ethnic status, without consent, constitutes a disparate treatment claim under Title VII.[7] This

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Part I for a discussion of the Employer Information Report EEO-1 and how it is used to gather information about employees' ethnic identities.

3. *See* § 1602.13 ("Employers may acquire the information . . . by visual surveys . . . ."); *see also Fact Sheet for EEO-1 Survey Filers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/eeo1survey/fact_sheet_filers.cfm [https://perma.cc/MYW6-M792] (noting that self-identification is preferred, but employers may use observation or employment records for employees who decline to self-identify).

4. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231, 1252 (1994) (noting "we cannot be sure that . . . the 'visual survey' methods used by employers will closely track the distribution of race-based disadvantage at which the remedial thrust of [the EEO-1] policy is presumably aimed. An enforcement system based upon the comparison of data derived from [this type] of procedure arguably does a poor job of addressing the remedy to the wrong"); Gloria J. Liddell et al., *Is Obama Black? The Pseudo-Legal Definition of the Black Race: A Proposal for Regulatory Clarification Generated from a Historical Socio-Political Perspective*, 12 SCHOLAR 213, 246 (2010) (describing the administration of the Employer Information Report EEO-1 as a "subjective method of identification . . . fraught with the possibility of error in many cases"); *see also* Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1539 (2014) (arguing the government is incorrect to assume "that if one is asked about one's privately held racial beliefs, these views easily can be collected in the standard data-collection form used to record documentary race").

5. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 952–54 (2019) (pointing out the EEOC's ability to survey multi-racial ethnicities but its implicit refusal to survey transgender and non-binary identifying employees).

6. *See* EEOC v. Ass'n of Cmty. Orgs. for Reform Now, No. 95-30347, 1996 U.S. App. LEXIS 44921, at *9–12 (5th Cir. Mar. 20, 1996) (holding that the required use of the Employer Information Report EEO-1 did not violate a non-profit's right to private association, right to expressive association, or organizational right to privacy).

7. Padilla v. N. Broward Hosp. Dist., No. 06-CIV-60934, 2007 U.S. Dist. LEXIS 59405, at *9–11 (S.D. Fla. Aug. 14, 2007) (dismissing the retaliation claim under Title VII, where plaintiff's opposition to his change in ethnic classification from white to Hispanic in his employer's diversity reporting was not a "statutorily protected activity"

Note contributes to that debate by advancing a novel First Amendment argument to demonstrate that the Employer Information Report EEO-1 is unconstitutional. As this Note discusses, the First Amendment protects not only the right to speak, but also the right to refrain from speaking.[8] Applying that important principle of constitutional law, this Note argues that the EEOC's requirement that employers reclassify employees who decline to self-identify constitutes a form of compelled speech in violation of the First Amendment. In that vein, this Note builds on a growing conversation surrounding the tense relationship between compelled speech and government regulation.[9]

This Note proceeds in three parts. Part I begins with a discussion of the history and policy underlying the application of the Employer Information Report EEO-1.[10] Part II discusses relevant First Amendment principles, beginning by addressing the threshold question of what qualifies as speech protected by the First Amendment, and then discussing compelled speech jurisprudence. Part III applies the precedents cited in Part II to argue that the EEOC's requirement that an employer affirmatively classify an employee as a member of a particular ethnic group, without the employee's consent, constitutes compelled speech and thus violates the First Amendment. Finally, this Note concludes that the EEOC must adjust the way it administers the Employer Information Report EEO-1 to conform to constitutional standards.

I. THE EMPLOYER INFORMATION REPORT EEO-1

The Employer Information Report EEO-1 is a regulatory mechanism of the EEOC intended to hold employers accountable for ensuring

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and thus plaintiff lacked the requisite "reasonable, good-faith belief" that the conduct was unlawful), *aff'd*, 270 F. App'x 966 (11th Cir. 2008).

8. See *infra* Section II.B for a discussion of compelled speech jurisprudence.

9. *See generally* Elizabeth A. Aronson, Note, *The First Amendment and Regulatory Responses to Workplace Sexual Misconduct: Clarifying the Treatment of Compelled Disclosure Regimes*, 93 N.Y.U. L. REV. 1201, 1211 (2018) (mentioning that disclosure differs from other regulations due to disclosures being a form of communication, which makes disclosures "peculiarly vulnerable to First Amendment claims"); Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 599 (2014) (noting that the First Amendment does not look positively on government efforts to require speech).

10. This Note refers to the reporting procedure that employers are obligated to undertake in this context as "Employer Information Report EEO-1." By contrast, this Note uses "EEO-1 questionnaire" when referring to paperwork that an employee completes in order to self-identify.

diversity in the workplace.[11] While this underlying objective is no doubt important in society and the business community, this Note questions the constitutionality of the means employed by the EEOC to achieve this goal. In setting the stage for that debate, this Part proceeds with a discussion of the Employer Information Report EEO-1 process and its requirement that employers classify the ethnicity of employees who decline to self-identify.

The EEOC began using the Employer Information Report EEO-1 as a reporting tool upon the agency's creation under the Civil Rights Act of 1964.[12] A survey of the inaugural Employer Information Reports EEO-1 revealed data indicating a strong imbalance in the racial composition of the workforce.[13] For example, forty-three percent of New York City employers reported having no black workers in high paying jobs, while ninety-nine percent of African Americans in the Carolinas were reported to hold the lowest paying job categories.[14]

In its current form, the Employer Information Report EEO-1, as promulgated under 29 C.F.R. § 1602.7, requires employers of 100 or more employees to submit data to the EEOC on the racial composition of their workforce.[15] To adhere to this reporting requirement, employers typically

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11. *See EEO-1 Frequently Asked Questions and Answers*, *supra* note 1 (stating that the EEOC uses EEO-1 data to support civil rights enforcement and analyze employment patterns); *see also Job Patterns for Minorities and Women in Private Industry (EEO-1)*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/statistics/employment/jobpatterns/eeo1 [https://perma.cc/27FM-EBTH] (providing links to aggregated employment statistics gathered by the EEO-1 Report); *see also Enforcement and Litigation Statistics*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/statistics/enforcement-and-litigation-statistics [https://perma.cc/7S4N-U6LZ] (linking to various categories of discrimination statistics brought to the EEOC over time, such as race, religion, sex, and retaliation based charges, among others). *See generally Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/overview [https://perma.cc/ZT58-D3EV] ("The EEOC's Mission is to: Prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace.").

12. 1 U.S. EQUAL EMP'T OPPORTUNITY COMM'N ANN. REP. 2, 11 (1966). In its first year, the EEOC facilitated conciliation agreements with 111 employers including an agreement affecting 5,000 black workers in Newport News, Virginia. *Id.* at 8–9, 20.

13. *Id.* at 5–6.

