ACLU 60
AMERICAN CIVIL LIBERTIES UNION of KENTUCKY
60 YEARS OF PROTECTING YOUR LIBERTY

March 15, 2016

Kathy Litteral, Warden
Eastern Kentucky Correctional Complex
200 Road to Justice
West Liberty, Kentucky 41472

RE: EKCC Policy No. 16-02-01(J)(5) - Inmate Correspondence

Dear Warden Litteral:

It has come to our attention that the Eastern Kentucky Correctional Complex (EKCC) prohibits prisoners from receiving mail that "promote[s] homosexuality." Policy No. 16-02-01(J)(5). And based on our Open Records Act investigation, EKCC has invoked this provision at least 13 times since August, 2015 to reject mail sent to prisoners. Such mail items included personal letters and photographs not marked as sexually explicit, as well as periodicals such as *Out* magazine and *The Advocate*, which contain articles about popular culture and politics of interest to the LGBT community. EKCC's policy of mail censorship on this basis, as explained more fully below, constitutes a viewpoint-based restriction on speech that serves no legitimate penological interest and actively harms gay prisoners. On behalf of the American Civil Liberties Union ("ACLU") and the ACLU of Kentucky, we write to request that EKCC immediately suspend its mail censorship under subsection (J)(5) because failure to do so will result in further deprivations of prisoners' (and publishers') constitutionally protected rights under the First and Fourteenth Amendments.

The First Amendment to the U.S. Constitution and Section 8 of the Kentucky Constitution protect the freedom of speech of all people. This protection extends not only to verbal communications, but also materials sent through the mail. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965). Furthermore, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," including the First Amendment. *Turner v. Safley*, 482 U.S. 78, 84 (1987). While prisoners' First Amendment rights are more limited than those of

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non-prisoners, prison officials cannot create restrictions on the mail prisoners receive unless they are "reasonably related to legitimate penological interests." *Id.* at 89.

Courts have not hesitated to strike down prison censorship policies that do not satisfy the *Turner* test. *See, e.g.*, *Jones v. Caruso*, 569 F.3d 258, 262, 274 n.3 (6th Cir. 2009) (prohibition on "[m]ail regarding actions that can be taken under the Uniform Commercial Code"); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (prohibition on mail containing material that has been downloaded from the Internet); *Morrison v. Hall*, 261 F.3d 896, 903-05 (9th Cir. 2001) (prohibition on bulk rate and third- and fourth-class mail as applied to paid subscription publications such as *The New York Times*, *Sports Illustrated*, and *Montana Outdoors*); *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) (prohibition on standard rate mail as applied to nonprofit subscription publications such as *Prison Legal News*); *Kikimura v. Turner*, 28 F.3d 592, 599 (7th Cir. 1994) (prohibition on foreign-language publications); *Greybuffalo v. Kingston*, 581 F. Supp. 2d 1034 (W.D. Wis. 2007) (prohibition on materials related to the American Indian Movement).

Moreover, those cases in which courts have upheld prison mail restrictions for content deemed to "promote homosexuality" relied on the proffered justification that "homosexuality poses a security problem in all prisons." *See Espinosa v. Wilson*, 814 F.2d 1093, 1098 (6th Cir. 1987). But *Espinosa* and similar cases were decided before the Supreme Court recognized the equal dignity of gay people and understood what it means to be gay. *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1203 (D. Utah 2013) (in striking down ban on marriage for same-sex couples, court explained that "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian."). Indeed, at that time, the law of the land was that gay relationships could constitutionally be criminalized because the Supreme Court believed at the time that there was "[n]o connection between family, marriage, or procreation," which the Constitution protects, and "homosexual activity." *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

After the Supreme Court unequivocally recognized the equal dignity of gay people in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and *United States v. Windsor*, 133 S. Ct. 2675 (2013), it can no longer be seriously argued that being gay constitutes a security threat that justifies discriminatory treatment of gay prisoners. Moreover, as those cases recognize, being gay is an immutable part of who a person is. *Obergefell*, 135 S. Ct. at 2596. And it is untenable for the government to censor constitutionally protected expression by pointing to security issues caused by third parties opposed to the speech. Doing so, in effect, grants to other inmates a "heckler's veto" and a ready excuse for prison officials to ignore or minimize anti-gay violence. Further, the unstated premise of such asserted security

interests is that publications that "promote homosexuality" contribute to prisoners identifying as gay, and that an increase in gay prisoners leads to greater security problems within the facility. But there is simply no basis for notion that reading publications about gay people will somehow cause people to become gay. Reading articles about gay celebrities and newsmakers in *Out* magazine or *The Advocate* does not make anyone gay any more than reading articles about heterosexual couples in *People* magazine makes someone heterosexual. Here, the letters, cards, photographs, and magazines confiscated by EKCC do not pose a risk to prison safety because they do not promote anything illegal, nor do they impede rehabilitation. To the extent the concern relates to prisoners being targeted for violence if they are seen with gay-related publications, there are many other permitted items whose possession might cause a person to become the target of unwanted attention or violence. Thus, the legitimate penological interests of safety and security cannot justify policies like EKCC's because it is well settled that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

Kentucky prisoners cannot constitutionally be denied the right to receive mail just because the content relates to gay people or issues of interest to gay people, or may be construed as "promoting homosexuality." Doing so singles out particular individuals for unequal treatment on the basis of their sexual orientation thus denying them the fundamental right to receive information protected by the First Amendment. We therefore ask that you immediately remedy the situation by ceasing to deny mail to prisoners on the basis that it "promotes homosexuality," and by removing the prohibition under subsection J(5) in the policy manual.

We look forward to written confirmation, within 14 days, of EKCC's response to our request. Please note, failure to respond within that time will be construed by us as EKCC's refusal to address this matter, and we will then explore alternative options to address this issue. If you have any questions, please feel free to contact the ACLU of Kentucky directly so that we can discuss a mutually agreeable resolution to this issue. Thank you, and we look forward to your reply.

Sincerely,

William E. Sharp, Legal Director
ACLU of Kentucky

Ria Tabacco Mar, Staff Attorney
ACLU National LGBT Project