

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of

AUSTIN TONG,

Index #:

*Petitioner,*

-against-

FORDHAM UNIVERSITY, JOSEPH M. MCSHANE,  
in his capacity as President of FORDHAM UNIVERSITY,  
and KEITH ELDREDGE, in his capacity as Assistant Vice  
President and Dean of Students of FORDHAM UNIVERSITY,

**VERIFIED PETITION**

*Respondents.*

For a Judgment Pursuant to Article 78 and Section 3001  
of the Civil Practice Law and Rules.

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**INTRODUCTION & PRELIMINARY STATEMENT**

1. This is a special proceeding brought pursuant to Article 78 (§§7801-7806) and § 3001 of the Civil Practice Law and Rules (CPLR) against Respondents Fordham University (“Fordham” or the “University”), Joseph M. McShane, in his capacity as President of Fordham (“McShane”), and Keith Eldredge, in his capacity as Assistant Vice President and Dean of Students of Fordham (“Eldredge”), which arises out of Respondents’ imposition of disciplinary sanctions against Petitioner Austin Tong (“Tong” or “Petitioner”) arising out of and related to social media (Instagram) posts made by Tong on June 3, 2020 and June 4, 2020.

2. Tong seeks an Order of Judgment for the following relief: (a) pursuant to Article 78 of the CPLR, annulling any and all disciplinary sanctions or loss of Fordham student privileges imposed by Respondents against Tong relating to or arising out of his social media posts including but not limited to Instagram posts dated June 3, 2020 and June 4, 2020; (b)

pursuant to CPLR 3001, declaring that Tong's social media posts, specifically Instagram posts dated June 3, 2020 and June 4, 2020, for which Respondents imposed disciplinary sanctions and loss of Fordham student privileges against Tong, constitute permitted exercise of free expression protected under Fordham's policies and rules; (c) awarding damages incidental to the primary relief sought by Tong, for breach of implied contract by Fordham in connection with Respondents' imposition of disciplinary sanctions against Tong; and (d) granting such other relief as this Court deems just, equitable, and proper.

3. Tong is a Chinese-American who immigrated to the United States when he was six years of age and became a United States citizen. He has a strong love for our great country, the United States of America, and is grateful for the personal liberties that we are all privileged to enjoy here.

4. Tong is currently a student (rising senior) at Fordham University, Gabelli School of Business. He enrolled in Fordham largely based on the University's promise of freedom of expression and stated commitment to open exploration of challenging ideas.

5. On June 3, 2020 and June 4, 2020, exercising his right to freedom of expression, Tong made several lawful, constitutionally protected, and non-threatening social media posts on Instagram in response to current events and the associated nationwide social turbulence.

6. Tong's posts were motivated by his desire to celebrate his rights as an American citizen to speak freely and bear arms and were also substantially motivated by his desire as a Chinese-American to recognize the thirty-first anniversary of the Tiananmen Square protests, a deeply meaningful event to Tong and many other Chinese-Americans.

7. As discussed at length hereinafter, Tong's posts are plainly protected by any reasonable conception of freedom of expression, a right that Fordham has publicly committed

to uphold for its students.

8. In response to Tong’s Instagram posts and in contravention of its own policies and rules unequivocally committing the University to free expression, Respondents imposed a series of damaging and humiliating disciplinary actions against him, including draconian requirements that he must follow in order to avoid immediate suspension or expulsion from the University.

9. These sanctions have placed Tong in an untenable position: he must either (1) abandon his principled beliefs, forfeit his right to lawful expression, and submit to Fordham’s unconscionable discipline, or (2) face suspension or expulsion from Fordham, which would severely damage his future academic and employment prospects.

**JURISDICTION & VENUE**

10. Pursuant to CPLR §§ 7804(b) and 506(b), venue in this proceeding lies in New York County, in the judicial district in which the Respondents took the actions herein challenged, and where the relevant offices of the Respondents are located.

