

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

-----X

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,

Respondents.

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

-----X

**PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR A
PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY**

JOSHPE MOONEY PALTZIK LLP

By: Edward A. Paltzik, Esq.

360 Lexington Avenue, Suite 1502

New York, NY 10017

Tel: 212-344-8211

Cell: 516-526-0341

Fax: 212-313-9478

epaltzik@jmpllp.com

Attorneys for Petitioner Austin Tong

July 23, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES	-ii-
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS	2
1. Tong's Social Media Posts.....	2
2. Fordham's Arbitrary, Capricious, & Politically Discriminatory Harassment & Punishment of Tong	3
3. Fordham's Policies & Rules on Freedom of Expression.....	8
ARGUMENT	11
<u>POINT I</u>	
PETITIONER IS ENTITLED TO A PRELIMINARY INJUNCTION	11
A. PETITIONER HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE FORDHAM ACTED ARBITRARILY AND CAPRICIOUSLY BY VIOLATING ITS POLICIES AND RENDERING A DECISION THAT WAS WITHOUT FOUNDATION IN FACT AND CONTRADICTED BY THE EVIDENCE	
1. Fordham violated its own policies and rules	14
2. The reasons given by Fordham for its decision lacked a rational factual basis	16
3. Fordham's Policies & Rules on Freedom of Expression.....	20
B. PETITIONER WILL BE IRREPARABLY HARMED BEFORE A DECISION ON THE MERITS CAN BE RENDERED UNLESS THE COURT ISSUES A PRELIMINARY INJUNCTION	
C. A WEIGHING OF THE EQUITIES FAVORS PETITIONERS' POSITION	
<u>POINT II</u>	
PETITIONER HAS A RIGHT TO LIMITED DISCOVERY IN CONNECTION WITH HIS MOTION FOR PRELIMINARY RELIEF	24
CONCLUSION.....	25

TABLE OF AUTHORITIES**Cases**

<i>Bachellar v. Maryland</i> , 397 U.S. 564 (1970).....	15
<i>Cohen v. California</i> , 403 U.S. 15 (1971).....	16
<i>Cox v. Louisiana</i> , 379 U.S. 536 (1965).....	16
<i>Doe v. Univ. of Mich.</i> , 721 F. Supp. 852 (E.D. Mich. 1989).....	18
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	23
<i>Hustler Magazine, Inc. v. Falwell</i> , 485 U.S. 46 (1988).....	16
<i>Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.</i> , 993 F.2d 386 (4 th Cir.1993).....	18
<i>Jamaica Chamber of Commerce v. Metro. Transp. Auth.</i> , 159 Misc.2d 601 (Sup. Ct. Queens Co. 1993).....	12
<i>Gray v. Canisius Coll. of Buffalo</i> , 76 A.D.2d 30 (4 th Dep't 1980).....	21
<i>Gerber Prods. Co. v. New York State Dep't of Health</i> , 47 Misc.3d 249 (Sup. Ct. Albany Co. 2014)	24
<i>Kallini v. N.Y. Inst. of Tech.</i> , 34 Misc.3d 1211(A) (Sup. Ct. N.Y. Co. 2012).....	13
<i>Kickertz v. N.Y. Univ.</i> , 110 A.D.3d 268 (1st Dep't 2013).....	13
<i>Klein, Wagner & Morris v. Lawrence A. Klein, P.C.</i> , 186 A.D.2d 631 (2d Dep't 1992).....	22
<i>Lee v. New York City Dep't of Hous. Pres. & Dev.</i> , 162 Misc.2d 901 (Sup. Ct. N.Y. Co. 1994).....	12

<i>Levine v. Feldman</i> , 215 A.D.2d 182 (1 st Dep’t 1995)	24
<i>Matal v. Tam</i> , 137 S. Ct. 1744 (2017).....	18
<i>Matter of Awad v. Fordham Univ.</i> , 2019 N.Y. Misc. LEXIS 4720 (Sup. Ct. N.Y. Co. July 29, 2019)	21
<i>Melvin v. Union Coll.</i> , 195 A.D.2d 447 (2d Dep’t 1993).....	11, 22
<i>NAACP v. Claiborne Hardware Co.</i> , 458 U.S. 886 (1982).....	19
<i>Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.</i> , 70 A.D.2d 1021 (3d Dep’t 1979).....	12
<i>Nespoli v. Doherty</i> , 17 Misc.3d, 1117(A) (Sup. Ct. N.Y. Co. 2007)	24
<i>Stewart v. Parker</i> , 41 A.D.2d 785 (3d Dep’t 1973).....	11
<i>Olsson v. Board of Higher Education</i> , 49 N.Y.2d 408 (1980).....	21
<i>Papish v. Board of Curators of the University of Missouri</i> , 410 U.S. 667 (1973).....	15
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992).....	17
<i>Ranking v. McPherson</i> , 483 U.S. 378 (1987).....	20
<i>Riccelli Enters. Inc. v. State of New York Workers’ Compensation Bd.</i> , 117 A.D.3d 1438 (4th Dep’t 2014).....	11
<i>Rizvi v. N.Y. Coll. of Osteopathic Medicine of N.Y. Inst. of Tech.</i> , 98 A.D.3d 1049 (2d Dep’t 2012).....	12, 14
<i>Rodriguez v. Maricopa County Community College District</i> , 605 F.3d 703 (9 th Cir. 2009).....	18
<i>Rosenberg v. Rector & Visitors of the Univ. of Va.</i> ,	