14. *A History of the EEO-1 Report*, COMPLETE PAYROLL (Dec. 2, 2019, 7:00 AM), https://blog.completepayroll.com/a-history-of-the-eeo-1-report [https://perma.cc/9PRT-3GFH].

15. 29 C.F.R. § 1602.7 (2019); *EEO-1 Instruction Booklet*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/eeo-1-survey/eeo-1-instruction-booklet

prompt employees to self-identify as belonging to one of seven ethnic categories during the recruitment or onboarding process: (1) Hispanic or Latino, (2) White, (3) Black or African American, (4) Native Hawaiian or Pacific Islander, (5) Asian, (6) Native American or Alaska Native, or (7) Two or More Races.[16] To gather this information, the Society for Human Resources Management recommends a basic checkbox-style questionnaire prompting employees to voluntarily identify with one of the seven enumerated ethnic groups, or check a box indicating that the employee "do[es] not wish to disclose."[17] When an employee elects not to disclose her ethnic identity, the EEOC recommends "visual surveys of the work force" to "acquire the information necessary for completion" of the Employer Information Report EEO-1.[18]

Many people are alarmed to find out that their employer has subjectively determined what their identity is without their consent, especially in light of the invasive practice of using visual observation to make that determination.[19] For example, three Boulder Colorado

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[https://perma.cc/3VEB-A5X8]. The Employer Information Report EEO-1 has undergone a series of changes over the years, with the most recent amendments taking effect in 2007. George S. Howard & Julia E. Judish, *Employers Must Comply with New Requirements*, LAW360 (Mar. 22, 2007, 12:00 AM), https://www.law360.com/articles/21126/employers-must-comply-with-new-requirements. The previous structure of the Employer Information Report EEO-1 included five race and ethnicity categories. Revision of EEO-1 Comment Request, 68 Fed. Reg. 34965, 34967 (June 11, 2003) (listing the categories prior to the proposed changes which were adopted in 2007). The amendment created a new category for race and ethnicity called "two or more races" and divided the category of "Asian or Pacific Islander" into two categories, "Asian" and "Native Hawaiian or Other Pacific Islander." *Id.*

16. *See Sample Self-Identification Forms*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employers/sample-self-identification-forms [https://perma.cc/KT5Z-VML8] (providing links to sample self-identification forms and instructing employers not to use any race or ethnicity categories other than those used on the Employer Information Report EEO-1); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, OMB NO. 3048-0007, EMPLOYER INFORMATION REPORT EEO-1 at 2 [hereinafter EMPLOYER INFORMATION REPORT EEO-1], https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2-2.pdf [https://perma.cc/VG4P-A6K4] (providing columns in which employers can report the number of employees for each race or ethnicity).

17. *EEO-1 Voluntary Self Identification Form*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/cms_019910.aspx.

18. *See* 29 C.F.R. § 1602.13 (elaborating that post-employment records can be utilized to fulfil the EEOC's reporting requirements).

19. *See, e.g.*, John Bear, *Boulder County HR Employees Visually Identified Race of Some County Workers*, DAILY CAMERA, (June 1, 2018, 8:15 PM), https://www.dailycamera.com

County Commissioners issued a letter in 2018 apologizing for the county's use of this practice and acknowledged that the use of visual observation to classify employees "raises concerns about bias and institutional racism and has caused feelings of anxiety and even anger among some staff."[20] New York University came under similar public scrutiny because "the practice of assigning an employee's race based on their appearance raises ethical questions."[21] Yet it is hard to blame these institutions for assigning employees' races when they are following the government's regulatory guidance, a compliance tactic legitimized through common industry practices.[22] Regardless of the morality of the Employer Information Report EEO-1 as a product of government regulation, the practice's controversial nature is symptomatic of a legal ailment plaguing the EEOC's regulatory framework: the use of unconstitutionally compelled speech to elicit racial data from employers.[23]

Government reporting and classification requirements touching on racial categorization have been the subject of much debate throughout American history. From the malign debate surrounding the three fifths compromise,[24] to the story of Susie Phipps, who was classified by the

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/2018/06/01/boulder-county-hr-employees-visually-identified-race-of-some-county-workers [https://perma.cc/GPM4-PFZK] (reporting concerns over Boulder County workers using visual inspection to report ethnicity).

20. *Id.* (describing that an affected employee who declined to self-identify subsequently found the race box filled in while using human resources software).

21. Sayer Devlin, *NYU Guesses Racial, Ethnic Identity of Some Employees*, WASH. SQUARE NEWS (April 17, 2017), https://nyunews.com/2017/04/17/nyu-guesses-racial-ethnic-identity-of-some-employees [https://perma.cc/EE25-GFVV] (discussing NYU's supposed use of the visual observation method to report ethnicity for the EEO-1 Report).

22. *See* Kate Tornone, *Hack Your EEO-1 Report: A Guide to Employee Data Reporting*, HR DIVE (Oct. 27, 2017), https://www.hrdive.com/news/hack-your-eeo-1-report-a-guide-to-employee-data-reporting/508301 [https://perma.cc/NV4Y-CZQG] (quoting two attorneys from Eckstein Becker & Green who stated that "[i]f the employee does not complete the survey, you may take the information from any applicable existing employment records, and if none exist, make a best guess based on a visual observation of the employee"); *Don't Miss the September 30th Deadline to File EEO-1 Reports!*, UNDERWOOD, https://www.uwlaw.com/insights/dont-miss-the-september-30th-deadline-to-file-eeo-1-reports [https://perma.cc/5M4H-8NXW] ("If an employee refuses to [self-report], the EEOC suggests that then . . . employers use employment records or visual observation.").

23. See *infra* Section III.B for an analysis of employers' EEO-1 responses for employees who decline to self-identify as a form of compelled speech.

24. *Madison Debates*, YALE L. SCH. (1787), https://avalon.law.yale.edu/18th_century/debates_711.asp#17 [https://perma.cc/3P9U-CPXZ] (recalling how "Mr. Wilson did not well see on what principle the admission of blacks in the proportion of three

state of Louisiana as "[C]olored" after forty-three years of life believing she was white;[25] the government frequently runs into controversy where it seeks to classify the racial status of an individual. Whether it is a person's identity on surveys collected by the Census Bureau,[26] a politician's controversial ancestry,[27] or someone completing an application for asylum,[28] the ability of an individual to maintain the privacy of their racial identity is as relevant as ever. Indeed, this is one of the core values that both the Civil Rights Act of 1964 and the First Amendment seek to protect.[29] Accordingly, the First Amendment obligates the EEOC to adjust its regulatory scheme to accommodate the privacy interests of job-seekers[30]

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fifths could be explained. Are they admitted as Citizens? then why are they not admitted on an equality with White Citizens? are they admitted as property? then why is not other property admitted into the computation?").