11. This Court has subject matter jurisdiction pursuant to Article 78 and § 3001 of the CPLR, and the Respondents are subject to the jurisdiction of this Court, as they are situated in and transact extensive business in the State of New York.

**PARTIES**

12. Tong is a student at Fordham’s Gabelli School of Business, located at the Lincoln Center campus, 140 W 62<sup>nd</sup> St, New York, NY 10023. Tong is a resident of Nassau County, State of New York. Tong uses the name “**comrademeow**” on Instagram.

13. Respondent Fordham is a private educational institution with a campus in the Lincoln Center area of Manhattan, at which campus Respondent Eldredge has his office, and

where Petitioner was enrolled and was actively attending, and where the actions alleged in this Petition occurred.

14. Respondent McShane is the President of Fordham and upon information and belief, was at all times responsible for setting Fordham's policies and rules, and Respondent Eldredge is the Assistant Vice President and Dean of Students at Fordham's Lincoln Center campus, and upon information and belief, was at all times responsible in whole or in part for imposing student discipline at Fordham.

### FACTUAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

#### Tong's Social Media Posts

15. On June 3, 2020, Tong posted a photo on his Instagram page of retired St. Louis Police Captain David Dorn with the caption "Y'all a bunch of hypocrites."<sup>1</sup> A true and accurate copy of the June 3 Instagram post is annexed hereto as Exhibit A.

16. Captain Dorn was tragically murdered by burglars while trying to protect his friend's pawn shop during a night of violent protests and rioting.<sup>2</sup>

17. Tong's post referred to his disappointment, as a supporter of equal rights for all races and ethnicities, with what he refers to in the post as "the nonchalant societal reaction over [Dorn's] death."

18. On June 4, 2020 at approximately 4:00 p.m., the thirty-first anniversary of the tragedy at Tiananmen Square, Tong posted a photo of himself in his backyard holding a *legally-owned* rifle (pointed at the ground) with the caption, "Don't tread on me."<sup>3</sup>

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<sup>1</sup> Austin Tong (@comrademeow), INSTAGRAM (June 3, 2020), <https://www.instagram.com/p/CA-Z5Ddlc2z>.

<sup>2</sup> Jim Salter, "Widow: Retired police captain died protecting friend's store", Associated Press (June 3, 2020), <https://apnews.com/1421b4f84e39488c41c0a285dba8a8cc> (last visited July 21, 2020).

<sup>3</sup> The phrase "Don't tread on me" originated with the Gadsden Flag, "a historical American flag with a yellow field depicting a timber rattlesnake coiled and ready to strike. Beneath the rattlesnake resting on grass are the words: 'Don't Tread on Me.' The flag is named after American general and politician Christopher Gadsden (1724-1805), who designed it in 1775 during the American Revolution. "Since the Revolution, the flag has seen resurgences as a

#198964🇺🇸🇨🇳. [United States flag and China flag emojis]”.<sup>4</sup> A true and accurate copy of the

June 4 Instagram post is annexed hereto as Exhibit B.

19. Several hours later, at around 9:00 p.m., Tong made a follow-up post:

**comrademeow** To everyone and @fordhamuniversity: this post or my mentality is SOLELY for the memory of the thousands of armless students who had no method of defense and were massacred in 6.4.1989, *and in no way advocating violence to anyone*. This post is my appreciation toward the United States and the privilege in this country to have the right to bear arms, to have a populace that can defend itself from tyranny. Tiananmen Incident is a huge deal in my motherland and to my *ethnicity*, and so is civil rights in America, but this post is solely my belief that freedom comes from a strong and armed populace. *Violence against any citizen should not be tolerated*, and the Second Amendment protects us from that.<sup>5</sup> (Emphasis added). (Included as part of **Exhibit B**)

#### **Fordham’s Arbitrary, Capricious, and Politically Discriminatory Harassment & Punishment of Tong**

20. On June 4, close to midnight, two agents from the Fordham Department of Public Safety traveled to Tong’s home in Nassau County, startling Tong and his parents in the middle of the night. After interviewing Tong, the public safety agents left and took no further action, demonstrating that they perceived no threat from Tong. In fact, one of the agents said to Tong that his social media posts were “not threatening to me.”

