



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

September 11, 2012

Molly Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
Post Office Box 193939
San Francisco, CA 94119-3939

Re: *Haskell v. Harris*, No. 10-15152

Oral Argument: September 19, 2012

En Banc Panel: Kozinski, Pregerson, McKeown, Fisher, Gould, Paez, Tallman, Rawlinson, M. Smith, N.R. Smith, Watford, CJJ

Dear Ms. Dwyer:

Pursuant to Federal Rule of Appellate Procedure 28(j), *amicus curiae* Electronic Frontier Foundation respectfully calls this Court's attention to new research on "junk" DNA produced by a nine-year, world-wide, federally-sponsored project called ENCODE.¹ This research has determined that more than 80% of DNA once thought to be no more than "junk" has at least one biochemical function, controlling how our cells, tissue and organs behave.²

In this Court's panel opinion finding that Cal. Penal Code § 296(a)(2)(C) did not violate the Fourth Amendment, the majority relied heavily on the assumption that a DNA profile does nothing more than identify a person. The panel held that, because "[a] DNA profile contains only thirteen 'junk DNA' markers that are not linked to any genetic or physical trait," it does not "catalogu[e] our most intimate traits" and "is substantially indistinguishable from traditional fingerprinting." *Haskell v. Harris*, 669 F.3d 1049, 1059-60 (9th Cir. 2012). For this reason, the panel held that DNA profiles do not implicate cognizable privacy interests. *Id.* at 1060.

This assumption has now been brought into question. The ENCODE project has determined that "junk" DNA plays a critical role in determining a person's susceptibility to disease and physical traits like height.³ In fact, *Scientific American* has described the new DNA landscape revealed by ENCODE as "absolutely teeming with important genetic elements."⁴

The ENCODE project results support Appellants' and amici's argument that collecting DNA samples from arrestees without a warrant violates the Fourth Amendment. Based on the research, it is highly likely the genetic markers contained in each Appellant's DNA profile reveal much more information than just his or her identity—information that is sensitive and private and does implicate a cognizable privacy interest.

¹ See <http://www.nature.com/encode/>; see also Gina Kolata, "Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role," *NY Times* (Sept. 5, 2012) <https://www.nytimes.com/2012/09/06/science/far-from-junk-dna-dark-matter-proves-crucial-to-health.html>.

² Magdalena Skipper, Ritu Dhand & Philip Campbell, "Presenting ENCODE," *Nature*, 489, 45 (Sept. 6, 2012) <http://www.nature.com/nature/journal/v489/n7414/full/489045a.html>.

³ Gina Kolata, "Bits of Mystery DNA, Far From 'Junk,' Play Crucial Role," *NY Times*.

⁴ Stephen S. Hall, "Hidden Treasures in 'Junk' DNA," *Scientific American* (Sept. 5, 2012) <http://www.scientificamerican.com/article.cfm?id=hidden-treasures-in-junk-dna>.

For this reason, we respectfully ask the Court to consider the ENCODE project findings in determining the outcome of this case.

Respectfully submitted,

/s/ Jennifer Lynch

Jennifer Lynch
Hanni M. Fakhoury
Lee Tien
Attorneys for *Amicus Curiae*
Electronic Frontier Foundation