25. *See* Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 8 (1997) (highlighting Mrs. Phipps, who sued the state of Louisiana to change her state designated racial classification in a case ultimately denied cert. by the Supreme Court).

26. *See* Hansi Lo Wang, *Why Is The Census Bureau Still Asking A Citizenship Question on Forms?*, NPR (Aug. 9, 2019, 5:00 AM), https://www.npr.org/2019/08/09/743296249/why-is-the-census-bureau-still-asking-a-citizenship-question-on-forms [https://perma.cc/Q2RD-SWPV] (noting that there will not be a citizenship question on the 2020 census but that the Census Bureau collects citizenship data through other surveys such as the American Community Survey and the Current Population Survey).

27. *See* Garance Franke-Ruta, *Is Elizabeth Warren Native American or What?*, ATLANTIC (May 20, 2012), https://www.theatlantic.com/politics/archive/2012/05/is-elizabeth-warren-native-american-or-what/257415 [https://perma.cc/CT38-USHD] (noting how political figures such as Madeleine Albright, Marco Rubio, and Susanna Martinez have all misstated family stories about their identity, often due to reliance on oral history passed down by family members).

28. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., OMB NO. 1615-0067, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL, https://www.uscis.gov/i-589 [https://perma.cc/6HBU-H4CP] (requesting personal data such as "Race, Ethnic, or Tribal Group," gender, marital status, and nationality); *see also* Gregory Taylor, Comment, *Dillon's Rule: A Check on Sheriffs' Authority to Enter 287(g) Agreements*, 68 AM. U.L. REV. 1053, 1057–58 (2019) (describing recent trends in increased immigration rates).

29. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641–42 (1943) ("We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes."); Rich, *supra* note 4, at 1508 ("Title VII can and should protect employees from sanctions based on their self-identification decisions and hostile uses of employees' private racial data.").

30. *See* Rich, *supra* note 4, at 1505 ("[W]e are currently living in the era of 'elective race'—a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning.").

and multi-ethnic professionals,[31] a principle that becomes increasingly critical in today's pandemic-induced world of telecommuters.[32]

II. FIRST AMENDMENT PROTECTIONS AND COMPELLED SPEECH

The First Amendment protects the freedom of speech and expression.[33] It stands for principles of individualism, personal dignity, and political accountability by embracing the notion that a rich "marketplace of ideas" is indicative of a healthy democracy.[34] The First Amendment furthermore protects not only the right to speak, but the right to decline to speak.[35] In that vein, one of the core values of the marketplace of ideas is that the government may not compel speech.[36] The rationale behind this fixture of American constitutional law is the idea that the right to refrain from speaking protects the concept of

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31. *See id.* at 1538 ("[T]here have been changes in how many Americans understand racial identity, and these changes are affecting the approach these Americans take when making decisions about racial self-identification. Individuals appear to be less influenced by ascriptive race, namely racially associated physical traits or publicly observable racially marked actions. Instead, racial self-definition has become a far more subjective, complicated process.").

32. Drew Desilver, *Before the Coronavirus, Telework was an Optional Benefit, Mostly for the Affluent Few*, PEW RES. CTR. (Mar. 20, 2020), https://www.pewresearch.org/fact-tank/2020/03/20/before-the-coronavirus-telework-was-an-optional-benefit-mostly-for-the-affluent-few [https://perma.cc/6QLL-ATS2].

33. U.S. CONST. amend. I.

34. Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." (citation omitted)); *see* Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995) (contending that there is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message"); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."); *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 1238–42 (5th ed. 2017) (discussing four primary foundational principles underlying the First Amendment: (1) "Self-Governance," (2) "Discovering Truth," (3) "Advancing Autonomy," and (4) "Promoting Tolerance").

35. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796–97 (1988).

36. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) (explaining that government-compelled speech may contribute to driving out certain views from the marketplace of ideas).

"individual freedom of mind."[37] Thus, courts exercise caution when dealing with cases of compelled speech as it "raise[s] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."[38]

This Part begins with a discussion of First Amendment protections as they apply to pure speech and expressive conduct. Subsequently, this Part provides an overview of compelled speech by tracing the doctrine from its inception to its contemporary application. In synthesizing the current state of compelled speech case law, this Note will delineate between two critically different forms of speech compulsion: where the government unconstitutionally requires the speaker to assume a particular viewpoint and instances of constitutionally permissible compulsion of statements grounded in fact. From there, this Part completes the jurisprudential framework applicable to the Employer Information Report EEO-1 by drawing on instructive case law from the realm of political speech.

A. What Constitutes Speech Under the First Amendment?

The most easily understandable form of speech protected by the First Amendment is "pure speech," which typically involves the formation of actual words, whether verbally or in text.[39] However, the "First Amendment does not only protect 'verbal and written expression, but also symbols and conduct that constitute "symbolic speech."'"[40] As Professor Robbins notes, "[s]ociety's conception about what constitutes speech has evolved over time and now encompasses many forms of symbolic expression in addition to pure speech."[41] To make the determination of what constitutes

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37. W. Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

38. *Turner*, 512 U.S. at 641 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)). Analyzing the applicable standard of review is beyond the scope of this Note, but compelled speech generally warrants the most exacting level of judicial scrutiny. *Id.* at 641–42.

39. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (noting that "pure speech" merits "comprehensive protection under the First Amendment"); Zachary Shklar, Note, *Social Networking and Freedom of Speech: Not "like" Old Times*, 78 MO. L. REV. 665, 670 (2013) ("Pure speech generally encompasses words that are spoken or written, including 'books, magazines, newspapers, radio, television, [and] public speeches.'") (alteration in original); *see also Speech*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining speech as "[w]ords or conduct limited in form to what is necessary to convey the idea").

40. Pounds v. Katy Indep. Sch. Dist., 517 F. Supp. 2d 901, 915 (S.D. Tx. 2007) (quoting Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 282 (5th Cir. 2001)).

41. Ira. P. Robbins, *What Is the Meaning of "like"?: The First Amendment Implications of Social-Media Expression*, 7 FED. CTS. L. REV. 123, 126–27 (2014). Some courts and

expressive activity, the Supreme Court has formulated a two-part test deriving from two major Supreme Court cases: *Spence v. Washington*[42] and *Texas v. Johnson*.[43]

In *Spence*, the Court determined that hanging an American flag upside down with a peace sign on the back amounted to a form of First Amendment speech.[44] In making this determination, the Court looked to "the nature of [the speaker's] activity" and "the factual context and environment in which it was undertaken."[45] The Court elaborated on this test in *Johnson* by holding that burning the American flag constitutes First Amendment expression: "(1) whether the speaker intends for the conduct to convey a 'particularized message,' and (2) the 'likelihood [is] great' that a reasonable third-party observer would understand the message."[46]

Professor Robbins has offered insight into the *Spence-Johnson* test and its evolution over time.[47] Professor Robbins notes that six years after the decision in *Johnson*, the Court relaxed the "particularized message prong" of the *Spence-Johnson* test in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*.[48] This decision confirmed that "an activity may constitute speech under the First Amendment even if it does not convey a clear message."[49] Professor Robbins goes on to argue that the act of clicking "Like" on social media is symbolic speech because it satisfies the *Spence-Johnson* test.[50] He argues that clicking "Like" not only generates textual communication which populates in the news feeds of other Facebook users, but also serves as a clear indication of a person's support for, or subjective viewpoint

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commentators distinguish between "pure speech" (i.e. literal words) and "expressive" or "symbolic" speech, and each category enjoys a somewhat different degree of protection under the First Amendment. Ryan Walsh, Comment, *Painting on a Canvas of Skin: Tattooing and the First Amendment*, 78 U. CHI. L. REV. 1063, 1067–68 (2011).