21. By letter dated June 8, 2020, Keith Eldredge, Assistant Vice Principal & Dean of Students, wrote to Tong, saying, *inter alia*:

It is alleged that you were involved in an incident in which you may have violated the University Code of Conduct, University Regulations and/or Office of Residential Life policy. Specifically, it is reported that on June 3 and 4, and in the recent past, you made several posts on social media related to the current racial issues in the country and political issues in China, including one in which you were holding an automatic weapon<sup>6</sup>.

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symbol of American patriotism, disagreement with government, or support for civil liberties.”  
[https://en.wikipedia.org/wiki/Gadsden\\_flag](https://en.wikipedia.org/wiki/Gadsden_flag) (last visited July 22, 2020).

<sup>4</sup> Austin Tong (@comrademeow), INSTAGRAM (June 4, 2020), <https://www.instagram.com/p/CBB08GDIFNX>.

<sup>5</sup> Austin Tong (@comrademeow), INSTAGRAM (June 4, 2020) <https://www.instagram.com/p/CBB08GDIFNX>.

<sup>6</sup> Eldredge, who by using the term “automatic,” suggests that Tong possessed a machine gun, is badly mistaken. Tong’s legally owned rifle depicted in the Instagram post is actually a *semi-automatic* firearm. Automatic weapons

Your actions may constitute a violation of the following University Code of Conduct articles, University Regulations and/or Office of Residential Life policies:

1. Violation of University Regulations relating to Bias and/or Hate Crimes;
2. Threats/Intimidation;
3. Disorderly Conduct.

In view of this, I intend to conduct a hearing to further investigate these allegations and make a determination as to whether you are responsible for violation of these policies or articles.

A true and accurate copy of this letter is annexed hereto as **Exhibit C**.

22. On June 10, 2020, Eldredge conducted a telephonic disciplinary hearing related to Tong's social media posts.

23. When Eldredge asked Tong if he was aware of the protests and social unrest across the nation, Tong responded in the affirmative and indicated that he genuinely felt unsafe as a Chinese-American, particularly given the blame that some assign to China for recent events involving COVID-19.

24. Eldredge seemed unconcerned about Tong's feelings on the subject of Tong's safety as a Chinese-American and deflected to a different topic.

25. Eldredge then stated that Tong did not violate any University policies relating to weapons and conceded that Tong had obtained the weapon legally.

26. Inexplicably, though, Eldredge concluded his opening remarks by asserting that Tong had expressed a threat, without expressly describing how Tong's actions constituted any threat.

27. Tong then took an opportunity to read a prepared statement, indicating that: (1)

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(commonly referred to as machine guns) are illegal under both New York and Federal law with only certain narrow exemptions.

he is sympathetic to the movement for racial equality, (2) he used the phrase “Don’t Tread on Me” to speak out against tyranny and oppression, while noting that the phrase has been used by various branches of the United States military, (4) he supports the Second Amendment and wanted to show that had students in China been afforded this right, there would have been fewer casualties at the hands of the Chinese State, and (5) he understood Fordham’s policies and rules to permit his free expression of ideas and this was the main reason why he chose to attend Fordham.

28. Referring to the university’s reprimanding of Tong, he also stated that “not even a Chinese university would do this to their students.”

29. In response to Tong’s reasonable and thoughtful remarks, Eldredge asked him whether there was any particular reason for which he purchased a firearm. Lost on Eldredge was the fact that this question was wholly improper, since Eldredge had already conceded that Tong did not violate any University firearm policies and Tong had a Second Amendment right to purchase and own a firearm which did not require any explanation.

30. When Tong would not concede wrongdoing or ill intent, Eldredge tried a different approach, asking whether Tong had ever heard the expression “Intent vs. Impact?” Again, as Eldredge should have well known, this was an improper question, since Fordham’s policies and rules, as well as basic First Amendment jurisprudence, make it abundantly clear that uncomfortable or unpleasant impact on a speaker’s audience is not a proper ground to restrain the speech in question.