515 U.S. 819 (1995).....	15
<i>Sylmark Holdings Ltd. v. Silicone Zone Intl. Ltd.</i> , 5 Misc. 3d 285 (Sup Ct. N.Y. Co. 2004)	24
<i>Snyder v. Phelps</i> , 562 U.S. 443 (2011).....	16
<i>Stop BHOD v. City of New York</i> , 22 Misc.3d 1136(A) (Sup. Ct. Kings Co. 2009)	24
<i>Tedeschi v. Wagner Coll.</i> , 49 N.Y.2d 652 (1980).....	12
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	15
<i>Tucker v. Toia</i> , 54 A.D.2d 322 (4 th Dep’t 1976).....	23
<i>Ulster Home Care v. Vacco</i> , 255 A.D.2d 73 (3d Dep’t 1999).....	23
<i>Virginia v. Black.</i> , 538 U.S. 343 (2003).....	20
<i>Warner v. Elmira Coll.</i> , 59 A.D.3d 909 (3d Dep’t 200).....	13
<i>Watts v. United States</i> , 394 U.S. 705 (1969).....	19, 20

Statutes

Article 78 of the New York Civil Practice Law and Rules (“CPLR”)	11, 12, 24
CPLR 408	24
CPLR 6301	11
CPLR 7805	11
New York Penal Law (“PL”) 485.05	9, 17

Other Sources

DAVID L. FERSTENDIG & OSCAR G. CHASE, WEINSTEIN KORN & MILLER CPLR MANUAL § 6301.05 (3d ed. 2017)	21
Thomas. A. Schweitzer, Hate Speech On Campus And The First Amendment: Can They Be Reconciled?, 27 CONN . L. REV . 493, 514 (1995)	18
Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal, 1990 DUKE L.J. 484, 557–58 (1990))	18

PRELIMINARY STATEMENT

Petitioner Austin Tong (“Tong” or “Petitioner”) (Verified Petition dated July 23, 2020 cited as “Pet.”) , a Chinese-American who immigrated to the United States when he was six years of age and became a United States citizen, is a Fordham University (“Fordham” or the “University”) student (a rising senior) who loves the United States of America and is grateful for the personal liberties that we are all privileged to enjoy in this great nation. Pet. at ¶¶ 3, 4. Tong enrolled in Fordham largely based on the University’s promise of freedom of expression and stated commitment to open exploration of challenging ideas. Pet. at ¶ 4. 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. Pet. at ¶ 5. 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. Pet. at ¶ 6. 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.

In response to Tong’s Instagram posts, Fordham, in contravention of its own policies and rules unequivocally committing the University to free expression, 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. Pet. at ¶ 8. These sanctions have placed Tong in an untenable position: he must either (1) abandon his principled beliefs, forfeit his right to lawful free 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. Pet. at ¶ 9. As discussed at length in the Verified Petition dated and filed July 23, 2020, and also discussed at length herein and in Tong's accompanying Affidavit in support of a preliminary injunction, the risk of irreparable harm is concrete and imminent, and cannot be adequately addressed absent expedited relief. A preliminary injunction is necessary to remedy the harm caused by Fordham's misguided and unlawful disciplinary actions (and the severe harm that will be caused if these actions are not remedied). Accordingly, Tong respectfully submits this Memorandum of Law, together with his Affidavit dated and filed July 23, 2020, all in support of his motion for a preliminary injunction, brought by Order to Show Cause dated and filed July 23, 2020

STATEMENT OF FACTS

1. Tong's Social Media Posts

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."¹ Pet. at ¶ 15. Captain Dorn was tragically murdered by burglars while trying to protect his friend's pawn shop during a night of violent protests and rioting.² Pet. at ¶ 16. 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." Pet. at ¶ 17.

On June 4 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

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

² 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).

(pointed at the ground) with the caption, “Don’t tread on me.”³ #198964 🇺🇸 🇨🇳. [United States flag and China flag emojis]”⁴ Pet. at ¶ 18.

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.⁵ Pet. at ¶ 19. (Emphasis added).

2. Fordham’s Arbitrary, Capricious, and Politically Discriminatory Harassment & Punishment of Tong

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.” Pet. at ¶ 20.

By letter dated June 8, 2020, Keith Eldredge, Assistant Vice President & Dean of Students (“Eldredge”), wrote to Tong, *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

³³ 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 symbol of American patriotism, disagreement with government, or support for civil liberties.” https://en.wikipedia.org/wiki/Gadsden_flag (last visited July 22, 2020).

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

⁵ Austin Tong (@comrademeow), INSTAGRAM (June 4, 2020),

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 weapon⁶.

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.

Pet. at ¶ 21.