42. 418 U.S. 405 (1974) (per curiam).

43. 491 U.S. 397 (1989).

44. *Spence*, 418 U.S. at 406.

45. *Id.* at 409–10.

46. *Johnson*, 491 U.S. at 404 (citing *Spence*, 418 U.S. at 410–11); Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890, 906 (Az. 2019).

47. Robbins, *supra* note 41, at 130.

48. 515 U.S. 557 (1995); Robbins, *supra* note 41, at 130.

49. Robbins, *supra* note 41, at 131.

50. *See id.* at 141, 143 (further arguing that "[e]ven if clicking like is not a clear and articulable message under the *Spence-Johnson* test, it still meets the relaxed criteria set out in *Hurley*").

of, a particular Facebook post.[51] This, Professor Robbins argues, meets the first prong of the *Spence-Johnson* test.[52] Furthermore, clicking "Like" is expressive conduct that is likely to be widely understood, which in turn satisfies the second prong of the test.[53] Even if clicking "Like" does not satisfy *Spence-Johnson* in its original form, Professor Robbins contends that it still meets the lesser standard required by *Hurley* insofar as no "clear and articulable message" is necessary to merit First Amendment protection.[54]

Courts applying *Spence* and its progeny have held a wide range of different conduct to merit First Amendment protection.[55] For example, in *Junger v. Daley*,[56] the Sixth Circuit held that computer encryption source code is protected by the First Amendment.[57] In its analysis, the court reasoned that a form of expression that has a "functional capacity" to convey a message, even if "unintelligible to many," nonetheless merits protection under the First Amendment where it can serve as a form of cognizable communication among a select group, such as computer programmers.[58] Similarly, in *Holloman ex rel. Holloman v. Harland*,[59] the

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51. *Id.* at 141–42.

52. *See id.* at 142 (comparing clicking Like on a political candidate's Facebook page to wearing an armband or burning a flag as a symbolic message of solidarity).

53. *Id.* at 142.

54. *Id.* at 143.

55. *See* Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003) (brandishing a weapon at an anti-gun control rally); Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 392 (4th Cir. 1993) (fraternity's "ugly woman contest"); McClure v. Ashcroft, No. CIV.A.01-2573, 2002 WL 188410, at *1 (E.D. La. Feb. 1, 2002) (glow sticks, pacifiers, vaporizers, and other items "commonly used to enhance . . . the ingestion of ecstasy" at a rave concert) *vacated on other grounds by* 335 F.3d 404 (5th Cir. 2003); Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co., 510 F. Supp. 81, 86 (D. Conn. 1981) (figure skating); *see also* Ferrell v. Dallas Indep. Sch. Dist., 392 F.2d 697, 702 (5th Cir. 1968) (assuming, without deciding, that hair style is First Amendment speech); Sandy Tomasik, *Can You Understand This Message? An Examination of* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*'s Impact on* Spence v. Washington, 89 ST. JOHN'S L. REV. 265, 267 (discussing how the different circuit courts deal with this issue). *But see* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 385 (6th Cir. 2005) (violation of school dress code); Davis v. Norman, 555 F.2d 189, 190 (8th Cir. 1977) (display of a wrecked automobile in the front yard of a house); State v. White, 560 S.E.2d 420, 421–22 (S.C. 2002) (tattooing); City of Albuquerque v. Sachs, 92 P.3d 24, 30 (N.M. Ct. App. 2004) (publicly displayed nipple piercing).

56. 209 F.3d 481 (6th Cir. 2000).

57. *Id.* at 482.

58. *Id.* at 484 (analogizing computer programmers communicating in source code to musicians communicating with a musical score).

Eleventh Circuit held that raising a fist during a recital of the pledge of allegiance constitutes expressive activity protected by the First Amendment.[60] The court in *Holloman* applied *Spence* and its progeny, noting that the critical question is "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message."[61] The Eleventh Circuit determined that holding up a fist was just as communicative as sign language or displaying a sign during a demonstration, and that the conduct was something that a reasonable student would understand to represent a symbol of dissent.[62]

A review of these cases indicates that courts and practitioners engaged in a *Spence-Johnson* analysis must look first to the subjective intent of the speaker and second to the way in which the message the speaker intends to communicate is perceived objectively.[63] As Part III.A will demonstrate, this analysis is directly applicable in the context of the Employer Information Report EEO-1 as employers who affirmatively reclassify the ethnic status of their employees engage in expressive conduct protected by the First Amendment.

B. The Compelled Speech Doctrine

The First Amendment's protection from compelled speech was enshrined as a foundational principle of constitutional law by the Supreme Court in the landmark case, *West Virginia State Board of Education v. Barnette*.[64] In *Barnette*, the Court struck down a state law obligating public school students to salute the American flag during the pledge of allegiance, holding that the First Amendment prohibits

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59. 370 F.3d 1252 (11th Cir. 2004).

60. *Id.* at 1270.

61. *Id.*

62. *Id.*

63. *See* Tomasik, *supra* note 55, at 269–71 (describing the subjective intent of the student in *Spence* and the objective likelihood that his message would be understood).

