



July 17, 2020

Father Joseph M. McShane, S.J.
Office of the President
Fordham University
441 East Fordham Road
Bronx, New York 10458

URGENT

Sent via Electronic Mail (president@fordham.edu)

Dear Father McShane:

FIRE¹ is disappointed to once again have reason to write you to express our grave and continuing concern about the state of freedom of speech at Fordham University following the discipline of student Austin Tong for his social media posts. 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.


Fordham must immediately reverse Tong's disciplinary probation, allow him to return to campus when in-person classes resume, and clarify to all students that they will not face discipline for exercising the expressive rights Fordham explicitly promises to respect.

I. Fordham Bans Student from Campus for Core Political Speech

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find enclosed an executed waiver authorizing you to share information with FIRE. However, if the facts here are substantially accurate, Fordham must rescind its sanctions against Tong.

¹ As you will recall from our previous correspondence, the Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

On June 3, Tong posted a photo of retired St. Louis Police captain David Dorn with the caption “Y’all a bunch of hypocrites.”² Tong tells FIRE the post referred to his frustration, as a supporter of the Black Lives Matter movement, with what he refers to as “the nonchalant societal reaction over [Dorn’s] death.”

On June 4, the thirty-first anniversary of the tragedy at Tiananmen Square, Tong posted a photo of himself in his backyard with the caption, “Don’t tread on me. #198964 .”³

Tong is a Chinese-American immigrant and a rising senior at Fordham.

In response to these posts, Fordham investigated and held a hearing, at which the university found Tong responsible for violating university policies “relating to Bias and/or Hate Crimes” and “Threats/Intimidation.”⁴ As a result of this finding, Fordham issued the following sanctions to Tong:

- Disciplinary probation for the remainder of his tenure at Fordham, including prohibition from “represent[ing] the University in any extracurricular activity,” such as serving as leadership for student organizations or participating in varsity or club sports.⁵ Violation of this probation will result in “immediate suspension or expulsion from the University.”⁶
- Prohibition from returning to Fordham’s campus without prior permission from the Dean of Students’ Office.⁷ As a result of this sanction, Tong is required to complete his coursework for the 2020-21 school year entirely online.⁸
- Mandatory meetings and “activities related to learning about implicit bias” with Fordham Vice President for Multicultural Affairs, Juan Carlos Matos.⁹
- Required apology letter and notification to Tong’s parents of his disciplinary sanctions.¹⁰

II. Disciplining Political Speech Betrays Fordham’s Commitment to Free Expression

Fordham makes clear promises—to its students, faculty, accreditor, and the general public—that students and faculty at Fordham have the right to freedom of expression. Punishing Tong for political expression is a disconcerting abdication of those commitments.

² Austin Tong (@comrademeow), INSTAGRAM (June 3, 2020), <https://www.instagram.com/p/CA-Z5Ddlc2z>.

³ Austin Tong (@comrademeow), INSTAGRAM (June 4, 2020), <https://www.instagram.com/p/CBB08GDlFNX>.

⁴ Letter from D. Keith Eldredge, Dean of Students, Fordham University, to Austin Tong (July 14, 2020) (on file with author).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* As of the date of this letter, Fordham plans to resume in-person classes for the fall semester. *Coronavirus Updates*, FORDHAM UNIV., <https://www.fordham.edu/coronavirus> (last visited July 16, 2020).

⁹ *Id.*

¹⁰ *Id.*

A. *Fordham's Public Commitments to Freedom of Expression*

While 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. For example, Fordham's mission statement provides:

Fordham strives for excellence in research and teaching and guarantees the freedom of inquiry required by rigorous thinking and the quest for truth.¹¹

Further, Fordham's Demonstration Policy also stresses the university's commitment to protecting free expression:

By its very nature, the University is a place where ideas and opinions are formulated and exchanged. **Each member of the University has a right to freely express their positions and to work for their acceptance whether they assent to or dissent from existing situations in the University or society.**¹²

Fordham's policy on "Bias-Related Incidents and/or Hate Crimes"—one of the very policies under which Tong has been disciplined—again stresses Fordham's recognition of the value of free and open debate on campus:

It should be noted, however, that the University values 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.¹³

In fact, 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 prohibits actions "which prevent[] or limit[] the free expression of the ideas of others."¹⁴

¹¹ *Mission Statement*, Fordham University, https://www.fordham.edu/info/20057/about/2997/mission_statement#:~:text=The%20Mission%20of%20the%20University,education%20of%20the%20highest%20quality (last visited July 16, 2020).

¹² *Demonstration Policy*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/3709/demonstration_policy (last visited July 16, 2020) (emphasis added).

¹³ *Bias-Related Incidents and/or Hate Crimes*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/6566/bias-related_incidents_andor_hate_crimes (last visited July 16, 2020) (emphasis added).

¹⁴ *Code of Conduct*, Fordham University, https://www.fordham.edu/info/21684/university_regulations/3693/the_university_code_of_conduct (last visited July 16, 2020).