On June 10, 2020, Eldredge conducted a telephonic disciplinary hearing related to Tong's social media posts. Pet. at ¶ 22. When Eldredge asked Tong if he was aware of the protests and social unrest caused across the nation, Tong responded in the affirmative and indicated that he felt unsafe as a Chinese person, particularly given the blame that some assign to China for recent events involving COVID-19. Pet. at ¶ 23. Eldredge seemed unconcerned about Austin's feelings on the subject and deflected. Pet. at ¶ 24. Eldredge then stated that Tong did not violate any University policies relating to weapons and conceded that Tong had obtained his firearm legally. Pet. at ¶ 25. Inexplicably, though, Eldredge concluded his opening remarks by asserting that Tong had expressed a threat, without describing how Tong's actions constituted a threat. Pet. at ¶ 26.

Tong then took his opportunity to read a prepared statement, and indicated that (1) he is sympathetic to the movement for racial equality, (2) his parents participated in the Tiananmen Square protests, (3) he used the phrase "Don't Tread on Me" to speak out against tyranny and

⁶ 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 (commonly referred to as machine guns) are illegal under both New York and Federal law with only certain narrow exemptions.

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 had this right, there would have been fewer casualties at the hands of the Chinese State, and (5) that 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. Tong also stated that "not even a Chinese university would do this to their students." Pet. at ¶¶ 27, 28.

In response to Tong's reasonable and thoughtful remarks, Eldredge asked him whether there was any particular reason he purchased a firearm. Pet. at ¶ 29. 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 a firearm which did not require any explanation. Pet. at ¶ 29. 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?" Pet. at ¶ 30. 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 abundantly clear that uncomfortable or unpleasant impact on a speaker's audience is not a proper ground to restrain the speech in question. Pet. at ¶ 30. 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. Pet. at ¶ 31.

Although Tong again made clear that his posts were about his opposition to tyranny and his celebration of American liberty, Eldredge remained unconvinced. Pet. at ¶ 32. Eldredge

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. Pet. at ¶ 32. Eldredge's analogy was particularly bizarre since Tong had not threatened to use his firearm against anybody. Pet. at ¶ 32. 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. Pet. at ¶ 33.

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.

Pet. at ¶ 34.

Eldredge also characterized Tong's actions as "threat of a weapon" during a contemporaneous phone call with Tong announcing the discipline. Pet. at ¶ 34. 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. Pet. at ¶ 35.

Eldredge’s arbitrary and capricious (and non-appealable) 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. Pet. at ¶¶ 36, 37.

However, absent judicial intervention, the worst harm is yet to come, and imminently. Pet. at ¶ 38. Tong is required to deliver his Apology Letter and submit to bias training no later than Thursday July 23, 2020. Pet. at ¶ 39. 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 (as discussed *infra*), 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. Pet. at ¶ 40. 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. Pet. at ¶ 41. 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. Pet. at ¶ 41.

3. Fordham's Policies & Rules on Freedom of Expression

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."⁷ Pet. at ¶ 42.

The University also promises that "[e]ach member of the University has a 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."⁸ Pet. at ¶ 43. Fordham assures that it will not infringe on the rights of students "to express [their] positions" and engage in "other legitimate activities."⁹ Pet. at ¶ 44. 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,¹⁰ prohibits actions "which prevent[] or limit[] the free expression of the ideas of others"¹¹ Pet. at ¶ 45.

⁷ *Mission Statement*, FORDHAM UNIV., https://www.fordham.edu/info/20057/about/2997/mission_statement (last visited July 21, 2020).

⁸ *Demonstration Policy*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 21, 2020).

⁹ *Demonstration Policy*, *supra* note 2.

¹⁰ *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 (last visited July 21, 2020).

¹¹ *The University Code of Conduct*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3693/the_university_code_of_conduct (last visited July 21, 2020).

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.*”¹² Pet. at ¶ 46. (Emphasis added). 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.”¹³ Pet. at ¶ 47. 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”¹⁴ Pet. at ¶ 48. 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. Pet. at ¶¶ 41, 50.

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

¹² *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited July 21, 2020).

¹³ *Id.*

¹⁴ *Id.* (citing PL 485.05).

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.¹⁵ Pet. at ¶ 51. This policy states that "carrying, maintaining or storing weapons [including "rifles, shotguns, firearms"] is prohibited "*on university property, or at university sponsored events on or off campus . . .*" Pet. at ¶ 51. 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."¹⁶ Pet. at ¶ 52. Nowhere in the Code of Conduct are firearms mentioned, let alone legally possessed firearms. Pet. at ¶ 53.

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. Pet. at ¶ 54. Social media posting, as a vehicle for free expression, represents a fundamental exercise of those principles. Pet. at ¶ 54. 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. Pet. at ¶ 55. 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. Pet. at

¹⁵ *Weapons, Ammunition, and Explosives*, FORDHAM UNIV., https://www.fordham.edu/info/24226/a_z_listing/9272/weapons_ammunition_and_explosives (last visited July 21, 2020).

¹⁶ *The University Code of Conduct*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/3693/the_university_code_of_conduct (last visited July 21, 2020).

