



## Statewide Proposal 2 of 2020

# PROHIBITION *of* WARRANTLESS ELECTRONIC SEARCHES

## Proposal Type

Legislatively Referred Amendment to the State Constitution.

## Background

The Fourth Amendment of the U.S. Constitution protects individuals from unreasonable search and seizures by the government:

*“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”*

In addition to the protections offered by the Fourth Amendment, Michigan’s State Constitution of 1963 prohibits the unreasonable search and seizure of “the person, houses, papers and possessions of every person” without probable cause and without a warrant in Article I, Section 11. However, with the increasing use of cell phones and other electronic devices, public discussions have been ongoing about whether privacy protections also apply to a person’s electronic data. The U.S. Supreme Court has considered the subject in many recent rulings, including *Riley v. California* in 2014, which addressed the access of a person’s cell phone without his consent, and *Carpenter v. United States* in 2018, which addressed the access of location data gathered by telecommunications companies for law enforcement. In light of the narrow nature of these and other rulings, several states have enacted measures that more clearly spell out the rules regarding electronic data and protect against warrantless electronic searches.

In June 2020, the Senate unanimously passed Senate Joint Resolution G to bring this proposal before Michigan

voters. The House of Representatives followed suit with a 106-0 vote. The resolution was sponsored by Senator Jim Runestad (R-White Lake).

## Proposal Summary

The proposal, if adopted, would add a provision to the Michigan Constitution of 1963 that includes “electronic data and electronic communications” as items that state and local law enforcement officials would be required to obtain a search warrant for in order to access.

## Supporters

Supporters include organizations such as the American Civil Liberties Union of Michigan (ACLU), Americans for Tax Reform, the Mackinac Center, Pacific Legal Foundation, Tenth Amendment Center, *The Detroit News* Editorial Board, and *The Toledo Blade* Editorial Board. **According to supporters, the proposal:**<sup>1,2</sup>

1. Offers clarity for Michiganders by requiring local and state law enforcement to obtain a warrant before searching through or collecting a person’s electronic data. This proposal would also take the guesswork out of the hands of the judiciary regarding whether data obtained by police needed a warrant or was admissible evidence. Judges currently have to rely on piecemeal rulings to guide them depending on the process of collection, device, or data storing method.
2. Ensures electronic privacy becomes the norm in Michigan, without needing to be repeatedly fought for or reestablished as new technology emerges.<sup>3</sup> Similar basic protections to those outlined in the proposal have existed for paper data for centuries.<sup>4</sup>
3. Updates Michigan law, as the law has not adapted as technology has developed. It has become easier for the government to access private information

without a citizens' knowledge or without a legal basis for doing so. The government should have to explain their reasoning to a judge.<sup>5</sup>

## Opponents

At the time of this writing, Michigan Catholic Conference has not found any organizations that have spoken out publicly in opposition to Proposal 2. During discussion of the amendment back throughout the legislative process, several organizations—including the Michigan Association of Chiefs of Police and the Michigan Sheriffs' Association—opposed or raised concerns about early drafts of the resolution (*although neither are currently calling on voters to oppose Proposal 2*).<sup>6</sup> Several of the concerns they raised were outlined in a June 2020 article from *The Detroit News*.<sup>7</sup> *These arguments include that the proposal:*

1. Does not change much practically, as most law enforcement agencies already must obtain a warrant or subpoena in order to access electronic data through a service provider.
2. Is unnecessary, as instances of large-scale data overreach by law enforcement are exaggerated.
3. Could impede the efforts of law enforcement in an emergency. In life-threatening situations where data is needed more quickly, such as kidnapping and murder, the current process is already sufficient to address public safety and the access of a person's electronic data. ●

## Official Proposal Text

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 Michigan Catholic Conference Board of Directors does not have a position on Proposal 2.**

1. "Runestad Privacy Resolution to be Placed on November Ballot," Michigan Senate GOP, 6/25/20: [bit.ly/36ettAf](https://bit.ly/36ettAf). 2. "Voters Decide Whether to Ban Police Use of Electronic Data Without Warrant," *The Detroit News*, 6/26/20: [bit.ly/3mOp1Or](https://bit.ly/3mOp1Or). 3. "Testimony from Pacific Legal Network on SJR G," Senate Judiciary & Public Safety Committee, 10/3/19: [bit.ly/302QT7u](https://bit.ly/302QT7u) and same as citation 1. 4. "Testimony from Tenth Amendment Center on SJR G," Senate Judiciary & Public Safety Committee, 9/9/19: [bit.ly/362RLwD](https://bit.ly/362RLwD). 5. Same as citation 1. 6. "Testimony from Mackinac Center for Public Policy on SJR G," Senate Judiciary & Public Safety Committee, 9/12/19: [bit.ly/3hUzmok](https://bit.ly/3hUzmok) and same as citation 2. 7. "Committee Meeting Minutes," Senate Judiciary & Public Safety Committee, 10/3/19: [bit.ly/2ScNjn5](https://bit.ly/2ScNjn5). 8. Same as citation 2.