31. Nonetheless, Eldredge, ignoring the University’s dedication to free expression and open dialogue, indicated that he was balancing intent vs. impact because, as he claimed, members of the Fordham community felt threatened by the social media posts. Eldredge

readily conceded, though that he was paraphrasing and not referring to any specific members of the community or any specific feelings of community members.

32. Although Tong again made clear that his posts were about his opposition to tyranny and his celebration of American liberty, Eldredge remained unconvinced. He then awkwardly attempted to support his position with a bizarre analogy about the difference between threatening to throw a marshmallow versus threatening to throw a rock. Eldredge's analogy was particularly bizarre since Tong had not threatened to use his firearm against anybody.

33. After these remarks, Assistant Director of Residential Life Kelly Sosa, also participating in the hearing, indicated that she found the Tiananmen Square event to be very traumatizing to Chinese-Americans, a reality that Eldredge had willfully ignored and discounted.

34. By letter dated July 14, 2020, Eldredge wrote to Tong regarding the outcome of the hearing:

I find that your actions constitute a violation of the following University Code of Conduct articles, University Regulations and/or Office of Residential Life policies:

1. Violation of University Regulations relating to Bias and/or Hate Crimes;
2. Threats/Intimidation.

Eldredge also characterized Tong's actions as "threat of a weapon" during a phone call with Tong announcing the discipline. A true and accurate copy of this letter is annexed hereto as

**Exhibit D.**

35. Having found these violations despite a record completely devoid of any indicia of bias, hate crimes, threats, or intimidation, Eldredge issued the following sanctions against Tong: (1) "University Disciplinary Probation," meaning that Tong "shall not represent the



University in any extracurricular activity or run for, or hold office in any student group or organization and/or represent the University in any varsity or club sports” and is subject to “immediate suspension or expulsion” for violation of any of the terms of Probation; (2) “Access Restriction,” meaning that Tong is not permitted to access the Fordham campus without permission from Eldredge and must complete the 2020-21 academic year via online instruction; (3) “Mandatory Meetings with Administrator and Program Completion,” meaning that Tong “will be required to complete activities related to learning about implicit bias by no later than August 10, 2020” and must schedule a meeting with Eldredge to discuss the details of the bias training no later than Thursday, July 23, 2020; (4) “Apology Letter, meaning that Tong must “write an apology letter and present this apology in draft form” to Eldredge no later than Thursday, July 23, 2020; and (5) “Parental Notification,” meaning that a copy of the sanctions would be sent to Tong’s parents.

36. Notably, in accordance with Fordham’s policies and rules, and as Eldredge informed Tong, Eldredge’s disciplinary sanction is *non-appealable and final*.

37. Respondents’ arbitrary and capricious punishment has already resulted in substantial harm to Tong, as he has been: (1) marginalized from Fordham’s academic life, (2) physically excluded from campus, (3) treated like a criminal, (4) branded as a dangerous and hateful individual, (5) forced to participate in online classes and barred from in-person learning, and (6) stigmatized by the imposition of wrongful punishment for the mere exercise of his constitutional rights which he rightfully trusted would be guaranteed by Fordham’s own policies and rules.

38. However, absent judicial intervention, the worst harm is yet to come, and imminently.

39. Tong is required to deliver his Apology Letter and submit to bias training no later than Thursday, July 23, 2020.

40. Tong *will not and should not have to* comply with either of these requirements because he plainly did not violate any Fordham policies or rules and will not and should not have to submit to punishment for exercising his constitutional rights, and will not and should not have to compromise his good faith beliefs, principles, and virtues.

41. Moreover, and ironically, Fordham, which as per its own policies set forth *infra*, purports to take a strong stance against discrimination based on matters of ethnicity or national origin, is actually discriminating against Tong based on ethnicity and national origin, as Fordham well knows that a significant motivation for Tong's social media posts was his desire to recognize a historically significant event for Chinese-Americans. The bottom line is that Tong will not give in to Fordham's coercive, discriminatory, arbitrary, and capricious disciplinary action and will therefore be subject to suspension and/or expulsion no later than July 23, 2020.