64. 319 U.S. 624 (1943). Though it was not adopted by the Supreme Court until 1943, compelled speech was first recognized as an unconstitutional infringement of First Amendment rights by the Supreme Court of Georgia in 1894 in *Wallace v. Georgia*. Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 355 (2018); *see also* Wallace v. Ga., C. & N. Ry. Co., 22 S.E. 579 (Ga. 1894). The court issued a brief one-paragraph opinion and stated its position concisely in the syllabus: "Liberty of speech and of writing is secured by the constitution, and incident thereto is the correlative liberty of silence." *Id.* at 579.

the government from compelling speech or the expression of ideas.[65] The opinion is riddled with tributes to individualism, along with skepticism of government overreach.[66] For example, Justice Jackson reasoned that compelled speech "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[67]

Importantly, *Barnette* set a framework for the future of the compelled speech doctrine by distinguishing between state action that compels the speaker to assume a certain belief and that which merely educates or informs.[68] In *Barnette*, the Court was "dealing with a compulsion of students to declare a *belief*,"[69] or one that "requires affirmation of . . . an *attitude of mind*."[70] The purpose of the flag salute and pledge of allegiance requirement, the Court reasoned, was not simply to inform or educate the students what the flag or pledge was, but rather to impose a belief upon them, a policy the Court considered to cross a constitutional boundary.[71]

In *Wooley v. Maynard*,[72] the Court extended the holding of *Barnette* to a New Hampshire statute prohibiting drivers from covering the state motto of "live free or die" displayed on state license plates.[73] The Court in *Maynard* was similarly concerned by state action compelling an individual to assume a particular opinion that cuts against their own beliefs and principles.[74] Indeed, the Court reaffirmed many of the principles underlying the decision in *Barnette*, such as the importance of individualism and the right of a speaker to decline to assume a viewpoint they feel to be "morally objectionable."[75] *Maynard* also drew comparisons to the flag salute in *Barnette* insofar as "[t]he fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable."[76]

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65. *Barnette*, 319 U.S. at 633–34.

66. *E.g.*, *id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

67. *Id.*

68. *Id.* at 631.

69. *Id.* (emphasis added).

70. *Id.* at 633 (emphasis added).

71. *Id.* at 631.

72. 430 U.S. 705 (1977).

73. *Id.* at 714–15, 717.

74. *Id.* at 714–15.

75. *Id.* at 715.

76. *Id.*

More recently, the Supreme Court reaffirmed the principles underlying the compelled speech doctrine in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*.[77] In *Janus*, the Court struck down a law automatically deducting fees from the paychecks of employees of the state of Illinois for participation in union collective bargaining agreement negotiations.[78] The plaintiff in *Janus* refused to join the union because of his opposition to the union's approach to collective bargaining, a fact which proved critical to the Court's analysis.[79] The Court reasoned that obligating state employees to contribute portions of their salaries towards an organization they might not believe in constituted compelled speech under *Barnette* and its progeny because the regulation effectively imposed a viewpoint upon the employees.[80]

In contrast to state action compelling subjective forms of speech, courts generally recognize that the government may compel statements of fact if the policy in question does not impose any particular viewpoint or attitude upon the speaker. For example, the California Supreme Court in *Beeman v. Anthem Prescription Management, LLC*[81] upheld a state law requiring third-party intermediaries between pharmacies and health insurance companies[82] to report certain data on pharmacy fees to their clients.[83] Specifically, these intermediaries were required by state law to conduct market studies every two years to determine their fee structure and disclose the results of those studies to clients.[84] While the court applied the California State Constitution's free speech protections, the opinion relied heavily on *Barnette* and its

77. 138 S. Ct. 2448 (2018).

78. *Id.* at 2486.

79. *Id.* at 2461.

80. *Id.* at 2463–64, 2486; *see also* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368, 2378 (2018) (invalidating a California law requiring crisis pregnancy centers to notify women of the availability of free or low-cost reproductive healthcare on the grounds that the law amounted to unconstitutional compelled speech).

81. 315 P.3d 71 (Cal. 2013).

82. The law in *Beeman* specifically regulated "prescription drug claims processor[s]," defined as "any nongovernmental entity which has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and which processes, consults, advises on, or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or patron thereof." *Id.* at 75.

83. *Id.* at 74–76.

84. *Id.* at 75–76.

progeny.[85] In particular, the court in *Beeman* distinguished the state law from the laws and regulations present in *Barnette*, *Maynard*, and other compelled speech cases since "[e]ach of those cases involved a law requiring a speaker to adopt, endorse, accommodate, or subsidize a moral, political, or economic viewpoint with which the speaker disagreed."[86] The court went on to draw the line at the required disclosure of "objective facts and statistics," which it held did not violate the First Amendment.[87] Similarly, in *Spirit Airlines, Inc. v. United States Department of Transportation*,[88] the D.C. Circuit held that a Department of Transportation regulation requiring airlines to make ticket price the most prominent figure listed on an advertisement was permissible under the First Amendment.[89] In particular, the court distinguished between a scenario where the government might compel the airline to say something of substance and the mere disclosure of pricing information.[90]

As these precedents demonstrate, courts carefully scrutinize all types of speech compulsion on the part of the government. However, courts draw the line where state action crosses over from a required disclosure involving a statement grounded in fact to compelled speech forcing the speaker to assume a subjective viewpoint.[91] Of course, all people are sometimes obligated to disclose certain facts to the government or other parties—date of birth to obtain a passport, address for a voter registration card, and income level on a tax

85. *Id.* at 82–84.
86. *Id.* at 84.
87. *Id.*
88. 687 F.3d 403 (D.C. Cir. 2012).
89. *Id.* at 413–14.
90. *Id.* at 414 ("[T]he Airfare Advertising Rule does not prohibit airlines from saying anything; it just requires them to disclose the total, final price and to make it the most prominent figure in their advertisements.").
91. *Compare* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (striking down New Hampshire's law requiring vehicle license plates to display the state motto), *and* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down a state law obligating public school students to salute the American flag during the pledge of allegiance), *with Spirit Airlines*, 687 F.3d at 414 (upholding the Airfare Advertising Rule requiring airlines to disclose prices as the most prominent figure in their advertising), *and Beeman*, 315 P.3d at 74–75 (upholding California law requiring prescription drug claims processors to transmit information about pharmacy fees to their clients).

return, to name a few.[92] As Professor Volokh insightfully points out, "[t]he Maynards were required to display a motto on their car as a condition of driving it on public streets, but surely at least one of them was also required to convey a good deal of information to the government to get a license to drive on those streets."[93]

C. Political Speech Jurisprudence as Guidance for a Compelled Speech Analysis

Political speech cases can be instructive when analyzing compelled speech in the context of the required disclosure of an individual's identity. Requiring an individual to disclose her identity when engaging in political speech violates the First Amendment. For example, in *McIntyre v. Ohio Elections Commission*,[94] the Court held that individuals have a right to distribute campaign literature without disclosing their identity.[95] Justice Brennan, writing for the majority, noted that anonymity "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society."[96] This rationale is also evident in other political speech cases dealing with anonymity. Both *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*[97] and *Buckley v.*

92. *See, e.g.*, 26 U.S.C. § 1 (2012) (imposing an income tax); D.C. Code § 1-1001.02(2) (2020) (requiring citizens to maintain a residence in the District to register to vote); 22 C.F.R. § 51.23 (2019) (requiring passport applicants to establish their identities).

