

PRIVACY LAW CONCERNS ASSOCIATED WITH THE
REINTRODUCTION OF THE CITIZENSHIP QUESTION TO THE 2020
NATIONAL CENSUS

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The right to be let alone is indeed the beginning of all freedom.
–William O. Douglas¹

The proposed reintroduction of the citizenship question to the national census challenges an individual's right to privacy from the government. At issue is the conflict between an individual's right to privacy regarding personal citizenship data and the government's need for that information. To that end, this paper will discuss the history of the citizenship question; the potential privacy violations and resulting harms; the legality of reintroducing the citizenship question; and the best solutions to alleviate privacy concerns while still allowing the Census Bureau to compile citizenship data.

I.	INTRODUCTION	2
II.	THE HISTORY OF THE CITIZENSHIP QUESTION IN THE NATIONAL CENSUS	3
	A. Pre-2017 History of the Citizenship Question	5
	B. Reintroduction of the Citizenship Question.....	6
III.	PRIVACY LAW ISSUES	8
	A. Potential Privacy Violations	9
	B. Potential Privacy Harms	11
	1. Primary Harms	11
	2. Secondary Harms.....	13
	i. Incorrect Reapportionment.....	14
	ii. Decreased Federal Funding	15
	iii. Insufficient National Disaster Relief and Epidemic Preparedness.....	16

¹ Pub. Util. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

IV. LEGALITY OF THE CITIZENSHIP QUESTION IN LIGHT OF PRIVACY LAW CONCERNS	17
A. Arguments for Legality.....	17
1. Precedent and Lack of Standing.....	18
2. Limited Intrusiveness.....	19
3. Strong Statutory Protections	21
B. Arguments Against Legality	21
1. Failure to Conduct a Privacy Impact Assessment.....	22
2. Arbitrary and Capricious Decision	23
3. Enumeration Clause Challenge.....	25
V. POTENTIAL SOLUTIONS	27
A. Non-Mandatory Citizenship Question	27
B. Keeping the Citizenship Question Only on the ACS	28
C. Use of Federal Administrative Records to Collect Citizenship Data.....	29
VI. CONCLUSION	31

I. INTRODUCTION

Supreme Court Justice William Douglas recognized the importance of what Samuel Warren and William Brandeis described in 1890 as “the right to be let alone”—better known as the right to privacy.² Today, the right to privacy from one’s own government is being challenged by the proposed reintroduction of the citizenship question to the national census.³ At issue here is the conflict between an individual’s right to privacy regarding personal citizenship data and the government’s need for that

² Samuel D. Warren & William Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

³ *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 604 (S.D.N.Y. 2019).

information. While this reintroduction has been viewed as a political move, few understand the privacy issues such a question poses.⁴

Therefore, Section II of this paper will discuss the history of the citizenship question and how it was reintroduced to the national census. Section III will show how the mandatory citizenship question is a privacy violation that has the potential to cause primary and secondary harms to residents of the United States which could include deportation, improper reapportionment, decreased federal funding, and disaster preparedness problems. Section IV will analyze the legality of the citizenship question in light of *Department of Commerce v. New York*⁵, a recent Supreme Court case that dealt with a challenge to the reintroduction of the citizenship question. And finally, Section V will show how the best solution to alleviate privacy concerns—while still allowing the Census Bureau to compile citizenship data—is to create a central database within the Census Bureau that can access citizenship information from administrative records already in the government’s control.

II. THE HISTORY OF THE CITIZENSHIP QUESTION IN THE NATIONAL CENSUS

The national census is one of the few textually explicit mandates imposed on Congress by the Constitution.⁶ The founding fathers agreed that an “actual enumeration” of all Americans should be made every ten years “in such Manner as [Congress]

⁴ See Muzaffar Chishti & Jessica Bolter, *Census Citizenship Question Triggers Legal and Political Fallout*, MIGRATION POLICY INSTITUTE (Oct. 24, 2018), <https://www.migrationpolicy.org/article/census-citizenship-question-triggers-legal-and-political-fallout> [perma.cc/LDJ8-VMYD] (discussing, *inter alia*, confidentiality concerns expressed by immigrants in census pretest interviews).

⁵ 139 S. Ct. 2551, 2574–76 (2019) (denying the Commerce Department from reintroducing the citizenship question by remanding the case back to the agency for failing to follow the Administrative Procedures Act).

⁶ U.S. CONST. art. I, § 2, cl. 3.

shall by Law direct.”⁷ In accordance with this constitutional mandate, the first national census was conducted on August 2, 1790, during George Washington’s presidency.⁸ The Secretary of State, Thomas Jefferson, was in charge of implementing the census and collecting the data.⁹ Since then, the national census has been conducted every ten years.¹⁰ However, the governmental actors responsible for carrying out the census have changed dramatically over time.

Originally, either the President would issue an executive order or Congress would pass legislation for each national census, but this impromptu procedure yielded varied results from one census to the next.¹¹ To fix this, Congress passed the Permanent Census Act in 1902 which created the Census Bureau.¹² Congress also codified administrative rules for conducting the national census in 1954.¹³ Some of the rules provide privacy protections like never publishing private census data and not allowing any government agencies to use private census data against respondents.¹⁴ Today, the Census Bureau—an admin-istrative

⁷ *Id.*

⁸ *1790 Overview*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades/overview/1790.html [https://perma.cc/FM6K-LSV6] (last visited Mar. 16, 2019).

⁹ *Id.*

¹⁰ *Through the Decades*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/through_the_decades (last visited Mar. 16, 2019).

¹¹ Carrie Pixler, Note, *Setting the Boundaries of the Census Clause: Normative and Legal Concerns Regarding the American Community Survey*, 18 WM. & MARY BILL OF RTS. J. 1097, 1100 (2010).

¹² *When did the U.S. Census Bureau Become a Permanent Agency?*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/faqs/agency_history_faqs/when_did_the_us_census_bureau_become_an_agency.html [https://perma.cc/VF7L-8WMK] (last visited Mar. 16, 2019).

¹³ 13 U.S.C. §§ 1–402 (2018).