¶ 55. Moreover, he is pictured with a non-threatening facial expression while holding his legal firearm pointed at the ground rather than at the camera. Pet. at ¶ 55. Tong even stated multiple times that he was “*in no way advocating violence to anyone.*”¹⁷ Pet. at ¶ 55. Only an individual seeking to intentionally misrepresent the content of Tong’s posts could consider the posts to be a threat. Pet. at ¶ 56.

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. Pet. at ¶ 57.

ARGUMENT

POINT I

PETITIONER IS ENTITLED TO A PRELIMINARY INJUNCTION

Courts are authorized to issue a preliminary injunction in an Article 78 proceeding in the same manner as authorized under CPLR 6301. *Melvin v. Union Coll.*, 195 A.D.2d 447, 448 (2d Dep’t 1993) (granting a temporary injunction forbidding a college from suspending a student during the pendency of an Article 78 proceeding); *see also Riccelli Enters., Inc. v. State of New York Workers’ Compensation Bd.*, 117 A.D.3d 1438, 1439 (4th Dep’t 2014) (deciding that

¹⁷ Austin Tong (@comrademeow), INSTAGRAM (June 4, 2020), <https://www.instagram.com/p/CBB08GDIFNX>.

although petitioners moved for a stay pursuant to CPLR 7805, the Court properly granted their request for relief as a request for a preliminary injunction); *Stewart v. Parker*, 41 A.D.2d 785, 786 (3d Dep’t 1973) (a party can request a preliminary injunction under CPLR 6301 or a stay under CPLR 7805 during an Article 78 proceeding).

The standard for the issuance of a preliminary injunction under CPLR 6301 and CPLR 7805 are identical: “In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that a balancing of the equities demonstrates that the moving party is entitled to injunctive relief.” *Lee v. New York City Dep’t of Hous. Pres. & Dev.*, 162 Misc.2d 901, 909 (Sup. Ct. N.Y. Co. 1994); *see also Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022 (3d Dep’t 1979); *Jamaica Chamber of Commerce v. Metro. Transp. Auth.*, 159 Misc.2d 601, 603 (Sup. Ct. Queens Co. 1993).

A. PETITIONER HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE FORDHAM ACTED ARBITRARILY AND CAPRICIOUSLY BY VIOLATING ITS POLICIES AND RENDERING A DECISION THAT WAS WITHOUT FOUNDATION IN FACT AND CONTRADICTED BY THE EVIDENCE

Fordham’s decision to subject Tong to draconian punishment—in violation of its own policies and with disregard for the evidentiary record—is subject to close judicial scrutiny. This decision was a non-academic determination, unrelated to issues of academic performance.¹⁸ Courts in Article 78 proceedings review a university’s non-academic determinations “closely” to ensure that the university has followed “its own rules,” in addition to reviewing “whether the institution has acted in good faith or its action was arbitrary or irrational.” *Tedeschi v. Wagner*

¹⁸ As Dean of Students, Eldredge oversees Student Life, a part of the Division of Student Affairs and is “responsible for many of the activities that are not directly related to [students’] academic courses,” including overseeing disciplinary hearings. *See* Welcome from Dean Eldredge, FORDHAM UNIV., https://www.fordham.edu/info/25099/welcome_from_the_deans/10007/welcome_from_dean_eldredge (last visited July 20, 2020); *see also Student Conduct System*, FORDHAM UNIV., (last visited July 20, 2020).

Coll., 49 N.Y.2d 652, 658 (1980) (annulling university’s non-academic decision because it did not conform to its own rules and guidelines). “To suggest . . . that the college can avoid its own rules whenever its administrative officials in their wisdom see fit to offer what they consider as a suitable substitute is to reduce the guidelines to a meaningless mouthing of words.” *Id.* at 662; *see also Rizvi v. N.Y. Coll. Of Osteopathic Medicine of N.Y. Inst. of Tech.*, 98 A.D.3d 1049, 1052 (2d Dep’t 2012) (“When, as here, action taken against a student is predicated upon grounds unrelated to academic achievement, the operative standard requires that the educational institution proceed in accordance with its own rules and guidelines.”); *Kallini v. N.Y. Inst. of Tech.*, 34 Misc.3d 1211 (A) (Sup. Ct. N.Y. Co. 2012) (“If the university has not substantially complied with its own guidelines and policies or its determination is not rationally based upon the evidence, the determination will be annulled as arbitrary and capricious.”).

A non-academic university determination must “substantially adhere to its own published rules and guidelines” *and* be based on a “rational interpretation of the relevant evidence.” *Kickertz v. N.Y. Univ.*, 110 A.D.3d 268, 272 (1st Dep’t 2013); *see also Warner v. Elmira Coll.*, 59 A.D.3d 909, 910 (3d Dep’t 200). Fordham did neither. It failed to substantially comply with its policies that allow students to freely express their viewpoints and political beliefs—including by making social media posts—even when those ideas may be controversial in to some in academia. Fordham’s stated justifications for the punishment—“Violation of University Regulations relating to Bias and/or Hate Crimes” and “Threats/Intimidation”, when Tong expressed no bias or hate whatsoever regarding any ethnicity, nationality, race, gender, sexual orientation, or other protected category (and in fact was *recognizing* a culturally significant anniversary for individuals of *his* ethnicity and national origin), and made no threats to anyone or anything—are wholly without basis in fact and contradicted by the evidence. Since Tong plainly

made no expressions of bias or hate, and didn't make any threats, there is only one remaining explanation: Tong was punished because of his (1) political views, most notably his support for the right to bear arms guaranteed by the Second Amendment, (2) good faith beliefs, principles, and virtues, and (3) recognition of a culturally significant historical event related to his ethnicity and national origin. None of these are acceptable grounds for punishment under Fordham's policies and rules.