93. Volokh, *supra* note 64, at 380. Although certain disclosures of fact are permissible under the First Amendment in the regulatory or commercial speech context, courts remain suspicious of any type of state action obligating someone to speak, even if the speech is grounded in facts. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1280–81 (2014). In practice, the constitutional difference between commercial speech and other forms of compelled speech oftentimes boils down to the standard of review. *See id.* at 1286–87. Within the context of commercial disclosures required by regulation, compelled disclosures grounded in fact are typically analyzed through rational basis review, while those imposing ideological speech through regulation merit a more heightened standard of review. *Id.* For purposes of this Note, it suffices to say that the critical distinction to be made here is whether and to what extent state action compels a speaker to assume a subjective viewpoint as opposed to speech compulsion grounded in mere facts.

94. 514 U.S. 334 (1995).

95. *Id.* at 348–53.

96. *Id.* at 357.

97. 536 U.S. 150 (2002) [hereinafter *Watchtower Bible*].

American Constitutional Law Foundation, Inc.[98] struck down laws obligating individuals to identify themselves in the course of engaging in political speech on the grounds that the right to anonymous expression is a core principle of the First Amendment.[99]

While *McIntyre* did not apply a *Barnette* analysis, the statute in question easily could have been analyzed through the lens of compelled speech. And scholars agree. For example, Professor Volokh relies on *McIntyre*, *Buckley*, and *Watchtower Bible* to contend that "compelling speakers to disclose certain things that they would be reluctant to disclose (such as their identities)" is presumptively unconstitutional.[100] Similarly, Professor Greene noted that "compelling speech violates an autonomy or personhood right of the individual, intruding on the person and insulting the person's dignity through requiring the person to speak words she would rather not speak."[101] The statute in *McIntyre* effectively imposed a requirement that individuals disclose their identity in the course of handing out pamphlets.[102] Obligating someone to disclose their identity in the political speech context constitutes an infringement on the right to anonymous expression that *McIntyre* and related cases stand for—a principle with clear similarities to the right not to speak recognized by *Barnette* and subsequent compelled speech cases.[103]

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98. 525 U.S. 182 (1999).

99. *See Watchtower Bible*, 536 U.S. at 165–67 (holding unconstitutional a local ordinance requiring pamphleteers to register for a permit on grounds that there is a personal autonomy interest in ability to support causes anonymously); *Buckley*, 525 U.S. at 199–200 (holding unconstitutional a law requiring people circulating political petitions to wear badges due to the First Amendment interest in anonymous political advocacy; because of the individual anonymity interest, the law extended beyond mere elections regulation and infringed on First Amendment rights).

100. Volokh, *supra* note 64, at 367.

101. Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451, 490 (1995) (comparing the Court's stance against using psychological pressure in coercing participation in school to the practice of having teachers leading students in the recitation of the pledge of allegiance in public school classrooms).

102. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 336 (1995) ("The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a 'law . . . abridging the freedom of speech' within the meaning of the First Amendment.").

103. *See supra* Section II.B (discussing the foundational principles underlying compelled speech including that the First Amendment protects the right to refrain from speaking).

III. APPLICATION OF COMPELLED SPEECH PRINCIPLES TO THE EMPLOYER INFORMATION REPORT EEO-1

Thus far, this Note has explained how a typical EEO-1 questionnaire functions through a series of checkboxes prompting employees to select an ethnicity to identify with, which in turn requires employers to affirmatively classify which ethnic group an employee belongs to when the employee declines to select an ethnic identity. This Note has also discussed case law surrounding the extent to which expressive conduct is protected by the First Amendment through an application of the *Spence-Johnson* test, as modified by *Hurley*.[104] Thereafter, this Note has laid out the current state of compelled speech jurisprudence in order to delineate between speech compulsions grounded in fact and those imposing a subjective viewpoint on the speaker. Finally, this Note draws on case law from the context of political speech to inform a broader compelled speech analysis. The following section builds on those underlying principles in applying the test for First Amendment speech protections and relevant compelled speech precedents to argue that the EEO-1 reporting mechanism constitutes a form of compelled speech in violation of the First Amendment.

A. The Employer Information Report EEO-1 as First Amendment Speech

An employee's response to an employer's EEO-1 questionnaire is a type of pure speech because it implicates the use of plain language.[105] In particular, this procedure provides data that employers later publish in the Employer Information Report EEO-1, which employers submit to the EEOC.[106] Accordingly, the specific contents of an employee's EEO-1 questionnaire include the direct byproduct of that employee's expression, which is in turn converted to data or text in the employer's Employer Information Report EEO-1.[107] The employee completing an EEO-1 questionnaire checks a box in response to a specific question, an action reflecting the employee's answer to that question.[108] Likewise, where the employer functionally checks the box on the employee's behalf by populating the contents of its Employer Information Report EEO-1, the employer is simply speaking for the employee. If

104. To be protected by the First Amendment, the expressive conduct (1) must convey a particularized message that (2) a reasonable person would understand. *See supra* Section II.A.

105. *See* Shklar, *supra* note 39 (defining pure speech).

106. 29 C.F.R. § 1602.7 (2019).

107. *Id.*

108. *See* EMPLOYER INFORMATION REPORT EEO-1, *supra* note 16.

the EEO-1 questionnaire structure instead prompted an employee to fill in a blank space by writing out their ethnic affiliation, that use of plain words would surely constitute pure speech.[109] Furthermore, a check mark is a commonplace character in everyday communication, and it represents a clear thought indicating that something has been observed or confirmed.[110] This notion is consistent with the Third Circuit's determination that "[i]n analyzing this First Amendment compelled speech claim, we will assume without deciding that the act of answering questions on a survey is speech for First Amendment purposes."[111] An employer's use of data deriving from an employee's checkmark on a questionnaire to populate the contents of an Employer Information Report EEO-1 thus represents a form of pure speech.

However, classifying an employee's ethnic status on an Employer Information Report EEO-1 using visual observation does not necessarily need to constitute pure speech in order to fall within the protection of the First Amendment.[112] Rather, it is speech for First Amendment purposes as long as it constitutes expressive conduct, which is a standard that companies meet by subjectively assigning ethnic identities to their employees.[113] This is especially true given that an employee's responses in their EEO-1 questionnaire reflect that individual's identity, which is not only an extremely personal matter, but also an important element of the employee's sense of autonomy and dignity.[114]

The *Spence-Johnson* test is an appropriate starting point to evaluate whether determining the ethnic identity of an employee through visual observation and then noting that determination on the Employer Information Report EEO-1 constitutes protected speech.[115] As mentioned earlier, this analysis involves a two-pronged inquiry: (1) whether the speaker intends to convey a particularized message and

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109. *See* Shklar, *supra* note 39 (defining pure speech).

110. *Check*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/check [https://perma.cc/V8HV-7RPY] ("[A] mark typically ✓ placed beside an item to show it has been noted, examined, or verified.").