¹⁴ *Title 13, U.S. Code*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/reference/privacy_confidentiality/title_13_us_code.html [https://perma.cc/CU8N-C5KZ] (last visited Mar. 24, 2019).

agency under the umbrella of the Commerce Department—conducts the national census in accordance with the rules enumerated in Title 13 and is responsible for drafting all census questions.¹⁵

A. Pre-2017 History of the Citizenship Question

The citizenship question originated with Thomas Jefferson in 1800 and was first included on the national census in 1820.¹⁶ The original citizenship question asked for the “number of foreigners not naturalized” in each household.¹⁷ Since 1820, there has been at least one question concerning citizenship status on the national censuses of 1830, 1870, and 1890-1950.¹⁸ While the citizenship question was removed from the 1960 national census, from 1970-2000 the citizenship question was asked on the long-form census, which was only sent to a small portion of the population.¹⁹ Evidence shows that Currently, the annual American Community Survey (ACS), which replaced the long-form census, has asked a citizenship question every year since 2005.²⁰ The ACS is administered annually to approximately three

¹⁵ *Agency History*, U.S. CENSUS BUREAU, https://www.census.gov/history/www/census_then_now/ [<https://perma.cc/98XJ-35G8>] (last visited Apr. 27, 2019).

¹⁶ Hans A. von Spakovsky, *Only in the U.S. is it Controversial for the Census to Ask About Citizenship*, THE HERITAGE FOUNDATION (Mar. 30, 2018), <https://www.heritage.org/immigration/commentary/only-the-us-it-controversial-the-census-ask-about-citizenship> [<https://perma.cc/6TNQ-CEMV>].

¹⁷ *Census for 1820*, U.S. CENSUS BUREAU, <https://www.census.gov/library/publications/1821/dec/1820a.html> [<https://perma.cc/2M2M-R9D6>] (last visited Mar. 16, 2019).

¹⁸ *See* Dep’t of Commerce v. New York, 139 S. Ct. 2551, 2561–62 (2019); *see also* Chishti & Bolter, *supra* note 4.

¹⁹ Chishti & Bolter, *supra* note 4.

²⁰ *Id.*

percent of all households²¹ and, until recently, was the only method the Census Bureau had for directly collecting citizenship information.

B. Reintroduction of the Citizenship Question

In January 2017, an executive order directing the Census Bureau to add a citizenship question was drafted but never issued.²² Then, in December 2017, the Department of Justice (DOJ) asked the Commerce Department to include a citizenship question on the 2020 national census.²³ The DOJ argued that citizenship data is “critical to the Department’s enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting.”²⁴ Section 2 of the Voting Rights Act aims to prevent vote dilution during redistricting, which may occur when a particular racial group is prevented from forming a majority in a district where it should hold a majority, assumingly due to non-citizens voting in elections.²⁵ To protect against this, the DOJ contended that it needed citizenship information on all residents.²⁶

On March 26, 2018, Secretary Ross ordered the addition of a citizenship question on the 2020 national census—effectively lighting a political powder keg.²⁷ Senators, including Dianne Feinstein, responded by sending a memo to Secretary Ross

²¹ *Id.*

²² Chishti & Bolter, *supra* note 4.

²³ See DOJ Memo to Census Bureau, Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire (Dec. 12, 2017), <https://assets.documentcloud.org/documents/4340651/Text-of-Dec-2017-DOJ-letter-to-Census.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Chishti & Bolter, *supra* note 4.

implored him not to add the citizenship question.²⁸ Senator Feinstein argued that an additional question on citizenship could not be properly field-tested in time, and it would “likely depress participation in the 2020 Census from immigrants who fear the government could use the information to target them.”²⁹ This concern was also echoed throughout arguments opposing the citizenship question from twenty state attorneys general³⁰, 161 mayors³¹, numerous United States senators³², and former Directors of the Census Bureau.³³

In the initial District Court challenge of the citizenship question, evidence showed that Secretary Ross unilaterally initiated steps to reintroduce the citizenship question before the Voting Rights Act explanation was posited.³⁴ Secretary Ross first elicited requests from both the Department of Homeland Security and the Executive Office for Immigration Review within the Department of Justice about whether the citizenship question

²⁸ See Senator Dianne Feinstein (D-CA) et al., Memo to Secretary Ross (Jan. 5, 2018), https://www.feinstein.senate.gov/public/_cache/files/3/7/376f8dcd-7f35-4913-9e80cd1e48e3b312/7E4C59B2988E2CC14866543EDD7E01A6.2018.01.05census-citizenship-letter.pdf [<https://perma.cc/95QS-HMC3>].

²⁹ *Id.*

³⁰ See Memo to Secretary Ross from Twenty State Attorneys General (Feb. 12, 2018), https://ag.ny.gov/sites/default/files/multi-state_letter_2020_census.pdf (stating that a citizen question “would significantly depress participation” because of governmental mistrust throughout the immigration community).

³¹ Sara Durr, *Nation’s Mayors to Secretary Ross: Don’t Politicize Census. Remove the Citizenship Question*, THE UNITED STATES CONFERENCE OF MAYORS (Mar. 27, 2018), <https://www.usmayors.org/2018/03/27/nations-mayors-to-secretary-ross-dont-politicize-census-remove-the-citizenship-question/> [<https://perma.cc/YF8P-R5NR>].

³² See Senator Dianne Feinstein, et al, *supra* note 28.

³³ See Memo to Secretary Ross from former Directors of the U.S. Census Bureau (Jan. 26, 2018), https://www.washingtonpost.com/r/2010-2019/WashingtonPost/2018/03/27/Editorial-Opinion/Graphics/DOJ_census_request_Former_Directors_ltr_to_Ross.pdf?tid=a_mcntx&noredirect=on.

³⁴ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575–76 (2019).

should be reintroduced.³⁵ After neither agency formally requested the citizenship question, the Commerce Department proffered the Voting Rights Acts rationale for reintroducing the citizenship question.³⁶ Secretary Ross then contacted the Civil Rights Division of the Department of Justice, after which the Civil Rights Division expressed an interest in acquiring citizenship information to help enforce the Voting Rights Act.³⁷ But it appears that the Civil Rights Division's interest regarding the citizenship question was more on the Commerce Department's behalf than on its own.³⁸

III. PRIVACY LAW ISSUES

For an individual to have legal standing to bring a privacy law claim in court, that person must have suffered some type of actual or threatened privacy harm.³⁹ To this day, a standard definition of privacy harm has evaded legal scholars,⁴⁰ likely due to the subjective nature of privacy itself. Nonetheless, privacy harm can generally be understood as “the negative consequence of a privacy violation.”⁴¹ Thus, to bring a valid privacy law challenge to the addition of the citizenship question, a plaintiff must prove that the

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴⁰ See, e.g., Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 280 (1974) (defining privacy as control over who can sense us); see also Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (defining privacy as “the right to be let alone”); see also Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 482 (2006) (defining privacy in terms of specific activities that pose privacy problems).