1. Fordham violated its own policies and rules.

Subjecting Tong to punishment because of his political views violated Fordham's obligation to "proceed in accordance with its own rules and guidelines." *Rizvi*, 98 A.D.3d at 1052. Fordham's policies guaranteeing free expression, as reflected in the University Mission Statement, Demonstration Policy, Bias-Related Incidents and/or Hate Crimes policy, and University Code of Conduct, together establish Fordham's unequivocal commitment to permitting the expression of viewpoints and ideas without regard to content. Fordham has ardently committed itself, through these written policies, to protect a diverse range of expression, even when Fordham disagrees with the views expressed. Therefore, although Fordham is a private university and thus not legally bound by the First Amendment, it is both morally and contractually bound to honor the explicit, repeated, and unequivocal promises of freedom of expression it has made to its students and its commitment to abide by fundamental principles of freedom of expression. *Effectively, Fordham has guaranteed its students the same, if not greater, protections as they would enjoy under the First Amendment.* Indeed, taken together, Fordham's relevant policies and rules are clear promises—to its students, faculty, accreditor, and the general public—that students and faculty at Fordham have the right to freedom of expression. These commitments are not only a moral obligation, but a legal duty on the part of the

University, which must honor its promises and abide by its own rules. Punishing Tong for political expression is a disconcerting abdication of those commitments.

Inherent in a commitment to freedom of expression is a rejection of the notion that certain ideas will not be tolerated because some may find them offensive or controversial. The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a particular community may find controversial or offensive. Here, Fordham has agreed to provide the same level of free speech protections to its students that they would enjoy against government infringement of their free speech rights under the First Amendment. To that end, The Supreme Court has explicitly held, in rulings spanning decades, that speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (“[I]t is firmly settled that under our Constitution 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.”); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’ ”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (speech cannot be regulated due to the “specific motivating ideology or the opinion or perspective of the speaker.”).

The principles expressed in this Supreme Court jurisprudence are echoed by Fordham’s

Mission Statement and its policies governing student speech. Even though not bound by the First Amendment, Fordham's policies on free speech clearly extend the same protections to its students—especially when a student expresses an opinion that some or even many in an academic community may find to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot prohibit the burning of the American flag (*Texas v. Johnson*, 491 U.S. at 414), prohibit the wearing of a jacket emblazoned with the words “Fuck the Draft” (*Cohen v. California*, 403 U.S. 15, 25 (1971)), penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse (*Hustler Magazine Inc. v. Falwell*, 485 U.S. 46, 50 (1988)), or disperse civil rights marchers out of fear that the presence of “muttering” and “grumbling” white onlookers might lead to violence (*Cox v. Louisiana*, 379 U.S. 536, 557 (1965)). In ruling that the First Amendment did not allow the government to punish signs outside of fallen soldiers' funerals (including signs that read “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations”) the Court reiterated this fundamental principle, remarking that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle debate.” (*Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011)).

Fordham's own policy recognizes the necessary protection of controversial, offensive speech, clarifying in its “Bias-Related Incidents and/or Hate Crimes” that “expression of an idea or point of view [that] may be offensive or inflammatory to others” does not constitute a bias-related incident or a hate crime.¹⁹

2. The reasons given by Fordham for its decision lacked a rational basis.

¹⁹ *Bias-Related Incidents and/or Hate Crimes*, FORDHAM UNIV., https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited July 21, 2020).

Eldredge articulated three reasons for the discipline imposed against Tong:

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

Pet. at ¶ ____.

All three of these reasons are arbitrary, capricious, irrational, cannot withstand scrutiny, and are utterly devoid of merit.

As to the claim of bias and/or hate, Eldredge's determination is irrational for three reasons. First, it is impossible to identify any bias because on their face, Tong's social media posts don't contain any statement of bias or hate toward a protected class. In fact, the only reference to any ethnicity or nationality relates to China, where Tong was born. Indeed, Tong is Chinese-American and is proud of both the United States and his heritage, and used the June 4 post to recognize the Tiananmen Square protests anniversary. There is no rational interpretation that could be applied to this post to support Eldredge's determination of bias or a hate crime.

Second, Tong's posts do not meet the definition of a hate crime within the meaning of PL 485.05, because there can be no hate crime without an underlying specific criminal offense. Here, Tong did not commit any crime. Posing in a photograph with a legally-owned firearm is not criminal and is in fact protected by the First Amendment. No rational prosecutor would (or could) charge Tong with a crime for his expression of support for the Second Amendment. Moreover, there was no victim, and as established at length, there was no statement regarding any protected class. Since Fordham's own policy tracks the language of PL 485.05 word-for-word, there is no rational interpretation that could be applied to support Eldridge's determination of a hate crime.

