

STATEWIDE BALLOT PROPOSAL

2020

September 2020

This bulletin is available online at www.canr.msu.edu/vote2020.

By Eric Walcott, Michigan State University Extension Specialist in Government and Public Policy Programs

Proposal 20-2 will appear on the ballot as follows:

Statewide Ballot Proposal 20-2

A proposed constitutional amendment to require a search warrant in order to access a person's electronic data or electronic communications.

This proposed constitutional amendment would:

- 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.

Should this proposal be adopted? Yes [] No []

The Proposal

The proposal would amend Article I, Section 11 of the Michigan Constitution to specify that electronic data and communications would be secure from unreasonable searches and seizures and that a warrant would be required to gain access to those materials.

A “yes” vote supports this constitutional amendment to require a search warrant to access a person's electronic data and communications.

A “no” vote opposes this constitutional amendment to require a search warrant to access a person's electronic data and communications.

The full text of the proposal is available in the Elections section of the Michigan Secretary of State website at <https://www.michigan.gov/sos/>.

Background

Article I, Section 11 of the Michigan Constitution currently prohibits the unreasonable search and seizure of a person, house, papers or possessions without probable cause and a warrant. It does not specifically prohibit the search and seizure of electronic data and communications.

The Fourth Amendment to the U.S. Constitution also provides protection from unreasonable search and seizure.

How existing laws apply to electronic data, and to cellphone data in particular, has been a topic of increasing interest as the volume and detail of digital information has increased. In recent years the U.S. Supreme Court has issued multiple rulings on this topic. In *Riley v. California* (2014), the Court ruled that law enforcement may not conduct a warrantless search of a cellphone seized from a suspect “incident to arrest.”

A “search incident to lawful arrest” is the legal principle that allows police to perform a warrantless search of an arrested person and the area within their immediate control, in the interest of officer safety, escape prevention, and evidence preservation (*Riley v. California*, 2014). For example, police can remove weapons from a person or prevent the concealment or destruction of evidence within a vehicle without a search warrant. Recognizing the vast amount of sensitive personal information many people carry with them in their cellphones, the Supreme Court ruled that warrantless cellphone searches are not allowable in these cases (*Riley v. California*, 2014).

In another case, *Carpenter v. United States* (2018), the Supreme Court ruled that law enforcement agencies may not access an individual’s cellphone location data without a warrant. In this decision, the Court ruled that the defendant had a reasonable expectation of the privacy of his cellphone location records, which are compiled automatically each time a phone connects to a cell tower (Mich. State Appellate Defender Office and Criminal Defense Resource Center, 2018). In *Carpenter*, the Court determined that warrantless access to this data violates the Fourth Amendment.

Some other states already have similar protections enshrined in state statutes or their state constitutions. Constitutions in 11 states have explicit provisions relating to a right to privacy. In addition, Missouri voters approved Amendment 9 to the Missouri Constitution in 2014, providing explicit protection for electronic communications and data (National Conference of State Legislatures, 2020). (The Missouri amendment appears to be the model for Michigan Proposal 20-2.) A similar law was adopted by the Utah Legislature and signed into law in 2019 (Bolamperti & Fowler, 2019).

These laws, along with Michigan Proposal 20-2, are intended to fill gaps in current protections and provide explicit protection of electronic data and communications from warrantless searches.

Proposed Changes

Riley and *Carpenter* moved the U.S. legal system toward stronger protection of electronic data and communications, but each case addresses a specific instance in which certain data is protected, rather than providing complete

protection against warrantless searches of electronic data (Freed Wessler, 2019). Even these limited protections are not yet part of state law. The proposed amendment to the Michigan Constitution would provide broad protection of electronic data and communications from warrantless searches.

In practice, “Michigan law enforcement agencies generally obtain a search warrant or subpoena prior to accessing private electronic data.” According to the Michigan State Police and the Michigan Association of Police Chiefs, “most police agencies need a warrant or subpoena to get access to data through a service provider” (LeBlanc, 2020).

The proposed amendment “would apply to Michigan police agencies, not federal law enforcement. [. . .] It would bar state police agencies from gathering electronic data on behalf of federal law enforcement” (LeBlanc, 2020).

Summary

After a proposed constitutional amendment has been approved by at least a two-thirds majority in each chamber of the Michigan Legislature, the state constitution requires it to be put to a vote of the people.

This amendment was referred to Michigan voters in 2020 with the adoption of Michigan Senate Joint Resolution G (2020) by a vote of 38-0 in the Michigan Senate and 106-0 in the Michigan House of Representatives.

References

- Bolamperti, A., & Fowler, P. X. (2019, May 1). What does the new Utah electronic data privacy law do? *S&W Cybersecurity and Data Privacy Law*.
<https://bit.ly/3bZkNhZ>
- Carpenter v. United States*, 585 U.S. ____ (2018).
- Freed Wessler, N. (2019, June). *The Supreme Court’s most consequential ruling for privacy in the digital age, one year in*. American Civil Liberties Union.
<https://bit.ly/3gYC7nS>
- LeBlanc, B. (2020, June). *Michigan voters mull electronic search warrant*. Government Technology.
<https://bit.ly/2Z2pemG>
- Mich. Const. art. I, § 11.

Mich. S. Res. G, Mich. Legislature. (2020).

<http://legislature.mi.gov/doc.aspx?2019-SJR-G>

Michigan State Appellate Defender Office and Criminal Defense Resource Center. (2018). *US Supreme Court: Warrant required for search of cell-site records*.

<http://www.sado.org/Articles/Article/635>

National Conference of State Legislatures. (2020). *Privacy protections in state constitutions*. <https://bit.ly/32uY61X>

Riley v. California, 573 U.S. ____ (2014)

U.S. Const. amend. IV.

MICHIGAN STATE
UNIVERSITY | **Extension**

Produced for MSU Extension (extension.msu.edu) by the MSU Extension Educational Materials Team.

MSU is an affirmative-action, equal-opportunity employer, committed to achieving excellence through a diverse workforce and inclusive culture that encourages all people to reach their full potential. Michigan State University Extension programs and materials are open to all without regard to race, color, national origin, gender, gender identity, religion, age, height, weight, disability, political beliefs, sexual orientation, marital status, family status or veteran status. Issued in furtherance of MSU Extension work, acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. Jeffrey W. Dwyer, Director, MSU Extension, East Lansing, MI 48824. This information is for educational purposes only. Reference to commercial products or trade names does not imply endorsement by MSU Extension or bias against those not mentioned. 1P-9:2020-Web-RM/RM WCAG 2.1