⁴¹ M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1, 2 (2011).

mandatory census question caused a privacy violation that resulted in concrete and particularized harm.⁴²

A. Potential Privacy Violations

When determining whether there is a privacy violation, courts use the reasonable expectation of privacy approach—asking whether a reasonable person would view the action as an unwanted intrusion on privacy.⁴³ At issue here is the conflict between an individual’s right to privacy regarding personal citizenship data and the government’s need for that information. The DOJ argues that it needs citizenship data to enforce Section 2 of the Voting Rights Act.⁴⁴ However, requiring all households to answer a citizenship question, under threat of criminal penalties,⁴⁵ raises potential decisional, informational, and associational privacy violations.

A decisional privacy violation occurs when an individual’s right to decide for oneself is infringed.⁴⁶ Examples of this include the right to die, the right to marry, and the right to choose an abortion.⁴⁷ The right to decide also encompasses the decision of whether or not to provide the government with information about one’s citizenship. A government mandate to answer whether a person is a citizen thus intrudes upon decisional privacy because that person no longer can decide whether to provide the

⁴² *New York v. U.S. Dep’t of Commerce*, 351 F. Supp. 3d 502, 606-07 (S.D.N.Y. 2019).

⁴³ *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 154–55 (1978) (Powell, J., concurring) (stating that the Fourth Amendment protects a person’s reasonable expectation of privacy).

⁴⁴ *See supra* Section II. B. Reintroduction of the Citizenship Question.

⁴⁵ 13 U.S.C. § 221 (2018) (stating that refusing to answer, or falsely answering, census questions can result in fines up to 500 dollars).

⁴⁶ David Levine, Associate Professor of Law, Elon University School of Law, Privacy Law Lecture: Invasions of Privacy (Jan. 22, 2019) (transcript on file with author).

⁴⁷ *Id.*

government with this information. Instead, Congress requires it.⁴⁸ While the government can, and does, gather information on its populace,⁴⁹ the government need for that information must be greater than the privacy violation caused by collecting the data.

Informational privacy violations include the unwanted dissemination of private information.⁵⁰ The citizenship question infringes upon informational privacy because it may result in the unwanted dissemination of citizenship information to the Census Bureau. While there are strict rules in place that aim to keep private census data confidential, even from other government agencies, this does not erase privacy concerns.⁵¹ For example, in the past government agencies outside the Census Bureau have acquired citizenship information illegally and misused the information to the detriment of people residing in the United States.⁵²

Associational privacy violations involve limitations on the ability to associate with individuals.⁵³ The citizenship question impedes associational privacy because families may feel forced to separate. Because the census is sent to every household, and only one person fills out the census for each household,⁵⁴ immigrant

⁴⁸ 13 U.S.C. §§141–193 (2018).

⁴⁹ See, e.g., Margaret Hu, *Taxonomy of the Snowden Disclosures*, 72 WASH. & LEE L. REV. 1679, 1689–90 (2015) (showing that the NSA collected data on citizens from a wide array of sources including wiretapping, metadata of phone records, and social media data).

⁵⁰ See Levine, *supra* note 46, at 8.

⁵¹ See 13 U.S.C. §§ 1–402 (2018) (codifying a number of strict guidelines that the Census Bureau must follow in performing the national census).

⁵² *EPIC v. Commerce (Census Privacy)*, ELECTRONIC PRIVACY INFO. CTR., <https://epic.org/privacy/litigation/pia/epic-v-commerce/#PIA> [<https://perma.cc/3BL4-7B3Z>] (last visited Mar. 17, 2019) (describing how during WWI the Census Bureau disclosed confidential information from the national census to the Department of Justice to help enforce the draft).

⁵³ See Levine, *supra* note 46, at 8.

⁵⁴ THOMAS S. MAYER, U.S. BUREAU OF THE CENSUS, PRIVACY AND CONFIDENTIALITY RESEARCH AND THE U.S. CENSUS BUREAU RECOMMENDATIONS BASED ON A REVIEW OF THE LITERATURE 28 (Feb. 7,

families having both citizens and non-citizens living in a single residence may be compelled to separate due to fears that they will be forced to provide potentially harmful citizenship information on other family members. Therefore, a citizenship question could create associational privacy violations because families may feel forced to separate in order to protect non-citizens.

B. Potential Privacy Harms

Every question on the census violates one's privacy at some level. To have a cause of action, however, there must be a real or readily apparent harm associated with the collection of citizenship data that a reasonable person would determine outweighs the government's interest in that data.⁵⁵ As the numerous objections from government officials have illustrated, there are a number of potential harms that not only directly affect respondents but that may also indirectly impact all Americans.⁵⁶

1. Primary Harms

The primary harm associated with the citizenship question is that the government will use the information to target and deport persons whose immigration status may be uncertain.⁵⁷ While Title 13 of the United States Code provides great protections, like prohibiting the Census Bureau from sharing personal information with other government agencies,⁵⁸ many still fear that they, or

2002), <https://www.census.gov/srd/papers/pdf/rsm2002-01.pdf> [<https://perma.cc/SJL6-ZU9P>].

⁵⁵ *Morales v. Daley*, 116 F. Supp. 2d 801, 818 (S.D. Tex. 2000).

⁵⁶ See Senator Dianne Feinstein, et al., *supra* note 28; see also Memo to Secretary Ross from Twenty State Attorneys General, *supra* note 30; Memo to Secretary Ross from former Directors of the U.S. Census Bureau, *supra* note 33.

⁵⁷ See Senator Dianne Feinstein, et al., *supra* note 28.