#### **Fordham's Policies & Rules on Freedom of Expression**

42. Fordham's free expression commitment begins with its Mission Statement, which:

“guarantees the freedom of inquiry required by rigorous thinking and the quest for truth . . . . seeks to foster in all its students life-long habits of careful observation, critical thinking, creativity, moral reflection and articulate expression . . . . [and] seeks to develop in its students an understanding of and reverence for cultures and ways of life other than their own.”<sup>7</sup>

The Mission Statement also protects and encourages “the promotion of justice [and] the protection of human rights . . . .”

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<sup>7</sup> *Mission Statement*, FORDHAM UNIV., [https://www.fordham.edu/info/20057/about/2997/mission\\_statement](https://www.fordham.edu/info/20057/about/2997/mission_statement) (last visited July 21, 2020).

43. The University also promises that “[e]ach member of the University has a right to freely express his or her positions and to and to work for their acceptance whether he/she assents to or dissents from existing situations in the University or society.”<sup>8</sup>

44. Fordham assures that it will not infringe on the rights of students “to express [their] positions” and engage in “other legitimate activities.”<sup>9</sup>

45. Fordham apparently holds the right to freedom of expression so dear that it is a punishable offense to disrupt the free speech of others, as the University Code of Conduct, which is contained within the University’s Handbook of the Office of Residential Life,<sup>10</sup> prohibits actions “which prevent[] or limit[] the free expression of the ideas of others . . . .”<sup>11</sup>

46. Elsewhere, Fordham reaffirms its commitment to “freedom of expression and the open exchange of ideas. The expression of controversial ideas and differing views is a vital part of University discourse. *Although the expression of an idea or point of view may be offensive or inflammatory to others, it may not constitute a hate crime or bias-related incident.*”<sup>12</sup>

47. According to Fordham’s rules, “Bias-Related Incidents” refer only to “act[s] or behavior[s] that . . . [are] reasonably believed to be motivated by a consideration . . . of race, color, creed, religion, age, sex, gender, national, origin, marital or parental status, sexual orientation, citizenship status, veteran status, disability, or any other basis prohibited by law.

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<sup>8</sup> *Demonstration Policy*, FORDHAM UNIV., [https://www.fordham.edu/info/21684/university\\_regulations/3709/demonstration\\_policy](https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy) (last visited July 21, 2020).

<sup>9</sup> *Demonstration Policy*, supra note 2.

<sup>10</sup> *Residential Life Handbook: Rose Hill*, FORDHAM UNIV., [https://www.fordham.edu/info/20422/living\\_on\\_campus\\_at\\_rose\\_hill/7140/residential\\_life\\_handbook\\_rose\\_hill](https://www.fordham.edu/info/20422/living_on_campus_at_rose_hill/7140/residential_life_handbook_rose_hill) (last visited July 21, 2020).

<sup>11</sup> *The University Code of Conduct*, FORDHAM UNIV., [https://www.fordham.edu/info/21684/university\\_regulations/3693/the\\_university\\_code\\_of\\_conduct](https://www.fordham.edu/info/21684/university_regulations/3693/the_university_code_of_conduct) (last visited July 21, 2020).

<sup>12</sup> *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., [https://www.fordham.edu/info/21684/university\\_regulations/6566/bias-related\\_incidents\\_andor\\_hate\\_crimes](https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes) (last visited July 21, 2020).