Third, even if, *arguendo*, Tong had made a post that could be construed by a

rational person with different political beliefs as somehow “hateful” (which he obviously did not), there is no “hate speech” exception to freedom of expression. While some examples of hateful expression may not be protected speech because they fall into other exceptions to the First Amendment—such as “true threats” or “fighting words”—the Supreme Court has repeatedly held that there is no exception to the First Amendment for expression others view as hateful. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down an ordinance that prohibited placing on any property symbols that “arouse[[anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”). The Court recently and expressly reaffirmed this principle, refusing to establish a limitation on speech viewed as “hateful” or demeaning “on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground.” *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). This principle does not change in the context of public universities, whether the speech is a “heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high” (*See, e.g., Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 705 (9th Cir. 2009)), or a “sophomoric and offensive” skit depicting women and minorities in derogatory stereotypes. *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388-392 (4th Cir. 1993). If the state, or a private university like Fordham that has agreed to grant its students free speech rights on part with the First Amendment, could punish expression it deems to be hateful, it would imperil a broad range of political speech and academic inquiry, and such an exception would unquestionably be used against those it would be intended to protect. For example, when the University of Michigan briefly enacted an unconstitutional prohibition against hate speech, it was almost universally used to punish students of color who offended white students.²⁰

²⁰ “[M]ore than twenty cases were brought by whites accusing blacks of racist speech; the only two instances in which the rule was invoked to sanction racist speech involved punishment of speech by a black student and by a white student sympathetic to the rights of black students, respectively; and the only student who was subjected

Fordham's punishment of Tong demonstrates such absurd ends: Fordham here seeks to punish a person of color for criticizing the Chinese government's blatant attack on free expression 31 years ago, and for celebrating his rights as an American citizen to speak freely and bear arms.

Fourth, there was quite simply no threat made in Tong's posts and there is no rational interpretation under which the posts could be construed as a threat. While there is no question that firearms make some people uncomfortable (including, apparently, Eldredge) and still others wish that all firearms were banned, or even find the concept of firearms ownership to be "threatening" in the abstract, the fact of the matter is that firearms are legal in the United States and Fordham has made a commitment to the free exchange of ideas that may make some uncomfortable. Eldredge's apparent abstract fear of firearms or apparent determination that some Fordham students could feel threatened in some abstract sense by a picture of Tong holding a legally owned firearm is not the same thing as an actual, concrete threat to a person, place, or thing. It is not uncommon for people to feel "threatened" in the abstract by beliefs they disagree with—in fact, this is a feature of a healthy, free society. As well, Fordham has no policy or rule prohibiting the lawful ownership or display of firearms off campus on a student's personal time. Most importantly, quite the contrary to threats, Tong actually made multiple mentions of his commitment to *non-violence* in his social media posts.

Fifth, even if, *arguendo*, Tong had made a post that could be construed by a rational person as a threat (which he obviously did not), First Amendment jurisprudence grants considerable protection to even threatening language posed in a political context. Indeed,

to a full-fledged disciplinary hearing was a black student charged with homophobic and sexist expression." Thomas. A. Schweitzer, Hate Speech On Campus And The First Amendment: Can They Be Reconciled? , 27 CONN . L. REV . 493, 514 (1995) (citing Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal , 1990 DUKE L.J. 484, 557–58 (1990)); *see also Doe v. Univ. of Mich.*, 721 F. Supp. 852, 869 (E.D. Mich. 1989) (striking down the university's speech code as unconstitutional).

political speech, the type of expression in which Tong engaged, is accorded the highest protection under the First Amendment. *Watts v. United States*, 394 U.S. 705, 708 (1969) (“The language of the political arena . . . is often vituperative, abusive, and inexact . . .”). Courts approach with “extreme care” claims that “highly charged political rhetoric lying at the core of the First Amendment” amounts to unlawful threats or incitement. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982). Excluded from this protection are “true threats,” which are “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). But true threats do not encompass political speech. *Ranking v. McPherson*, 483 U.S. 378, 381 (1987) (not a true threat to express hope that the president might be assassinated); *Watts*, 394 U.S. at 706 (draftee’s statement that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” was political hyperbole, not a true threat). To the contrary, freedom of speech protects discussion of violence because of the need to protect political expression, and due to our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Watts*, 394 U.S. at 707-08.

In summary, it appears that Tong’s discipline is based on his benign photo of himself holding a firearm and perhaps his apparent criticism of protests for racial justice in his post about David Dorn. However, neither of these Instagram posts approximate a threat of any sort. Neither post was directed at a specific individual or group of individuals, and neither post on its face or in context indicates that Tong intended to engage in any form of violence. Fordham’s consideration of Tong’s social media post of him holding a gun and his comment on David Dorn

to be a “threat” demonstrates an abandonment of any reasonable or fair understanding of the term. Further, the public safety officers who visited Tong’s home after he posted the photo of himself holding the rifle took no immediate emergency action, evidencing that they did not believe him to be an ongoing threat to the Fordham community or anyone else.