⁵⁸ See 13 U.S.C. §§ 1–402 (2018).

their loved ones, may be targeted by immigration services based on citizenship information from the census. And based on history, these fears are not unfounded.⁵⁹

The United States government has misused personal census data on numerous occasions, including to intern Japanese-Americans during WWII and to locate Arab-American populations after 9/11.⁶⁰ During WWII, Congress passed the Second War Powers Act, which greatly reduced restrictions on who could access private census data.⁶¹ This allowed the Census Bureau to give the U.S. Secret Service personal information on all Japanese-Americans living near Washington, D.C.⁶² The Census Bureau also gave the War Department information on Japanese-Americans living in the western states; this information was used to intern thousands of Japanese-Americans.⁶³ Over sixty years later, in 2004, the Census Bureau presented the Department of Homeland Security with a list of cities having over 1,000 Arab-Americans, as well as a list showing how many Arab-Americans resided in each zip code area, broken down by country of origin.⁶⁴ This information was used to help target and apprehend Arab-Americans with alleged ties to terrorism.

Even today, the privacy of census data is still somewhat tenuous. While Title 13 protects individual level data, this protection is congressional, not constitutional.⁶⁵ The Constitution does not mandate that private census data should be protected.⁶⁶ It only mandates that Congress make an enumeration of all people living in the United States.⁶⁷ Thus, Congress has the discretion to afford

⁵⁹ *EPIC v. Commerce (Census Privacy)*, *supra* note 52, at 9

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 13 U.S.C. §§ 1–402 (2018).

⁶⁶ U.S. CONST. art. I, § 2, cl. 3.

⁶⁷ *Id.*

as much, or as little, protection to individual level census data as it deems necessary.

The block group level data that is distributed legally to many government agencies could also be used to ferret out large populations of non-citizens if citizenship information is included in the census. Block groups are geographical areas containing between 600 to 3,000 people.⁶⁸ The Census Bureau uses the national census to create statistics on block groups that are used by government agencies.⁶⁹ Block group level citizenship data could potentially allow agencies such as Immigration Control and Enforcement (ICE) to target geographic areas with high populations of non-citizens. Furthermore, with the citizenship data, it would be an easy task for a government agency to uniquely identify an individual, even without his or her name.⁷⁰ Latanya Sweeney, the Director of the Data Privacy Lab at Harvard, explained that eighty-seven percent of the population could be uniquely identified by their zip code, gender, and date of birth.⁷¹ Thus, a government agency could easily target specific non-citizens using census data that is legally distributed by the Census Bureau. However, specific individuals targeted by the government are not the only ones that may be harmed by the inclusion of a citizenship question. Everyone residing in the United States could be indirectly harmed.

2. Secondary Harms

While the primary privacy harm to a non-citizen is readily apparent—deportation and persecution—the secondary harms

⁶⁸ U. S. CENSUS BUREAU, 2010 CENSUS SUMMARY FILE 238 (2012), <https://www.census.gov/prod/cen2010/doc/sf2.pdf>.

⁶⁹ *Id.*

⁷⁰ Latanya Sweeney, *Simple Demographics Often Identify People Uniquely* 1-2 (Carnegie Mellon Univ., Data Privacy Working Paper, Paper No. 3, 2000), <https://dataprivacylab.org/projects/identifiability/paper1.pdf>.

⁷¹ *Id.*

caused by the inclusion of a citizenship question on the populace as a whole are also concerning. In an *amicus* brief to the Supreme Court, former directors of the Census Bureau argued that “a mandatory inquiry into citizenship status is all the more likely to engender privacy concerns, particularly among non-citizens.”⁷² Because of the privacy concerns, the former Directors posited that non-citizens who are already mistrustful of the government will “misrepresent themselves on the census form,” thereby leading to an erroneous census, and “any effort to correct for the data would be futile.”⁷³ An erroneous census, caused by a significant amount of the population failing to respond because of privacy concerns, may lead to improper reapportionment, decreased federal funding, and preparedness problems for epidemics and national disasters—all secondary harms caused by a privacy intrusion that will impact all Americans.⁷⁴

i. Incorrect Reapportionment

The reason the citizenship question is highly political is largely due to the reapportionment issue created by potentially erroneous census information.⁷⁵ Since the national census is used to reapportion the House of Representatives every ten years, incorrect census data could lead to improper representation, harming millions of Americans.⁷⁶ Thus, to correctly reapportion House districts requires that census data show the correct population densities for all areas of the country.

In *Evenwel v. Abbot*, the Supreme Court clarified that all people living in the United States, including children, the incarcerated,

⁷² Brief for the Former Directors of the U.S. Census Bureau as *Amici Curiae* Supporting Appellees at 24, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940).

⁷³ *Id.* at 24–25.

⁷⁴ See Chishti & Bolter, *supra* note 4.

⁷⁵ *Id.*

⁷⁶ *Id.*

and non-citizens, are required to be counted during reapportionment.⁷⁷ Thereafter, the potential chilling effect of the citizenship question became highly politicized because non-citizens who fail to respond to the census would likely reduce the number of Democratic House seats.⁷⁸ This is because non-citizens typically live in metro areas that are Democratic strongholds.⁷⁹ Thus, Democrats have vehemently opposed the addition of the citizenship question because failing to include these people in the census would likely dilute Democratic power.⁸⁰ Regardless of one's political beliefs, the potential chilling effect of the citizenship question could undermine the integrity of the House of Representatives, thereby harming millions of citizens and non-citizens alike through under-representation in Congress.

ii. Decreased Federal Funding

Another consequence of an undercount is decreased federal funding, which could also harm millions of Americans.⁸¹ Robert Shapiro, a senior policy fellow at Georgetown University's School of Business, has estimated that 24 million or more people may fail to respond to the 2020 national census because of privacy concerns—namely, that private citizenship data will be shared with law enforcement authorities.⁸² Because many federal programs rely on population data from the census to determine the amount of funding, this could harm millions of people, especially those living in areas with high immigrant

⁷⁷ Evenwel, 136 S. Ct. at 1123.

