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BALLOT PROPOSAL
20-2

An Overview

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On November 3, 2020, Michigan voters will decide whether to adopt an amendment to the State Constitution to require law enforcement to obtain a search warrant to gain access to a person's electronic data or electronic communications. Proposal 20-2 is the result of Senate Joint Resolution G of 2019, which passed the Michigan Senate and the House of Representatives with more than a two-thirds vote in each chamber. Proposal 20-2 will appear on the ballot at follows:

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

The 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 []

If a majority of the electors vote "yes" on Proposal 20-2, the State Constitution will be amended.

BACKGROUND

The Fourth Amendment to the United States Constitution provides that:

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.

Article I, Section 11 of the Michigan Constitution grants similar protections:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.¹

The Fourth Amendment protection against unreasonable searches and seizures generally means that the government must obtain a search warrant supported by probable cause before conducting a search or seizure. A "search" occurs if the government infringes upon a person's reasonable expectation of privacy.² A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property.³

¹ The Michigan Constitution's prohibition against unreasonable searches and seizures is construed as protecting the same interests as the Fourth Amendment. *People v. Lemons*, 299 MichApp 541, 545 (2013).

² *Katz v. United States*, 389 US 347, 361 (1967) (Harlan, J., concurring).

³ *United States v. Jacobsen*, 466 US 109, 113 (1984).

A search or seizure conducted without a valid warrant generally violates the Fourth Amendment; however, courts have carved out specific, limited exceptions to the warrant requirement. For a warrantless search to be constitutional, the government must have probable cause to conduct the search and must demonstrate satisfactorily that its actions were justified in the absence of a warrant. Exceptions to the warrant requirement include exigent circumstances, a search incident to arrest, consent, searches of automobiles, the plain view doctrine, inventory searches, detention short of arrest (also known as "stop and frisk"), random drug testing, searches permissible as a condition of parole, public school searches, and searches at the US border.

The Fourth Amendment's applicability to searches and seizures of electronic data and communications has become a topic of increasing interest. In recent years, state and Federal courts have had to deal with the issue of the intersection of the Fourth Amendment and technology. In his concurring opinion in *United States v. Jones*, in which the Supreme Court held that the installation of a global positioning system tracking device on a vehicle without a warrant constituted an unlawful search under the Fourth Amendment, Justice Samuel Alito noted that while the Court "must assur[e] preservation of that degree of privacy against government intrusion that existed when the Fourth Amendment was adopted...it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case".⁴

Two years after it issued its opinion in the *Jones* case, the Court decided *Riley v. California*, which dealt with the question of whether law enforcement could search the data on a cellphone incident to arrest.⁵ As noted above, a search made incident to arrest is an exception to the warrant requirement. The scope of a search incident to arrest was outlined by the Court in *Chimel v. California*, in which the Court held:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape...In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidence items must, of course, be governed by a like rule.⁶

In *United States v. Robinson*, the Court noted that there are two rationales for the search incident to arrest exception: 1) the need to disarm a suspect and take him or her into custody, and 2) the need to preserve evidence.⁷ The Court ultimately held that in the case of a lawful custodial arrest, a full search of a person is not only an exception to the warrant requirement, but also is "reasonable" under the Fourth Amendment.⁸

In *Riley*, the Court declined to extend its holding in *Robinson* to the search of digital data contained in a cellular device and, therefore, ruled that law enforcement may not search a cellphone's data incident to arrest. The court noted that:

The fact that a search in the pre-digital era could have turned up a photograph or two in a wallet does not justify a search of thousands of photos in a digital gallery. The fact that someone could have tucked a paper bank statement in a

⁴ 565 US 400, 420 (2012) (Alito, J., concurring).

⁵ 573 US 373 (2014).

⁶ 395 US 752, 762-763 (1969).

⁷ 414 US 218, 234 (1973).

⁸ *Id.*

pocket does not justify a search of every bank statement from the last five years.⁹

In another case, *Carpenter v. United States*, the Court ruled that a law enforcement agency may not access an individual's cellphone location data without a warrant because the individual has a reasonable expectation of the privacy of his or her cellphone location records.¹⁰

Certain Federal statutes also provide some protections for electronic data. For instance, the Electronic Communications Privacy Act (ECPA), extends and expands protections against wiretapping and electronic eavesdropping. The ECPA applies to email, telephone conversations, and data stored electronically.

Michigan courts have opined on the circumstances in which a warrant is required in order to gain access to certain electronic data. For example, in *People v. Gingrich*, the Michigan Court of Appeals held that "a personal computer storing personal information in the form of digital data must be considered defendant's 'effect' under the Fourth Amendment, and 'possession' under the Michigan Constitution".¹¹ In addition, Michigan statute provides certain protections against unreasonable searches and seizures. For example, the Fourth Amendment Rights Protection Act prohibits the State or its political subdivisions from participating with, or providing material support or resources to, a Federal agency to enable it to collect or use a person's electronic data or metadata unless the individual gives informed consent, the action is pursuant to a warrant, the action is in accordance with a legally recognized exception to the warrant requirement, the action will not infringe on the individual's reasonable expectation of privacy, or the State or political subdivision collected the electronic data or metadata legally.¹²

DISCUSSION

While the Supreme Court decisions like *Riley* and *Carpenter*, similar Michigan cases, such as *Gingrich*, and State and Federal statutes add to the protections guaranteed under the Fourth Amendment, each addresses only a specific instance in which certain data are protected.

Proponents of Proposal 20-2 contend that the proposed amendment to the Michigan Constitution would provide broad protections against warrantless searches of electronic data and communications. Traditionally the Fourth Amendment has been interpreted to protect against search of one's person and home and the seizure of physical property; however, information, such as bank statements, previously put on physical property or paper now is delivered and stored electronically and correspondence traditionally conveyed through landline calls and written letters or notes is now conveyed through cellular calls, emails, and texts. Proponents argue that these electronic data and communications deserve the same level of protection against unreasonable searches and seizures as physical property or papers and written correspondence. As technology continues to evolve, supporters believe that enshrining these broad protections in the Michigan Constitution would better protect digital privacy.

Others, however, argue that Proposal 20-2 is redundant because law enforcement agencies' current practice generally is to obtain a warrant or subpoena to gain access to electronic data and communications. Furthermore, many Federal laws already protect an individual's electronic privacy. Additionally, some believe that adopting Proposal 20-2 could make it more

⁹ *Riley*, at 400.

¹⁰ 585 US __ (2018).

¹¹ 307 MichApp 656, 663 (2014).

¹² MCL 37.263

difficult for State and local law enforcement officials to investigate cybercrimes and enforce cybercrime laws.

FISCAL IMPACT

Proposal 20-2 would have a negligible fiscal impact on State and local law enforcement agencies, as it is current practice that agencies seek search warrants to gain access to electronic data or electronic communications.