3. Fordham is a repeat violator of its own policies and rules

The arbitrary discipline of Tong is not the first time Eldredge has violated Fordham’s policies and rules. Indeed, there is now an emerging pattern of behavior relating to Eldredge’s handling of student discipline. In 2016, Eldredge denied the request of Fordham students to organize a club known as “Students for Justice in Palestine at Fordham University,” and to have the club recognized and sanctioned by the University. *Matter of Awad v. Fordham Univ.*, 2019 N.Y. Misc. LEXIS 4720 (Sup. Ct. N.Y. Co. July 29, 2019). The Supreme Court, New York County (Bannon, J.), held that “Fordham did not abide by its own published rules governing the approval and recognition of student clubs” *Id.* at *15. In addition, the Court found Eldredge’s rationale—that recognition of the proposed club could cause “polarization” of the Fordham community—unconvincing and inconsistent with Fordham’s policies on free speech. *Id.* at *15-16. “In other words, the consideration and discussion of differing views is actually part of Fordham’s mission, regardless of whether that consideration and discussion might discomfit some and polarize others.” *Id.* at *17-18. Unfortunately, it appears that Fordham as an institution, and Eldredge in particular, did not learn any lessons from the *Awad* matter and must once again be reminded of their explicitly stated academic mission. One of those lessons is that “[a]n academic institution must act in good faith in its dealings with its students.” *Olsson v. Board of Higher Education*, 49 N.Y.2d 408, 414 (1980). Courts will nullify university determinations made in bad faith. *Gray v. Canisius Coll. of Buffalo*, 76 A.D.2d 30, 34 (4th

Dep't 1980).

B. PETITIONER WILL BE IRREPARABLY HARMED BEFORE A DECISION CAN BE RENDERED ON THE MERITS UNLESS THE COURT ISSUES A PRELIMINARY INJUNCTION

Irreparable injury is defined as “that which cannot be repaired, restored, or compensated in money or where the compensation cannot be measured.” DAVID L. FERSTENDIG & OSCAR G. CHASE, WEINSTEIN KORN & MILLER CPLR MANUAL § 6301.05 (3d ed. 2017). The Court’s determination of irreparable injury should be based upon an assessment of the impact of non-intervention upon the party seeking relief, especially when the impact is greater than what an enjoined defendant would suffer. *Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 A.D.2d 631, 633 (2d Dep’t 1992) (granting a preliminary injunction preventing the appellants from using the firm’s name in an action to recover damages for breach of contract).

In the case at bar, Tong has already suffered irreparable injury and is about to suffer catastrophic irreparable injury absent court intervention. Indeed, if he does not write an apology letter, submit to bias training, and comply with all other terms of his Probation, he will be suspended or expelled from Fordham. This sort of injury cannot be repaired, restored, or compensated in money – if he is suspended or expelled, he will suffer irreversible harm to his future (both academically and professionally), loss of the opportunity to matriculate from an elite University, loss of the opportunity to earn a degree from an elite University, ongoing loss of academic opportunities, ongoing loss of opportunities to build lifetime friendships with fellow classmates, ongoing loss of opportunity to utilize Fordham’s campus resources, loss of opportunity to participate in extracurricular activities, ongoing exclusion from participation in University culture and University life, severe reputational harm. In short, the impact on Tong would be enormous, indeed, many orders of magnitude greater than any harm that Fordham

would suffer from the issuance of a preliminary injunction. Without prompt relief from this Court, Tong will be denied a college experience which both they and Fordham acknowledge to be an important one. The denial of that experience cannot be adequately remedied with monetary compensation and Tong will continue to suffer harm pending the final determination of the litigation. *Melvin*, 195 A.D.2d at 448. Fordham's denial of Tong's opportunity to enjoy his college experience because of the causes he seeks to advocate constitutes irreparable harm.

Adding further weight to this argument, when an alleged deprivation of a constitutional right is involved, such as the right to free speech, courts generally hold that no further showing of irreparable injury is necessary. *Elrod v. Burns*, 427 U.S. 347, 36 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Breaches of rights of equity are similarly viewed as constituting irreparable harm. *Ulster Home Care Inc. v. Vacco*, 255 A.D.2d 73, 75 (3d Dep't 1999) ("where, as in this instance, the granting of a preliminary injunction is necessary for the protection of rights cognizable in equity and there is a danger of irreversible injury... based on an invalid statute or administrative rule or order, such relief is available."). Fordham's commitment to students' rights to free expression is comparable to the First Amendment's, and the violation of that commitment inflicts injury that is no less serious. In short, Tong has suffered the same irreparable harm as that which warranted preliminary relief in *Elrod* and *Ulster Home Care*.

C. A WEIGHING OF THE EQUITIES FAVORS PETITIONERS' POSITION

For a preliminary injunction to issue, a court must weigh the equities and must determine that the irreparable injury to be sustained by the petitioner is more burdensome than the harm caused to respondent through the imposition of the injunction. *Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep't 1976) ("In view of the conceded irreparable harm facing plaintiffs as contrasted

with the damage the state would face by postponing implementation of the statute until this case can be heard on its merits, Special Term properly exercised its discretion by granting plaintiffs' motion for a preliminary injunction."").