⁷⁸ See Chishti & Bolter, *supra* note 4.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Deanna Paul, *The Supreme Court Agreed to Hear the Citizenship Case. Here's Why that Matters*, WASH. POST (Nov. 20, 2018), <https://www.washingtonpost.com/politics/2018/11/20/supreme-court-agreed-hear-census-citizenship-case-heres-why-that-matters/> [https://perma.cc/WP4Q-QQBB].

populations.⁸³ For example, eighty percent of the federal funding that states receive comes from programs that use census data to allocate funds.⁸⁴ In 2016, this included 493 billion dollars.⁸⁵ Medicaid, in particular, relies on census headcounts for determining state funding.⁸⁶ Thus, if the 2020 census undercounts a significant portion of the population, states will lose federal funding, and all people living within that state will be harmed.

iii. Insufficient National Disaster Relief and Epidemic Preparedness

A discrepancy between the official census population and the actual population can also lead to problems with disaster relief and epidemic preparedness.⁸⁷ Many state and federal programs, like FEMA, use census data for planning purposes.⁸⁸ According to Jeffrey Schlegelmilch, the deputy director for the National Center for Disaster Preparedness at Columbia University, if the census data is inaccurate, programs will be insufficiently funded and have blind spots because the government will not know how many people live in a certain area.⁸⁹ This could be extremely harmful if a natural disaster or epidemic occurs in an area with a high concentration of non-citizens because proper relief would not be forthcoming for all residents. Cities like Houston, Los Angeles, San Francisco, and New York which have large immigrant populations have already faced disasters from hurricanes, earthquakes,

⁸³ See Chishti & Bolter, *supra* note 4.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Paul, *supra* note 82.

⁸⁸ *Id.*

⁸⁹ *Id.*

and terrorist attacks and without sufficient funding these cities are susceptible to humanitarian crises.⁹⁰

IV. LEGALITY OF THE CITIZENSHIP QUESTION IN LIGHT OF PRIVACY LAW CONCERNS

As addressed in the preceding sections, the addition of the citizenship question on the national census creates privacy violations that have the potential for grave primary harm to non-citizens who may be targeted by the government, as well as secondary harms that could affect all people living in the United States. However, this does not mean that the citizenship question is illegal from a purely privacy law perspective. Recently, the Supreme Court denied the Commerce Department from reintroducing the citizenship question by remanding the case back to the agency for failing to follow the Administrative Procedures Act (APA).⁹¹ The Court held that the reasoning behind the reintroduction of the citizenship question was pretextual, thus violating the arbitrary and capricious standard under the APA.⁹² The following subsections will further delve into arguments, both for and against the reintroduction of the citizenship question.

A. Arguments for Legality

The Census Bureau admits that the right to privacy is defined “as the individual’s right to decide whether and to what extent he will divulge to the government his thoughts, opinions,

⁹⁰ *U.S. Immigrant Population by Metro. Area*, MIGRATION POLICY INST., <https://www.migrationpolicy.org/programs/data-hub/charts/us-immigrant-population-metropolitan-area> [<https://perma.cc/K7Q2-EB8R>] (last visited Oct. 1, 2019).

⁹¹ *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2574–76 (2019) (holding that the VRA rationale was pretextual and “seems to have been contrived”).

⁹² *Id.*

feelings, and the facts of his personal life.”⁹³ Thus, every question on the census violates an individual’s right to privacy. However, for a question to be a reasonable and legal search under the Fourth Amendment, the government’s justification for invading that privacy must be “greater [than] the privacy interest of the individual.”⁹⁴ As precedent has shown, most questions on the census do not intrude upon Fourth Amendment rights because the intrusion is limited, and the individual responses are statutorily assured to remain confidential.⁹⁵ Furthermore, even though the Supreme Court recently remanded the citizenship question back to the Commerce Department, it specifically said in the opinion that the question was not substantively invalid, only that there was a flaw in the reasoned decision-making of the agency.⁹⁶

1. Precedent and Lack of Standing

One of the strongest arguments for the citizenship question’s legality is that no court has ever held it was a violation of a person’s Fourth Amendment right to privacy.⁹⁷ This argument is certainly not foolproof—just because a certain action has not been deemed unconstitutional does not mean that it will remain constitutional indefinitely. However, it certainly holds weight. Earlier this year, multiple states brought suit against the Commerce Department in the Southern District of New York claiming they have been, or will be injured, by the inclusion of a citizenship question based on a theory of loss of privacy.⁹⁸ The court held that the “unlawful disclosure of confidential census data” (the primary harm discussed in Section III.B.i) would be an

⁹³ MAYER, *supra* note 54, at 2–3.

⁹⁴ *See, e.g.,* Morales v. Daley, 116 F. Supp. 2d 801, 817 (S.D. Tex. 2000).

⁹⁵ *Id.* at 820.

⁹⁶ Dep’t of Commerce v. New York, 139 S. Ct. at 2574–76.

⁹⁷ *See id.*; *see also* New York v. U.S. Dep’t of Commerce, 351 F. Supp. 3d 502, 618–19 (S.D.N.Y. 2019).

⁹⁸ New York v. U.S. Dep’t of Commerce, 351 F. Supp. 3d at 604.

invasion of privacy that “constitute[s] a cognizable Article III injury.”⁹⁹ However, absent evidence showing an unlawful disclosure, there was no readily apparent harm and, thus, no Article III standing on which to bring the claim.¹⁰⁰ The court even acknowledged that the confidentiality protections afforded to census data could be repealed by a future Congress but stated that even though “Plaintiffs may be subjectively fearful that the government will misuse citizenship data obtained through the census, however understandable such fears may be, [it] is ‘insufficient to create standing.’”¹⁰¹

When this case was appealed, the Supreme Court did not hear the privacy issue.¹⁰² Instead, the Court focused on “whether the Secretary violated the Enumeration Clause of the Constitution, the Census Act, or otherwise abused his discretion.”¹⁰³ Accordingly, it will be extremely difficult for a plaintiff to meet the injury in fact requirement when challenging the citizenship question based on an invasion of one’s right to privacy, absent direct evidence that the plaintiff was harmed by the Census Bureau unlawfully disclosing private census information to outside agencies. This will most likely never occur unless a government whistleblower intervenes, because plaintiffs will not be able to get into the discovery phase to find direct evidence of unlawful disclosures otherwise.

2. Limited Intrusiveness

A standard level of intrusiveness is difficult to define because of its subjective nature. However, most census questions, all of which intrude to some degree upon an individual’s right to privacy, are seen by courts as reasonable in light of the

⁹⁹ *Id.* at 618–19.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2561 (2019).