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48. In addition, a “Hate Crime” is considered by Fordham to be any violation of Section 485.05 of the PL, which relates to the act of committing any specific criminal offense *and* intentionally selecting the victim based on “race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation . . . .”<sup>14</sup>

49. Fordham’s policies regarding free speech and free expression have nonetheless been notoriously disregarded by the university; so much so in fact, that the Foundation for Individual Rights in Education (“FIRE”) listed Fordham in its list of the 10 worst colleges for free speech of 2017, which includes both public and private institutions.<sup>15</sup>

50. Ironically, it is *Fordham* that is targeting Tong based at least in part on his national origin, since the content of his posts involved in part his recognition as a Chinese-American of the importance of the Tiananmen Square event. This historical event is deeply meaningful to Tong and other Chinese-Americans, and Fordham’s disciplinary actions infringe on his ability to draw attention to an anniversary important to individuals of his national origin.

51. Notably, Fordham has *no* policy or rule relating to the lawful ownership, lawful display, lawful exhibition, or lawful use of firearms while an individual is *off campus* and not at a university sponsored event. The only place firearms are mentioned anywhere in Fordham’s policies and rules is the University’s “Weapons, Ammunition, and Explosives” policy.<sup>16</sup> This policy states that “carrying, maintaining or storing weapons [including “rifles, shotguns, firearms”] is prohibited “*on university property, or at university sponsored events*

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (citing PL 485.05).

<sup>15</sup> “*Fordham University Named One of America’s 10 Worst Colleges for Free Speech After Banning Student for Justice in Palestine*” (February 22, 2017), <https://www.thefire.org/fordham-university-named-one-of-americas-10-worst-colleges-for-free-speech-after-banning-students-for-justice-in-palestine/> (last visited July 21, 2020).

<sup>16</sup> *Weapons, Ammunition, and Explosives*, FORDHAM UNIV., [https://www.fordham.edu/info/24226/a\\_z\\_listing/9272/weapons\\_ammunition\\_and\\_explosives](https://www.fordham.edu/info/24226/a_z_listing/9272/weapons_ammunition_and_explosives) (last visited July 21, 2020).

on or off campus . . . .”

52. In addition, the University’s Code of Conduct makes punishable by sanctions “threats . . . and/or other conduct which threatens or endangers the health or safety of any person” and “disorderly conduct.”<sup>17</sup>

53. Yet, nowhere in the Code of Conduct are firearms mentioned, let alone legally possessed firearms.

54. Taken together, the policies and rules expressed in Fordham’s Mission Statement, Demonstration Policy, Bias-Related Incidents and/or Hate Crimes policy, and University Code of Conduct confirm the University’s unequivocal commitment to bedrock principles of free speech. Social media posting, as a vehicle for free expression, represents a fundamental exercise of those principles.

55. For Tong, his Instagram posts were a means of expressing his support for our country, for human rights, and for individual liberties including but not limited to the Second Amendment. Tong’s posts cannot rationally be considered violations of Fordham’s policies or rules because his posts were not targeted toward any individual or group, did not contain any threats or anything that could reasonably be construed as a threat, and the post depicts him in possession of a lawfully owned firearm at his home, off campus and not during a University-sponsored event. Moreover, he is pictured with a non-threatening facial expression while holding his legal firearm pointed at the ground rather than at the camera. Tong even stated that he was “*in no way advocating violence to anyone.*”<sup>18</sup>

56. Only an individual seeking to intentionally misrepresent the content of Tong’s

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<sup>17</sup> *The University Code of Conduct*, FORDHAM UNIV., [https://www.fordham.edu/info/21684/university\\_regulations/3693/the\\_university\\_code\\_of\\_conduct](https://www.fordham.edu/info/21684/university_regulations/3693/the_university_code_of_conduct) (last visited July 21, 2020).

<sup>18</sup> Austin Tong (@comrademeow), INSTAGRAM (June 4, 2020), <https://www.instagram.com/p/CBB08GDIFNXf>.

posts could consider the posts to be a threat.

57. Denying Tong the right to freely express himself on these topics not only deprives the Fordham academic community (and others) of the opportunity to engage in lively debate about these topics, but is also antithetical to Fordham's professed mission of creating a welcoming environment for free speech, while also sending a disturbing message to the Fordham academic community (and others) that advocacy for these particular causes (patriotism and basic human rights) is not sanctioned by the University administration. The end result is that Tong and other students who do not adhere to the political orthodoxy of Fordham's administrators are turned into outcasts, and other individuals who wish to speak out with potentially unpopular but good faith viewpoints are discouraged from exercising their right of free expression.