111. C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 189 (3d Cir. 2005).

112. *See supra* Section II.A (discussing the First Amendment's protection of expressive conduct).

113. *See id.*

114. *See* Volokh, *supra* note 64, at 367.

115. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Spence v. Washington, 418 U.S. 405, 409–11 (1974) (per curiam).

(2) whether that message could be reasonably understood by a third-party.[116]

Reclassifying an employee's ethnic status clearly indicates a subjective message the employer is conveying through the Employer Information Report EEO-1, and thus serves to satisfy the first prong of the *Spence-Johnson* test.[117] While the use of visual observation to reclassify an employee might seem like an administrative formality, it is in no way such a di minimis action. Employers have no reliable way of knowing how employees who decline to self-identify might characterize themselves ethnically if forced to do so, especially in light of today's multi-ethnic workforce composition. A determination of this kind is therefore necessarily a subjective thought process.[118] The employer in this context is not only speaking for employees against the employees' wishes but classifying them in a way that may in fact be inaccurate. In the same way that clicking "Like" on Facebook conveys a person's subjective view of a particular Facebook post,[119] an employer's reclassification of an employee's ethnic status conveys the employer's subjective view of that employee's ethnic identity.

This reasoning is also consistent with lower courts' application of the *Spence-Johnson* test.[120] Given that computer encryption source code is sufficiently particularized to merit First Amendment protection,[121] checking a box on a job application is assuredly an expressive form of communication. In the same way that computer code can contain a specific message,[122] the contents of the EEO-1 questionnaire communicates an employee's expression of their ethnic status. Similarly, completing an EEO-1 questionnaire could be considered a symbolic form of expression analogous to the message being conveyed by the student who held up

116. *Supra* note 46 and accompanying text.

117. *See Spence*, 418 U.S. at 410–11.

118. *See generally* Anna Brown, *Many Poll Respondents Guess Wrong on Their Interviewer's Race or Ethnicity*, PEW RES. CTR. (Sept. 27, 2017), https://www.pewresearch.org/fact-tank/2017/09/27/many-poll-respondents-guess-wrong-on-their-interviewers-race-or-ethnicity [https://perma.cc/3E6Q-8FW4] (explaining that identifying an individual's race by phone is an extremely inaccurate process, a fact ever more important considering the Employer Information Report EEO-1 in the context of the growing use of tele-working).

119. *See* Robbins, *supra* note 41, at 145–46.

120. *See, e.g.*, Junger v. Daley, 209 F.3d 481, 484 (6th Cir. 2000) (finding that encryption source code is an "efficient and precise means by which to communicate ideas" among programmers).

121. *Id.*

122. *See id.*

his fist during the pledge of allegiance, as discussed in *Holloman*.[123] In the same way that holding up a fist might represent an expression of disagreement with the status quo,[124] declining to self-identify represents an employee's disagreement with the characterization of their ethnicity reflected by the cookie-cutter ethnic categories that the EEO-1 form provides. And where an employer changes the contents of that employee's EEO-1 questionnaire responses, the employer is expressing a subjective viewpoint on behalf of the employee. Accordingly, an application of the holdings of *Junger* and *Holloman*, as well as the reasoning of Professor Robbins, indicates that the first prong of *Spence-Johnson* is met where an employer reclassifies an employee's ethnic status because such conduct conveys a "particularized message."[125]

Next, applying the second prong of the *Spence-Johnson* test confirms that the classification of employees' ethnicities for EEO-1 reporting constitutes First Amendment speech. Like computer source code, a cognizable form of communication among computer programmers,[126] the use of visual observation to classify employees' ethnic status on an Employer Information Report EEO-1 is clearly a recognizable means of communication among human resources professionals, as well as the broader public. Accordingly, human resource professionals, as well as the business community at-large, can easily discern when employers affirmatively reclassify their employees' ethnic statuses. If anything, compared to computer code, reasonable third-parties are more likely to understand communication through completed EEO-1 questionnaires given the fact that anyone who has applied to work for a company that has more than 100 employees has, at one point or another, had to select an ethnic status for EEO-1 purposes.[127] Affirmatively reclassifying the ethnic status on an employee's EEO-1 questionnaire submission is akin to clicking "Like" on Facebook or raising a fist in protest during the pledge allegiance, insofar as any reasonable person would understand the message.[128] Employers engaging in this regulatory process are communicating to the EEOC what they subjectively believe to be the

123. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1269–70 (11th Cir. 2004).
124. *See id.*
125. Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).
126. *See Junger*, 209 F.3d at 484.
127. *See* 29 C.F.R. § 1602.7 (2019); EMPLOYER INFORMATION REPORT EEO-1, *supra* note 19.
128. *See Holloman ex rel. Holloman*, 370 F.3d at 1269–70; Robbins, *supra* note 41, at 145–46.

ethnic identity of their employees. That easily understandable message satisfies the second prong of a *Spence-Johnson* analysis.

B. Affirmatively Creating Answers for Employees who Decline to Self-Identify as a Form of Compelled Speech

Like all forms of compelled speech, obligating an employer to subjectively dictate an employee's ethnic identity as provided by the Employer Information Report EEO-1 "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control."[129] In that respect, the argument that this Note advances is directly in line with the core principles outlined in *Barnette*.[130] Given that *Barnette* dealt with a "belief and an attitude of mind"[131] of a minority of individuals, the EEOC requirement to categorize an employee through visual observation on the Employer Information Report EEO-1 is exactly the type of compelled expression *Barnette* sought to avoid because it can force an expression contrary to one's belief.[132] As such, drawing the line between compelled speech that compels a statement of a subjective view and that which compels a statement of fact is consistent with the core of compelled speech jurisprudence.[133] Completion of the EEO-1 questionnaire, whether by the employee or upon alteration by the employer, clearly constitutes expression of a subjective viewpoint that the government cannot regulate through compelled speech.

This process is compulsory insofar as it obligates employers to assign ethnic identities that their employees otherwise would not identify with, or that might in fact be inaccurate. It cuts against both the business interest of the employer and the employee's interest in personal autonomy and privacy. A company or organization might have many legitimate reasons for not wanting to adhere to the ethnic reclassification component of the Employer Information Report EEO-1 process: ethical duty, avoiding potential employment discrimination litigation, data privacy, staff morale, the list could go on.[134] Similarly, an employee who declines to self-identify might simply feel that they

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129. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
130. *See id.*
131. *Id.* at 633.
132. *See id.* at 642.
133. *See supra* note 91 (citing cases that delineate between compelled speech that thrusts subjective views onto the speaker and compelled speech that states facts).
134. *See supra* Section I.

do not fit into any of the seven prescriptive ethnic categories provided by a typical EEO-1 questionnaire. Alternatively, that same employee might believe they will be subject to discrimination based on their responses to the EEO-1 questionnaire.[135] Or perhaps some employees might fear they will be investigated by the government, especially where ethnicity might be correlated to immigration status.[136] Still other employees might simply consider their ethnicity to be a private matter they do not wish to share with coworkers.[137] Ultimately, the EEO-1 reporting mechanism compels an employer to express a subjective view of its employees,[138] which runs afoul of the First Amendment protections outlined in *Barnette*.[139] Employers can and should rely on the First Amendment to preserve the chosen ethnic identity of their employees.