¹⁰³ *Id.*

government's need for that information.¹⁰⁴ Nevertheless, Congress has outlawed questions specifically because they were over intrusive.¹⁰⁵

One example of this is any question regarding religious beliefs.¹⁰⁶ In 1960, the Census Bureau proposed including a question on the census regarding religion.¹⁰⁷ Immediately thereafter, a number of Jewish organizations vehemently opposed the question, citing concerns regarding how Nazi Germany had used religious census information to locate Jewish populations during the Holocaust.¹⁰⁸ To appease the public, Congress quickly amended Title 13 to prohibit the compelled disclosure of religious affiliations on the census.¹⁰⁹ This begs the question of whether a question about citizenship status is as intrusive as a question about religious affiliation. Like religious affiliation, the compelled disclosure of citizenship information raises associational, informational, and decisional privacy violations, which may result in harm if the government misuses the information. Similar to the religious organizations that feared the government would misuse the census data, many immigrant communities also fear that citizenship data may be misused, however it remains to be seen whether Congress will take action in this case.

¹⁰⁴ *Morales v. Daley*, 116 F. Supp. 2d 801, 818–20 (S.D. Tex. 2000) (holding that questions like age, disability, race, and income on the long form census were reasonable in light of the Fourth Amendment right to privacy).

¹⁰⁵ 13 U.S.C. § 221(c) (2018) (providing that “no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body.”).

¹⁰⁶ *Id.*

¹⁰⁷ Pixler, *supra* note 11, at 1104–05.

¹⁰⁸ *Id.*

¹⁰⁹ 13 U.S.C. § 221(c) (2018).

3. Strong Statutory Protections

Another argument courts have used to uphold the legality of a citizenship question is that the individual responses are statutorily assured to remain confidential.¹¹⁰ For example, Title 13 provides a number of protections on private census data, including: (1) that private census data like names, addresses, social security numbers, and telephone numbers are never published; (2) that personally identifying information cannot be used by any government agency against census respondents; and (3) that Census Bureau employees are sworn to protect confidentiality and face up to five years in prison and a fine of up to \$250,000 for violating confidentiality.¹¹¹ While these protections are certainly robust, history has shown that the Census Bureau does not always abide by statutory rules.¹¹² Furthermore, Congress can always repeal these protections. Nonetheless, the strong statutory protections tend to favor the legality of the citizenship question.

B. Arguments Against Legality

The failure of the Census Bureau to conduct a privacy impact assessment, the arbitrary and capricious nature of the decision to include a citizenship question, and an Enumeration Clause challenge precipitated by privacy concerns all weigh against the legality of the citizenship question.

¹¹⁰ *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 618–19 (S.D.N.Y. 2019).

¹¹¹ *Title 13, U.S. Code*, UNITED STATES CENSUS BUREAU, https://www.census.gov/history/www/reference/privacy_confidentiality/title_13_us_code.html [<https://perma.cc/Y4TV-RHLN>] (last visited Mar. 24, 2019).

¹¹² See *EPIC v. Commerce (Census Privacy)*, *supra* note 52.

1. Failure to Conduct a Privacy Impact Assessment

When any government agency initiates a new collection of information that includes individual specific data of ten or more people, it is required to conduct a privacy impact assessment (PIA).¹¹³ The PIA must discuss “why the information is being collected . . . how the information will be secured . . . with whom the information will be shared . . . [and] . . . what information is to be collected.”¹¹⁴ However, when the Census Bureau announced its intention to add the citizenship question in 2018, it had failed to conduct a PIA.¹¹⁵ Juan Hourcade, a member of the Census Bureau’s Scientific Advisory Committee, analogized the failure to conduct a PIA to an unplanned space mission: “[i]t’s like you’ve been planning a space mission for 10 years and right before the mission you make a significant change to the spacecraft without testing it . . . Maybe it won’t crash, but you don’t know. It’s a big risk.”¹¹⁶

While failing to conduct a PIA would violate the E-Governance Act, the Northern District of California held that the Census Bureau only needs to conduct the PIA before it begins collecting citizenship data from the census in 2020.¹¹⁷ Thus, while it may be a bad look for the Census Bureau to delay implementation of the privacy impact statement, the Bureau will not violate the E-Governance Act unless it actually fails to conduct a PIA.¹¹⁸ This means a violation of the E-Governance Act alone, until 2020, is

¹¹³ Elec. Privacy Info. Ctr. v. Dep’t of Commerce, No. 18-cv-2711, 2019 U.S. Dist. LEXIS 20843, at *2–3 (D.D.C. Feb. 8, 2019).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at *1–2.

¹¹⁶ Deanna Paul, *Why the census citizenship question legal case matters*, THE MORNING CALL (Nov. 20, 2018), <https://www.mcall.com/news/pennsylvania/mc-nws-census-citizenship-qa-20181120-story.html>.

¹¹⁷ Elec. Privacy Info. Ctr. v. Dep’t of Commerce, 2019 U.S. Dist. LEXIS 20843 at *24–26.

¹¹⁸ *Id.*

futile by itself, but it can be used in conjunction with the administrative record to show that the decision to include the citizenship question was arbitrary and capricious in violation of the APA.¹¹⁹

2. Arbitrary and Capricious Decision

In *California v. Ross*, the Northern District of California held that the decision to include the citizenship question was arbitrary and capricious in violation of the APA.¹²⁰ The court found that Secretary Ross initiated the contact with the DOJ and directed the DOJ to formally ask the Census Bureau to add a citizenship question.¹²¹ The court referred to the DOJ request for citizenship data to help enforce the Voting Rights Acts as “ostensible” at best.¹²² Furthermore, evidence was discovered showing that Census Bureau professionals found “that inclusion of a citizenship question would likely result in a significant differential decline in self-response rates within noncitizen and Latino communities and that the requested data could be obtained by other means.”¹²³ Therefore, the court found that Secretary Ross’s reliance on the Voting Rights Act (“VRA”) to justify the addition of the citizenship question was not only unfounded but also arbitrary and capricious in violation of the APA, and ordered an injunction against the addition of the question.¹²⁴

The Supreme Court later heard a similar case regarding the citizenship question in *Department of Commerce v. New*

¹¹⁹ *California v. Ross*, No. 18-cv-01865-RS, 2019 U.S. Dist. LEXIS 36230, at *10–17 (N.D. Cal. Mar. 6, 2019).

¹²⁰ *Id.* at *11 (stating that courts cannot look at post hoc rationalizations for agency actions when determining if the action was arbitrary and capricious).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at *11–12.

¹²⁴ *Id.* at *12–13.