#### CAUSES OF ACTION

##### **First Cause of Action – Article 78/Free Speech Claim**

58. Petitioner restates and incorporates by reference the allegations set forth in all previous paragraphs of this Petition as though fully set forth herein.

59. By imposing disciplinary sanctions against Tong and threatening further disciplinary sanctions, Fordham violated its own policies and rules which unequivocally commit the University to the protection and encouragement of free speech and expression, and to fostering and allowing differing viewpoints, even viewpoints that may be controversial or make some individuals uncomfortable.

60. Fordham's relevant policies and rules about speech and expression convey at the most basic level that it cannot treat students that promote views that are unpopular or controversial differently or negatively because administrators or others on campus disagree or

have negative associations with them.

61. Respondents' failure to follow their own policies and rules and its reliance on factors for which there is no evidentiary basis is properly reviewable by this court. *Gertler v. Goodgold*, 107 A.D.2d 481 486 (1<sup>st</sup> Dep't 1985), *aff'd*, 66 N.Y.2d 946 (1985) (finding private universities accountable in CPLR Article 78 proceedings for review of their own policies and whether or not such rules and policies were followed or whether action was arbitrary or irrational); *Hyman v. Cornell Univ.*, 82 A.D.3d 1309, 1310 (3d Dep't 2011) ("When a university has not substantially complied with its own guidelines or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious."). *See also, Tedeschi v. Wagner College*, 49 N.Y.2d 652 (1980).

62. The understanding of Fordham's free speech policies, reliant on basic constitutional principles of free speech and association, is thus naturally informed by judicial interpretations of those principles under New York law.

63. Fordham's policies claim to protect the rights of students to "freely express his or her positions and to work for their acceptance whether he/she assents to or dissents from existing situations in the University or society."<sup>19</sup> This mandates a prohibition of discrimination against individuals because of their controversial views. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

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<sup>19</sup> *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., [https://www.fordham.edu/info/21684/university\\_regulations/6566/bias-related\\_incidents\\_andor\\_hate\\_crimes](https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes) (last visited July 21, 2020).

64. In *Bachellar v. Maryland*, the Supreme Court unambiguously acknowledged that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.” 397 U.S. 564, 567 (1970).

65. Eldredge, in basing his disciplinary decision-making on his finding that some readers of Tong’s Instagram posts may have felt uncomfortable or strongly disapproved of Tong’s posts, Eldredge, acting on behalf of Fordham in his capacity as Assistant Vice President and Dean of Students, acted arbitrarily, capriciously, abused his discretion, and violated clear free speech principles articulated by the Supreme Court and explicitly adopted by Fordham.

66. By imposing irrational discipline against Tong, Respondents stripped him of the very speech freedoms that Fordham’s policies and rules guarantee, including allowing students to engage in “the promotion of justice, the protection of human rights,” “the right to freely express his or her positions and to work for their acceptance whether he/she assents to or dissents from existing situations in the University or society,” and “the expression of controversial ideas and differing views.”

67. Accordingly, pursuant to Article 78 of the CPLR (CPLR § 7803[3]), Petitioner is entitled to an Order of Judgment annulling any and all disciplinary sanctions or loss of Fordham student privileges imposed by Respondents against Tong relating to or arising out of his social media posts including but not limited to Instagram posts dated June 3, 2020 and June 4, 2020.

#### **Second Cause of Action – Declaratory Judgment**

68. Petitioner restates and incorporates by reference the allegations set forth in all previous paragraphs of this Petition as though fully set forth herein.



69. Based on the foregoing, it is indisputable that Tong's right to free expression was and is protected by Fordham's policies and rules, and his social media posts on June 3, 2020 and June 4, 2020 were protected by Fordham's policies and rules.