It does not matter that the Employer Information Report EEO-1 might cover a range of ethnic groups that are viewed by most Americans as providing an adequate opportunity to characterize a person's ethnic identity. That is not the point. As indicated by *Maynard*, the entire rationale underlying compelled speech is that we all have the right to

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135. *Cf.* Padilla v. N. Broward Hosp. Dist., No. 06-CIV-60934, 2007 U.S. Dist. LEXIS 59405, at *2–3, *5 (S.D. Fla. Aug. 14, 2007) (describing a discrimination complaint brought by a former employee who was fired soon after opposing a change in his national origin from white to Hispanic made by his employer in a diversity report), *aff'd*, 270 F. App'x 966 (11th Cir., 2008).

136. *Cf.* Jose A. Del Real, *When It Comes to the Census, the Damage Among Immigrants Is Already Done*, N.Y. TIMES (June 27, 2019), https://www.nytimes.com/2019/06/27/us/supreme-court-citizenship-census-immigrants.html [https://perma.cc/A69N-CLED] (demonstrating the fear some communities experience when the government may collect information about immigration status).

137. *See EEO-1 Voluntary Self Identification Form*, *supra* note 17 (showing that employees may choose not to disclose their ethnicity).

138. Professor Volokh contends that "compelled personal creation of speech" on behalf of third parties is unconstitutional. Volokh, *supra* note 64, at 383. Under this theory, the government cannot compel an individual to speak on behalf of someone else. For example, in *Brush & Nib Studio, LC v. City of Phoenix*, the Supreme Court of Arizona held that a calligrapher could not be compelled to create wedding invitations for a same-sex couple. 448 P.3d 890, 926 (Ariz. 2019). In *Brush & Nib Studio*, the fact the government was compelling the calligrapher to create the message that the couple wanted to communicate through their wedding invitations ran afoul of the First Amendment, indicating that one cannot be compelled to speak on behalf of a third party. *Id.*

139. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

decline to assume a position widely accepted by the majority.[140] By that same logic, the use of the EEO-1 questionnaire and the Employer Information Report EEO-1 runs afoul of this basic principle insofar as it ignores the right of an employer to decline to assume the belief of an employee, even if the employer is classifying the employee within a broad range of ethnic categories otherwise acceptable to a majority of Americans.

The Employer Information Report EEO-1 can be distinguished from similar fact-based regulatory processes because it represents the manifestation of a subjective viewpoint. As noted previously, certain facts are required to be filed with the government such as one's date of birth to obtain a passport, address for a voter registration card, or income level on a tax return.[141] That reasoning is in line with *Beeman*, *Spirit Airlines*, and other commercial speech cases where the First Amendment does not prohibit the government from eliciting factual statements.[142] The crucial factor in those scenarios is that they do not involve the mindset of an individual. By contrast, the completion of the Employer Information Report EEO-1 obligates both the employee and employer to assume a viewpoint they might not otherwise share. Indeed, an employer's visual observation of an employee does not establish that employee's ethnicity as a matter of fact. It is rather a subjective speculation that many employers would just as soon avoid having to make. Thus, the EEO-1 process cannot be fairly considered fact-based speech that is ordinarily constitutionally permissible. Instead, these subjective views amount to compelled speech in violation of the First Amendment.

C. Viewing the Constitutionality of the Employer Information Report EEO-1 in Light of Political Speech Precedents

Looking to political speech precedents furthers the argument that use of the EEO-1 questionnaire runs afoul of basic First Amendment principles. Specifically, the concept articulated by the Supreme Court

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140. Wooley v. Maynard, 430 U.S. 705, 715 (1977) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and refuse to foster . . . an idea they find morally objectionable.").

141. *See supra* note 92.

142. *See* Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403, 414 (D.C. Cir. 2012) (upholding a rule requiring airlines to disclose prices as the most prominent figure in advertising); Beeman v. Anthem Prescription Mgmt., LLC, 315 P.3d 71, 74–75 (Cal. 2013) (upholding state law requiring prescription drug claims processors to transmit information about pharmacy fees to clients).

that there exists a critical right to anonymity in the political speech context is similar to the principles of individuality and personal autonomy underlying the compelled speech doctrine.[143] For example, the Court's concern with the statute in *McIntyre* imposing a requirement that individuals disclose their identities to hand out political pamphlets suggests that courts should be skeptical of the EEO-1 reporting process because it infringes on an employee's right to anonymity.[144] Regardless of whether an employee declines to self-identify because they do not believe they fit into one of the seven provided ethnic categories or because they simply prefer that their employer, and by extension the government, does not know how they ethnically identify, the First Amendment protects the employer's interest in respecting employees' anonymity. The right to anonymous expression is at the heart of compelled speech jurisprudence in the same way that it underlies the political speech doctrine. Both areas of constitutional law play an axiomatic role in protecting our fundamental freedoms, and the core principles underlying political speech lend further support to the argument that the EEO-1 reporting process constitutes compelled speech.

CONCLUSION

The EEO-1 reporting process constitutes a form of compelled speech in violation of the First Amendment. To begin with, both the act of self-identification through the EEO-1 questionnaire and reclassification of an employee's ethnic status on an Employer Information Report EEO-1 constitute a form of protected speech. It thus stands to reason that the government may not compel an employer to engage in that type of conduct; such state action runs afoul of fundamental First Amendment principles dictated by *Barnette* and its progeny.[145] However, the EEOC violates this basic principle by compelling employers to make a subjective determination of an employee's ethnic status, a personal invasion into an individual's privacy and autonomy, rather than obligating employers to merely disclose purely factual information.

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143. *See supra* Sections II.B–C.

144. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 348–53 (1996) (considering a state requirement that authors disclose information they otherwise have the discretion to exclude as not justified by a state's interest in informing the electorate populous).

145. *See supra* Section II.B.

This Note does not dispute the importance of holding employers to account for the ethnic composition of their work force. However, the EEOC must approach that admittedly complex issue through a means that is compatible with the spirit of the First Amendment. Where the EEOC obligates an employer to reclassify the racial identity of its employees, it engages in unconstitutional speech compulsion.[146] Such a policy forces the employer to make a subjective determination on behalf of the employee without the employee's consent. The Employer Information Report EEO-1 process is thus unconstitutional under the First Amendment, and the EEOC must find another means to fulfill its mandate.

146. *See id.*