York.¹²⁵ In this case, the Supreme Court enjoined the reintroduction of the citizenship question, holding that the Commerce Department acted pretextually in an arbitrary and capricious manner in violation of the APA.¹²⁶ The Court determined that:

evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process.¹²⁷

This led the Court to find that there was “a significant mismatch between the decision the Secretary made and the rationale he provided,” mainly that the citizenship data would be used to enforce the VRA.¹²⁸ The Court further stated that the VRA rationale appears “to have been contrived.”¹²⁹ Thus, the Court enjoined the citizenship question and remanded the case back to the agency.¹³⁰ While this does not mean the citizenship question is unconstitutional *per se*, it does show the VRA rationale was pretextual in violation of the APA. And, the pretextual violation tends to heighten the privacy concerns of many immigrants and non-citizens because it shows the government did not have a valid reason for trying to reintroduce the citizenship question.

¹²⁵ See *Dep’t of Commerce v. New York*, 139 S. Ct. 2551 (2019).

¹²⁶ *Id.* at 2574–2576.

¹²⁷ *Id.* at 2574.

¹²⁸ *Id.* at 2575.

¹²⁹ *Id.*

¹³⁰ *Id.* at 2576.

3. Enumeration Clause Challenge

The Enumeration Clause in the Constitution requires that all people residing in the United States be counted every ten years¹³¹, and broad discretion is given to the Commerce Secretary to decide what questions are on each census.¹³² “However, if the Secretary's decision to include a question affirmatively interferes with the actual enumeration and fulfills no reasonable governmental purpose, it may form the basis for a cognizable Enumeration Clause challenge.”¹³³ Here, the citizenship question has been predicted by professional members of the Census Bureau to reduce response rates within non-citizen and Latino communities because of privacy concerns over citizenship data.¹³⁴ The decreased response rates could lead to an inaccurate census, which is “contrary to the Constitution.”¹³⁵

In *Department of Commerce v. New York*, the Supreme Court declined to enjoin the reintroduction of the citizenship question on the basis of an Enumeration Clause challenge.¹³⁶ The Court stated that Congress has great discretion over the form of the census, and Congress has delegated this authority to the Department of Commerce.¹³⁷ The Court then used a historical argument positing that the census has long been used “for more than simply counting the population.”¹³⁸ For example, the census has been used to create statistics about race, sex, national origin,

¹³¹ U.S. CONST. art. I, § 2, cl. 3.

¹³² *California v. Ross*, No. 18-cv-01865-RS, 2019 U.S. Dist. LEXIS 36230, at *14 (N.D. Cal. Mar. 6, 2019).

¹³³ *Id.* (holding that the citizenship question violated the Enumeration Clause).

¹³⁴ *Id.* at *11–12.

¹³⁵ *Id.* at *15.

¹³⁶ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (“The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary's decision.”).

¹³⁷ *Id.*

¹³⁸ *Id.* at 2567.

and even the value of real estate.¹³⁹ Furthermore, a citizenship question has been asked on a census in some form since 1820.¹⁴⁰ And, because “[t]hat history matters,” the Court held that the Enumeration Clause does not prohibit the Commerce Secretary from asking about citizenship on the national census.¹⁴¹

Nonetheless, an Enumeration Clause challenge may be successful in the future if it can be shown that a large percentage of the population will fail to respond to the census. In the *Department of Commerce* case, the Supreme Court relied on the District Court finding that approximately 5.8 percent of noncitizen households would be undercounted if the citizenship question was reintroduced.¹⁴² While this percentage was sufficient to garner Article III standing¹⁴³, it was not sufficient to contravene the Enumeration Clause.¹⁴⁴ However, after the pretextual reasoning of the Commerce Department was uncovered, if the citizenship question is somehow placed on the census, it is likely that many more noncitizen households will fail to respond because of privacy concerns. The question is whether this increase would be enough for the courts to uphold an Enumeration Clause challenge.

Furthermore, the Supreme Court has found that the Apportionment Clause of Article I, Section 2, of the U.S. Constitution requires “one man’s vote in congressional elections . . . to be worth as much as another’s.”¹⁴⁵ However, a citizenship question could impact the accuracy of the census by undercounting the total number of people in each Congressional District. Because the

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 2565.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2567.

¹⁴⁵ *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see also Karcher v. Daggert*, 462 U.S. 725, 744 (1983) (holding that deviations in congressional districts must be “functionally equal as a matter of law” and “a good-faith effort to achieve population equality using the best available census data.”).

census is used to help create Congressional Districts, an inaccurate census could create Congressional Districts within a state that have nonuniform populations. This is a direct result of the privacy concerns of individuals residing in the United States and it could cause the population size of Congressional Districts to vary, potentially running afoul of the Fourteenth Amendment.¹⁴⁶ While the Supreme Court did not consider this in its Enumeration Clause analysis, this argument by itself, as well as coupled with the Enumeration Clause argument, could prove successful in the future.

V. POTENTIAL SOLUTIONS

Regardless of one's views on the citizenship question, the reintroduction of this question creates privacy violations which could indirectly harm all people living in the United States. The best solution from a privacy standpoint would be to prevent the government from collecting any citizenship data whatsoever. However, this is likely impractical. Nonetheless, there are a number of corrective actions that can be taken to help alleviate the privacy concerns while still allowing the government to have the citizenship data it desires.

A. Non-Mandatory Citizenship Question

One novel solution to the citizenship question dilemma would be to make this question non-mandatory. On the surface, this would alleviate many privacy law concerns because respondents would no longer be required by law to answer this question. However, not answering the question could serve as a *de facto* "yes" answer to non-citizenship because the Census Bureau could infer that respondents who fail to answer the citizenship question are non-citizens. Thus, many of the same primary and secondary harms are

¹⁴⁶ *Wesberry*, 376 U.S. at 6; *Karcher*, 462 U.S. at 746-47.

prevalent since the government may still acquire citizenship information through *de facto* answers. Furthermore, the Census Bureau has conducted studies that show non-mandatory census questions actually reduce the response rates even further than mandatory census questions.¹⁴⁷ Therefore, of the three solutions, this would be the least effective because it may further depress response rates and it is only a quasi-solution to the privacy problem.

B. Keeping the Citizenship Question Only on the ACS

The ACS is sent out yearly to approximately 2.6 percent of American households and has contained the citizenship question since 2005.¹⁴⁸ Keeping the citizenship question only on the ACS, and removing it from the national census, maintains the status quo. Also, it is likely the least intrusive privacy invasion the Census Bureau would cause while still gathering citizenship information through a census. Simple mathematics shows that the potential primary privacy harms stemming from a citizenship question on the ACS are 97 percent lower than the potential primary privacy harms stemming from a national census because only a small portion of households receive the ACS.¹⁴⁹ However, there are still problems with this solution.