70. Nonetheless, Respondents have imposed irrational disciplinary sanctions against Tong.

71. Accordingly, there is a "justiciable controversy" between Tong and Respondents within the meaning of CPLR § 3001, and the Supreme Court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties" to the controversy.

72. Therefore, Tong is entitled to an Order of Judgment pursuant to CPLR 3001, declaring that Tong's social media posts, specifically Instagram posts dated June 3, 2020 and June 4, 2020, for which Respondents imposed disciplinary sanctions and loss of Fordham student privileges against Tong, constitute permitted exercise of free expression protected under Fordham's policies and rules.

### **Third Cause of Action – Breach of Implied Contract**

73. Petitioner restates and incorporates by reference the allegations set forth in all previous paragraphs of this Petition as though fully set forth herein.

74. In New York, "[w]hen a student is admitted to an academic institution, an implied contract arises between the institution and the student 'such that if (the student) complies with the terms prescribed by the (institution), he [or she] will obtain the degree which he [or she] sought'". *Alissa S. v. Manhattanville Coll.*, 40 Misc. 3d 1224(A) (Sup. Ct. Westchester Co. August 6, 2013) (citing and quoting *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 414 (1980)). Inherent in this implied contract is the understanding that "[a]n

academic institution must act in good faith in dealing with its students.” Olsson, 49 N.Y.2d at 414.

75. Tong has complied in all respects with the terms and conditions of his status as a Fordham student.

76. However, Respondents breached their end of the bargain with respect to the implied contract by imposing irrational discipline against Tong as set forth herein.

77. Accordingly, Tong is entitled to damages incidental to the primary relief requested herein, in an amount to be determined upon hearing or trial of this special proceeding.

### RELIEF REQUESTED

**WHEREFORE**, the Petitioner seeks judgment as follows:

(a) pursuant to Article 78 of the CPLR, annulling any and all disciplinary sanctions or loss of Fordham student privileges imposed by Respondents against Tong relating to or arising out of his social media posts including but not limited to Instagram posts dated June 3, 2020 and June 4, 2020; (b) pursuant to CPLR 3001, declaring that Tong’s social media posts, specifically Instagram posts dated June 3, 2020 and June 4, 2020, for which Respondents imposed disciplinary sanctions and loss of Fordham student privileges against Tong, constitute permitted exercise of free expression protected under Fordham’s policies and rules; (c) awarding damages incidental to the primary relief sought by Tong, for breach of implied contract by Fordham in connection with Respondents’ imposition of disciplinary sanctions against Tong; and (d) granting such other relief as this Court deems just, equitable, and proper.

No prior application for the relief requested herein has been made in this or any other Court.

Respectfully submitted,

DATED: July 23, 2020  
New York, New York



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*Attorneys for Petitioner Austin Tong*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
In the Matter of

AUSTIN TONG,

*Petitioner,*

-against-

FORDHAM UNIVERSITY, JOSEPH M. MCSHANE,  
in his capacity as President of FORDHAM UNIVERSITY,  
and KEITH ELDREDGE, in his capacity as Assistant Vice  
President and Dean of Students of FORDHAM UNIVERSITY,

*Respondents.*

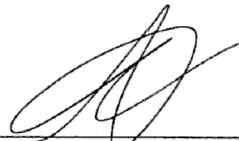
For a Judgment Pursuant to Article 78 and Section 3001  
of the Civil Practice Law and Rules.

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**VERIFICATION**


STATE OF NEW YORK)  
  )ss.:  
COUNTY OF NASSAU)

I, AUSTIN TONG, being duly sworn, depose and say that I am the Petitioner in the above-captioned special proceeding. I have read the foregoing Verified Petition dated July 23, 2020 in this action and know the contents thereof; the same is true to my own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

  
\_\_\_\_\_  
AUSTIN TONG

Sworn to before me this

23<sup>rd</sup> day of July, 2020

  
\_\_\_\_\_  
Notary Public

EDWARD PALTZIK  
Notary Public, State of New York  
No. 02PA6173175  
Qualified in Nassau County  
Commission Expires September 10, 2023