In the case at bar, as previously discussed at length, there is simply no comparison between the essentially non-existent burden that Fordham would sustain if Tong's punishment is rescinded or stayed, versus the catastrophic, life-altering harm that Tong will suffer if a preliminary injunction is not issued.

POINT II
PETITIONER HAS A RIGHT TO LIMITED DISCOVERY IN CONNECTION WITH HIS MOTION FOR PRELIMINARY RELIEF

It is well-settled that limited discovery is available pursuant to CPLR 408 in an Article 78 proceeding upon an appropriate showing of need. *See, e.g., Nespoli v. Doherty*, 17 Misc.3d 1117(A), 1117A (Sup. Ct. N.Y. Co. 2007) (granting limited discovery in an Article 78 proceeding to aid petitioner in furnishing information to the court that respondents' actions are without basis in fact). Thus, discovery will be granted when a petitioner questions, and the respondent denies, an improper motive for the challenged action. *See, e.g., Gerber Prods. Co. v. New York State Dep't of Health*, 47 Misc.3d 249, 254 (Sup. Ct. Albany Co. 2014) (discovery granted when respondent contested petitioner's assertion that the agency's action had been taken in order to favor a competitor, as it was "clearly relevant for the purposes of determining whether respondents' actions were rational"); *see also Levine v. Feldman*, 215 A.D.2d 182 (1st Dep't 1995) (discovery required to "prove that defendants' claim of economic necessity is a pretext for a termination that was actually motivated by age discrimination"). It is equally well settled that limited discovery is available upon a proper showing of need when an Article 78 petitioner seeks a preliminary injunction. *Stop BHOD v. City of New York*, 22 Misc.3d 1136(A) (Sup. Ct. Kings

Co. 2009), citing *Sylmark Holdings Ltd. v. Silicone Zone Intl. Ltd.*, 5 Misc. 3d 285 (Sup Ct. N.Y. Co. 2004).

Here, Tong alleges that Fordham punished him arbitrarily and without rational basis. The record is crystal clear and the evidence overwhelming that Tong did not violate any of Fordham's policies or rules. Therefore, the only remotely plausible explanations for Fordham's actions against Tong, or some combination thereof, are (1) intolerance for and/or animus toward Tong's political viewpoints, (2) intolerance for and/or animus toward Tong's advocacy for a viewpoint that has deep cultural and historical importance to Chinese-American individuals, and therefore intolerance for Tong's ethnicity and national origin. Either way, Fordham's justifications are pretextual, groundless, and contrary to their own policies and rules.

Accordingly, Tong is entitled to discovery relating to the following:

- (1) Eldredge's decision-making process and rationale;
- (2) Any internal communications by and among Eldredge or other Fordham administrators or employees regarding Tong's discipline;
- (3) Any documents prepared or maintained by the Fordham Public Safety department in connection with their interview of Tong;
- (4) Directing Respondents by August 13, 2020 to make Eldredge available for deposition by Petitioner.

The limited discovery sought by Tong is narrowly focused on the factual dispute concerning motivation. It will not delay the resolution of this matter and, importantly, it will provide the Court with a full factual record on which to base its decision on the motion. Limited discovery under these circumstances is consistent with the uniform holdings of New York courts.

CONCLUSION

When Tong immigrated to the United States from China at six years old, his family sought to ensure that he would be protected by the rights guaranteed by their new home, including the freedom of speech and the right to bear arms. By his own account, Tong chose to

attend Fordham because its policies promise to protect students' right to free expression. Here, however, Fordham has acted more like the Chinese government than an American university, placing severe sanctions on a student solely because of off-campus political speech. In banning Tong from campus, placing him on disciplinary probation with the threat of suspension/expulsion, and issuing other sanctions, Fordham betrayed not only Tong, but also its own ideals. For the foregoing reasons, and given the urgent nature of this matter, Petitioner respectfully requests an Order granting the following provisional relief:

- (a) Preliminarily enjoining Respondents from imposing any disciplinary sanctions or loss of Fordham University student privileges against Tong;
- (b) Granting a temporary restraining order enjoining Respondents from imposing any disciplinary sanctions or loss of Fordham University privileges against Tong pending the outcome of the hearing on the preliminary injunction;
- (c) Directing Respondents, by August 17, 2020, to produce copies of all documents including but not limited to emails and other electronic communications, notes, records of communications, and audio or video recordings, that relate to their decision to impose disciplinary sanctions against Tong;
- (d) Directing Respondents, by August 24, 2020, to make available Respondent Keith Eldredge for deposition by Tong's attorneys; and
- (e) Providing for such other and further relief as to this court shall seem just and proper.

Respectfully submitted,

DATED: July 23, 2020
New York, New York



JOSHPE MOONEY PALTZIK LLP
By: Edward A. Paltzik
360 Lexington Avenue, Suite 1502
New York, NY 10017
Tel: 212-344-8211
Cell: 516-526-0341
Fax: 212-313-9478
epaltzik@jmp LLP.com
Attorneys for Petitioner Austin Tong