

Ballot Proposal 2 of 2020



ACCESSING ELECTRONIC DATA OR COMMUNICATIONS

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Ballot Proposal 20-2
November 3, 2020 General Election
Placed on the ballot by the Legislature
Complete to 10-7-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Proposal 20-2 would amend section 11 of Article I of the state constitution to require the government to obtain a search warrant to access a person's electronic data or electronic communications.

Proposal 20-2 was placed on the ballot after the adoption of Senate Joint Resolution G by the required two-thirds vote of each house of the legislature on June 24, 2020.¹ The following is the official language of Proposal 20-2 as it appears on the November 2020 ballot:

<p>Proposal 20-2</p> <p>A proposed constitutional amendment to require a search warrant in order to access a person's electronic data or electronic communications</p> <p>This proposed constitutional amendment would:</p> <ul style="list-style-type: none">• Prohibit unreasonable searches or seizures of a person's electronic data and electronic communications.• Require a search warrant to access a person's electronic data or electronic communications, under the same conditions currently required for the government to obtain a search warrant to search a person's house or seize a person's things. <p>Should this proposal be adopted?</p> <p>[] YES</p> <p>[] NO</p>

Section 11 of Article I protects against unreasonable searches and seizures by the government. A warrant cannot be issued to search a place or seize a person or things unless it describes them and shows probable cause, supported by oath or affirmation.

The proposal would apply this protection to electronic data and electronic communications and would require a search warrant to access electronic data or electronic communications.

FISCAL IMPACT:

This amendment would have no fiscal impact on the Department of State Police, local law enforcement agencies, or the judiciary.

¹ The resolution was adopted unanimously by both houses. See <http://legislature.mi.gov/doc.aspx?2019-SJR-G>

BRIEF DISCUSSION:

The Fourth Amendment to the U.S. Constitution, echoed in section 11 of Article I of the Michigan constitution, protects citizens from unreasonable search and seizure of property. Generally speaking, a warrant is required before law enforcement can search, for example, a person's home, car, or person. In 2014, the U.S. Supreme Court ruled in *Riley v California*² that the search of a cell phone incident to an arrest requires a warrant. However, this ruling only addressed accessing data on a cell phone. To expand this scope to other electronics, another case would have to be litigated or a federal amendment would have to be enacted. But these processes can be lengthy.

Proponents say Proposal 20-2 is needed because the law has not kept up with advances in technology. Amending the state constitution would mean that Michiganders would not have to wait for the U.S. Supreme Court to apply the Fourth Amendment to searches of electronic data, wherever the data is stored and from whatever type of device it was generated (e.g., cell phone, computer, or tablet). Americans use the internet to conduct both personal and business affairs, and data are stored almost indefinitely by service providers, external devices, or in Cloud storage. Simply put, the amendment would protect access to electronic data in the same way as access to hard data (e.g., a diary, letters, photographs), regardless of where it is stored.

It should be noted that, according to legislative committee testimony, it is currently standard practice for state and local police agencies in Michigan to seek warrants before searching a person's electronic communications or data.

Further, requiring a warrant before electronic devices or data may be searched may not extend to all situations. For instance, Proposal 20-2 would not apply to federal law enforcement agencies. In addition, case law provides several exceptions to requiring a warrant before property may be searched. Although the *Riley* decision addressed the first exception—a search incident to an arrest—the other general exceptions (objects in plain view, consent, stop and frisk, an automobile exception, and emergencies/hot pursuit scenarios) could limit applicability of Proposal 20-2 in some situations.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

² *Riley v California*, 575 US 373 (2014). See https://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf