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July 22, 2020

Maj Gen. Frank M. Muth
Commanding General
United States Army Recruiting Command
1307 3rd Avenue
Fort Knox, KY 40121

Colonel Megan B. Stallings
Commander
United States Army Marketing and Engagement Brigade
Munoz Building, 9th Cavalry Regiment Road
Fort Knox, KY 40121

Rear Admiral Dennis Velez
Commander
United States Navy Recruiting Command
5722 Integrity Drive, Building 784
Millington, TN 38054

Dear Major General Muth, Colonel Stallings, and Rear Admiral Velez,

We represent Jordan Uhl, who was banned from Twitch channels maintained by the Army and Navy esports teams after he posted messages in the channel chats about U.S. war crimes. For the reasons explained below, the banning of Mr. Uhl from these channels violates the First Amendment. We write to ask that you unban Mr. Uhl immediately and also unban all others who have been banned from the channels based on similar speech. We also ask that you adopt and publish written policies to ensure that others are not banned from these channels in the future based on viewpoint.

As you know, Twitch is a digital platform that allows users to livestream video and participate alongside other users in chats accompanying the livestreams. More than 4 million people stream video on Twitch each month, and more than 17 million people visit the site each day. They use the platform

to stream or watch video games, including "esports," which are competitive, multiplayer games. Both the Army and Navy have esports teams, and both teams use channels on Twitch to livestream video games and to chat with viewers about the games themselves, the U.S. military, and any number of other topics. The Army esports team's channel is @USArmyEsports, and the Navy team's channel is @AmericasNavy.[1]

The Army and Navy established their esports teams and Twitch channels as part of their efforts to recruit young people to the military.[2] Thus, the Army's esports channel's "About" page states, "Welcome to the US Army esport's Official Twitch. Here we share our member's passion for gaming, showcase competitions, and connect with our viewers."[3] Similarly, the Navy esports channel's "About" page states, "Other people will tell you not to stay up all night staring at a screen. We'll pay you to do it. Get a look at what life is like inside the uniform on the America's Navy official Twitch channel."[4]

Because the Army and Navy established these Twitch channels in order to engage with the public, the channels are open to anyone who uses the platform. Any Twitch user can follow either or both of these channels, and, within broad parameters established by Twitch's terms of service, any Twitch user who follows one of these channels can view the livestreams and participate in the chats associated with those livestreams.

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[1] U.S. Army Esports (@USArmyEsports), Twitch, https://www.twitch.tv/usarmyesports; U.S. Navy (@AmericasNavy), Twitch, https://www.twitch.tv/americasnavy.

[2] *See U.S. Army Esports Team*, U.S. Army Recruiting Command, https://recruiting.army.mil/army_esports (describing the Army Esports Team as operating to "create awareness about the Army and the opportunities it provides"); *Army Esports Marketing Giveaways Include Consoles, Controllers*, U.S. Army Recruiting Command (July 20, 2020), https://recruiting.army.mil/News/Article/2280452/army-esports-marketing-giveaways-include-consoles-controllers/ (describing the Army Esports team as a "relatively new recruiting outreach initiative"); *Esports*, U.S. Navy, https://www.navy.com/explore-the-navy/esports (linking to the Navy's Esports Twitch page); Courtney Mabeus, *Ready Player One: Navy Creates Billets for Gamers*, Navy Times (Mar. 16, 2020), https://perma.cc/D43B-3GFF ("The sea service sees Goats and Glory [the Navy esports team] as a tool to recruit from a group of young people that grew up online and are more used to streaming content than they are watching traditional broadcast programming. The Navy plans to tap from its own talent pool of gamer-sailors to reach them.").

[3] "About USArmyEsports," U.S. Army Esports (@USArmyEsports), Twitch, https://www.twitch.tv/usarmyesports/about.

[4] "About AmericasNavy," U.S. Navy Esports (@AmericasNavy), Twitch, https://www.twitch.tv/americasnavy/about.

Our client was banned from both channels after he sent messages in the channel chats relating to war crimes. Mr. Uhl was banned from the Army's esports Twitch channel on July 8.[5] After Mr. Uhl learned that the Army esports team had banned users on another platform, called Discord, for asking questions relating to war crimes, Mr. Uhl decided to ask similar questions himself on Twitch. At the time, the Army's esports channel on Twitch was streaming a game called *Call of Duty: Warzone*. In the chat associated with the livestream, Mr. Uhl first tried to post the message, "whats your favorite us war crime?" This effort was unsuccessful because the Army's moderators had already programmed the team's channel to automatically reject messages using the phrase "war crime." Mr. Uhl was able to post a substantively identical message, however, by substituting numbers for several letters in the phrase "war crimes:" "what's your favorite u.s. w4r cr1me?" Mr. Uhl was also able to post a link to the Wikipedia page for "U.S. war crimes." Immediately after he posted this content, however, the Army's moderators banned Mr. Uhl from the channel.[6] Other users were banned for similar speech.

Mr. Uhl was banned from the Navy esports Twitch channel on July 18. At the time, the Navy's esports team was livestreaming a game called *Escape from Tarkov*. In the associated chat, Mr. Uhl posted several messages related to military misconduct and about the Navy's response to others who had asked about war crimes. For example, he wrote: "Can you use enhanced interrogation tactics on the enemy in this game?" Later, after several others had asked questions about U.S. war crimes, the Navy's player responded orally to those messages, quoting the Navy's viewership statistics on Twitch. In reply, Mr. Uhl sent the following message: "Just to be clear, in response to people asking about military war crimes, you rattled off your Twitch viewership stats? On a channel the Navy just admitted to the press this week they PAY to promote?" (Mr. Uhl substituted an image for one of the letters in "war crimes" to evade auto-moderation.) Immediately after he posted this message, the Navy's moderators banned him from the channel.[7] Other users were banned for similar speech.

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[5] Matthew Gault, *The U.S. Army Twitch Channel is Banning People for Asking About War Crimes*, Vice (July 9, 2020, 12:03 P.M.), https://perma.cc/VP9S-3A3J; Matthew Gault, *Navy Esports Team Bans Twitch Users Who Ask About SEAL Who Did War Crimes*, Vice (July 20, 2020, 2:15 P.M.), https://perma.cc/FD54-AHNY.

[6] A screen recording of this interaction was posted on Twitter. *See* Rod Breslau (@Slasher), Twitter (July 8, 2020, 6:51 P.M.), https://twitter.com/Slasher/status/1280998004368031744.

[7] A screen recording of this interaction was posted on Twitter. *See* Jordan Uhl (@JordanUhl), Twitter (July 18, 2020, 5:24 P.M.), https://twitter.com/JordanUhl/status/1284599863825530881.

The Army and Navy esports teams' banning of users based on their speech about war crimes is unconstitutional. When the government intentionally opens a space to the public at large for expressive activity, it has created a "public forum" under the First Amendment, and it cannot constitutionally bar speakers from that forum based on viewpoint. These principles apply with full force in the digital sphere, including on social media platforms, as courts have emphasized in recent cases.[8]

It is clear that the @USArmyEsports and @AmericasNavy Twitch channels are government-operated public forums for First Amendment purposes. Both channels are open to the public at large, and anyone who follows the channels can participate in the chats. In the chats, members of the Army and Navy esports teams engage in moderated exchanges with members of the public on a broad array of topics. Members of the public post written messages, and players, moderators, and other members of the public frequently respond. These chats have all the hallmarks of public forums. It is also clear that Mr. Uhl (and others) were banned on the basis of the viewpoints implicit in their questions and messages. They were banned after they engaged in speech critical of the military, drew attention to war crimes, criticized the teams' answers to questions about war crimes, or raised questions about the President's decision to pardon soldiers convicted of war crimes.

In the media, spokespeople for the Army have defended the banning of Mr. Uhl on the grounds that his messages constituted "harassment" under Twitch's terms of service, and they have asserted that "the Army may reasonably regulate the time, place, and manner of discussions on its recruiting social media sites."[9] For its part, the Navy has defended its actions by insisting that it "moderate[s] our channel in accordance with . . . posted channel rules."[10]

In fact, Mr. Uhl's speech did not constitute harassment under the terms of service, which define harassment to mean "any content or activity that

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[8] *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (holding that President Donald Trump and his aide violated the First Amendment by blocking users who criticized him from the @realDonaldTrump Twitter account); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (holding that a local government official violated the First Amendment when she blocked a Virginia resident from her Facebook Page for criticizing her); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (holding that Wisconsin state legislators violated the First Amendment by blocking an advocacy group from their Twitter accounts).

[9] Alex Horton, *Army Ban on War Crime Comments During Twitch Stream May Have Violated First Amendment, Lawyers Say*, Wash. Post (July 20, 2020, 4:01 P.M.), https://perma.cc/9HLR-7TBL (quoting Army spokesperson Lisa Ferguson).

[10] Gault, *Navy Esports Team Bans Twitch Users Who Ask About SEAL Who Did War Crimes*, *supra* note 5 (quoting a Navy spokesperson).

attempts to intimidate, degrade, abuse, or bully others, or creates a hostile environment for others."[11] Mr. Uhl's messages drew attention to prior U.S. military actions in the context of the Army's and Navy's use of Twitch as a recruiting tool. His messages were quintessential political speech, which lie at the "core of the First Amendment." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982). Nor does the government have the authority, in a forum like this one, to adopt rules that effectively prohibit participants from criticizing the military.

The argument that the bans reflect a constitutionally valid "time, place, and manner" restriction is also incorrect. As the Supreme Court has made clear, "time, place, and manner" restrictions must be content-neutral and narrowly tailored to serve a significant governmental interest, and they must leave open ample alternative channels for communicating the speaker's message. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Army and Navy esports teams' banning of Mr. Uhl fail the first requirement: Both teams clearly banned Mr. Uhl "because of disagreement with the message [Mr. Uhl's speech] convey[ed]." *Id.*

We ask that you immediately unban Mr. Uhl from the @USArmyEsports and @AmericasNavy channels and that you also unban all others who have been banned from the channels based on similar speech. In addition, we ask that you adopt and publish written policies to ensure that others are not banned from these channels in the future based on viewpoint. We would appreciate a response to this letter by August 5.

Respectfully,

*/s/ Katie Fallow*
Katie Fallow
Jameel Jaffer
Meenakshi Krishnan

[11] *Hateful Conduct and Harassment*, Twitch, https://www.twitch.tv/p/legal/community-guidelines/harassment/#harassment.