These commitments represent 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. As a New York Supreme Court explained to your institution just last year, Fordham must adhere to its own commitments to the freedom of expression of its students and faculty.¹⁵

Fordham's discipline of Tong for his political speech is at odds with Fordham's moral and legal obligation to uphold its stated commitments to foster free speech and protect controversial ideas. In order to uphold the principles to which the university commits itself, Fordham must immediately rescind the discipline against Tong.

B. Freedom of Expression Makes No Exception for Offensive Expression

Tong's posts about David Dorn and Tiananmen Square may be offensive to some who read them.¹⁶ However, whether speech is protected by the First Amendment is an analytical, "not moral, analysis."¹⁷

i. Freedom of Speech and Fordham's own policy protect offensive expression.

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 community may find controversial or offensive. 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., 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."); *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.'").

The Supreme Court has repeatedly, consistently, and clearly held that expression may not be restricted merely because some or even many find it to be offensive or disrespectful. This core First Amendment principle is why the authorities cannot prohibit the burning of the

¹⁵ *Awad v. Fordham Univ.*, 117 N.Y.S.3d 800 (Sup. Ct. 2019) (refusal to recognize a chapter of Students for Justice in Palestine was contrary to the university's mission statement guaranteeing freedom of inquiry).

¹⁶ One group that would likely be offended by Tong's post is the Communist Party of China, which punishes individuals who criticize the Chinese government's treatment of protesters at Tiananmen Square. Indeed, Tong's use of "198964" would be censored on social media in China, which bans all mentions of the massacre, including simple references to the date on which it occurred. *See* Yuhua Wang, *How has Tiananmen changed China?*, WASHINGTON POST (June 3, 2019), <https://www.washingtonpost.com/politics/2019/06/03/how-has-tiananmen-changed-china/>.

¹⁷ *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812, 821 (S.D. Iowa 2019).

American flag,¹⁸ prohibit the wearing of a jacket emblazoned with the words “Fuck the Draft,”¹⁹ penalize cartoons depicting a pastor losing his virginity to his mother in an outhouse,²⁰ or disperse civil rights marchers out of fear that “muttering” and “grumbling” white onlookers might lead to violence.²¹ 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 public debate.”²²

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 may be offensive or inflammatory to others” does not constitute a bias-related incident or a hate crime.²³

ii. 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.²⁴ 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.”²⁵

This principle does not waver in the context of public universities, whether the speech is a “heated exchange of views” on race²⁶ or a “sophomoric and offensive” skit depicting women and minorities in derogatory stereotypes.²⁷ If the state 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

¹⁸ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag was protected by the First Amendment, the “bedrock principle underlying” it being that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

¹⁹ *Cohen v. California*, 403 U.S. 15, 25 (1971).

²⁰ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

²¹ *Cox v. Louisiana*, 379 U.S. 536, 557 (1965).

²² *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011).

²³ *Bias-Related Incidents and/or Hate Crimes*, *supra* note 13.

²⁴ *See, e.g., 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”).

²⁵ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017).

²⁶ *See, e.g., Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 705 (9th Cir. 2009) (faculty member’s use of system-wide listserv to send “racially-charged emails” was not unlawful, as the First Amendment “embraces such a heated exchange of views,” especially when they “concern sensitive topics like race, where the risk of conflict and insult is high.”).

²⁷ *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388–392 (4th Cir. 1993).

against hate speech, it was almost universally used to punish students of color who offended white students.²⁸

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.

iii. The speech at issue does not amount to unprotected "true threats."

Certain well-defined categories of speech are excluded from the protection of the First Amendment, such as "true threats." Despite his punishment for "Threats/Intimidation," Tong's statements here do not meet the standard of true threats. Political speech, the type of expression in which Tong engaged, is accorded the highest protection under the First Amendment, and our system grants considerable deference to even threatening language posed in a political context. *See 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.²⁹

The Supreme Court has defined "true threats," which are not protected by the First Amendment, as "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."³⁰ The Court further elaborated that speech may lose protection as "intimidation," a form of "true threat," when "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."³¹ True threats do not, however, encompass political speech. *See, e.g., Ranking v. McPherson*, 483 U.S. 378, 381 (1987) (not a true threat to express hope that the president might be assassinated); *Watts v. United States*, 394 U.S. 705, 706 (1969) (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

²⁸ "[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 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).

²⁹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982).

³⁰ *Virginia v. Black*, 538 U.S. 343, 359 (2003).

³¹ *Id.* at 360.

it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³²

It appears that Tong’s discipline is based on his benign photo of himself holding of a firearm and his apparent criticism of protests for racial justice in his post about David Dorn. However, neither of his 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 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.

III. 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 threat of suspension, and issuing other sanctions, Fordham has betrayed not only Tong, but also its own ideals.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on Tuesday, July 21, 2020, confirming that Fordham will recommit to upholding the principles of freedom and rescind disciplinary sanctions in this matter.

Sincerely,



Lindsay Rank
Program Officer, Individual Rights Defense Program

Cc: D. Keith Eldredge, Dean of Students
Juan Carlos Matos, Asst. Vice President for Student Affairs for Diversity and Inclusion

Encl.

³² *Watts*, 394 U.S. at 707–08.