First, the privacy violations and potential primary harm described in Section III are still prevalent, even after implementation of this solution. While the total amount of the potential harms is greatly reduced, for those households that receive the ACS, the primary harm of governmental misuse of private citizenship data

¹⁴⁷ *Mandatory v. Non-Mandatory Methods*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/methodology/mandatory-voluntary-methods.html> (last visited Mar. 26, 2019).

¹⁴⁸ *American Community Survey Information Guide 3* (United States Census Bureau, Oct. 2017), https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS_Information_Guide.pdf.

¹⁴⁹ *Id.*

is still concerning. Thus, while this solution minimizes the total harm, it does not eliminate it.

Second, the secondary harm to all residents is still prevalent. The ACS is used, just like the national census, to create statistics about communities in America.¹⁵⁰ If a significant portion of households fail to respond to the ACS because of privacy concerns, the data will be incorrect. This incorrect data would then harm all residents in the same manner as an incorrect census would—decreased funding and insufficient national disaster relief. Thus, while this solution minimizes the potential privacy harms, it does not solve the bigger problem.

C. Use of Federal Administrative Records to Collect Citizenship Data

The best solution for maintaining the integrity of private citizenship information, while still allowing the government to collect citizenship data, is for the Census Bureau to remove the citizenship question from all censuses and instead use federal administrative records to collect citizenship data. In fact, this option was strongly considered, and in fact recommended, by the Census Bureau.¹⁵¹ Instead, the Commerce Secretary opted to reintroduce the citizenship question, claiming there was insufficient data from government administrative records on more than ten percent of the population.¹⁵² Over time, however, that percentage will decrease and with modern statistical models the potential error rate can be mitigated. Furthermore, by using information the government already

¹⁵⁰ *Id.* at 2.

¹⁵¹ *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2563 (2019) (“Option three was to use administrative records from other agencies, such as the Social Security Administration and Citizenship and Immigration Services, to provide DOJ with citizenship data. The Census Bureau recommended this option. . .”).

¹⁵² *Id.* (“But the Secretary concluded that administrative records alone were inadequate because they were missing for more than 10% of the population.”).

possesses, the national census would not create new privacy violations and subsequent harms stemming from the citizenship question.

This technique has already proven to be successful for a number of European countries, and these countries have stopped using survey questionnaires entirely.¹⁵³ For example, Iceland creates real time population reports by compiling government electronic databases such as birth registries, death registries, and so on.¹⁵⁴ Instead of a decennial population report, which is only a snapshot in time, countries like Iceland can create population statistic reports using real time data.¹⁵⁵ Furthermore, according to United Nations statistical authorities, this type of data compilation system is significantly more accurate than traditional surveys because hard to reach communities, like immigrants and the homeless, can be measured using information from social services, immigration control, and employment records.¹⁵⁶

Thus, the best practical solution to the citizenship question would be implementing a central database overseen by the Census Bureau for the collection of citizenship information from data the federal government already possesses through databases from Medicaid, Medicare, immigration services, social security, and so on. This would eliminate the privacy violations created by the addition of a citizenship question and would also remove all secondary harms. Furthermore, it would save the federal government millions of dollars.¹⁵⁷ President Trump has also recently

¹⁵³ Alex Johnson & Shereen Bhan, *New Ways of Counting Leave U.S. Census Behind*, NBC NEWS (Mar. 9, 2010), http://www.nbcnews.com/id/36195593/ns/world_news/t/new-ways-counting-leave-us-census-behind/#.XJqpeyhKjIV.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *This Should be the Final Answer to the Census Question*, WASH. POST (Jan. 21, 2019), https://www.washingtonpost.com/opinions/this-should-be-the-nal-answer-to-the-census-question/2019/01/21/c552b9d6-19df-11e9-9ebf-c5fed1b7a081_story.html?utm_term=.e7b14ee60c46.

begun to support this solution. After the Supreme Court enjoined the citizenship question and remanded it back to the agency, President Trump declared that his administration would no longer seek to include the citizenship question on the 2020 national census.¹⁵⁸ Instead, President Trump stated that he would use federal databases to compile citizenship information.¹⁵⁹

However, this solution is not a panacea for privacy issues because there are privacy concerns regarding a government database including, but not limited to, data security breaches, improper data use, and improper sharing of data between government agencies. Nonetheless, this is the best solution, assuming the government has a valid reason for needing the citizenship information, because the government is not creating additional privacy violations by aggregating information it already possesses. Thus, this solution would allow the Census Bureau to efficiently and effectively use information already collected by the government. Furthermore, Title 13 would still apply and would provide strong statutory protections upholding confidentiality and preventing governmental misuse of the data. This would eradicate the privacy violations inherent in the citizenship census question and, with the proper procedural safeguards in place protecting the central database, the Census Bureau could use information already in the government's control to create citizenship statistics instead of creating additional harms through the mandatory census.

VI. CONCLUSION

The privacy violations caused by the citizenship question on the national census may create primary harm to non-citizen

¹⁵⁸ Amy Howe, *Trump administration ends effort to include citizenship question on 2020 census*, SCOTUSBLOG (July 11, 2019), <https://www.scotusblog.com/2019/07/trump-administration-ends-effort-to-include-citizenship-question-on-2020-census>.

¹⁵⁹ Jeff Mason & David Shepardson, *Trump drops census citizenship question, vows to get data from government*, REUTERS (July 11, 2019), <https://www.reuters.com/article/us-usa-census/trump-drops-census-citizenship-question-vows-to-get-data-from-government-idUSKCN1U61D9>.

respondents as well as secondary harm to all residents of the United States. While the Fourth Amendment right to privacy is unlikely to defeat the citizenship question directly, the Supreme Court has recently enjoined the reintroduction of the citizenship question by holding that the rationale behind reintroducing the question—enforcing the VRA—was pretextual and violated the APA. Nonetheless, the best solution to alleviate these privacy concerns, as well as to assuage the APA violation, would be to create a central database within the Census Bureau that can access citizenship information from administrative records already in the government's control. This would prevent privacy violations from the reintroduction of the citizenship question on the census, limit potential privacy harms, create a more accurate census, and save the government millions of dollars.